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A New Safe Harbor for the Timely Deposit of Employee Contributions to Small Plans

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▲ Background

On February 29, 2008, the Department of Labor (DOL) issued proposed regulations establishing a safe harbor for the timely deposit of employee contributions to small retirement, health and welfare plans (<http://www.dol.gov/ebsa/regs/fedreg/proposed/02292008.htm>). The DOL previously issued regulations providing plan sponsors with guidance regarding the timely deposit of employee deferral contributions into a 401(k) plan. Pursuant to amended regulations issued in 1996, plan sponsors were required to deposit deferrals into the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's assets, but in no event to exceed the 15th business day of the month following the month in which the participants' contribution are received by the employer (29 CFR 2510.3-102).

Many plan sponsors and service providers ignored the "earliest date" aspect of the regulations, and interpreted this guidance to mean that the employer had until the 15th day of the following month to deposit employee deferrals into the plan. In contrast, the DOL's enforcement efforts have been focused on the requirement that funds be deposited as soon as they can be reasonably segregated from the employer's general assets.

How does the DOL determine "as soon as they can be reasonably segregated from the employer's general assets"? Frequently, the DOL referenced the shortest period of time in which the employer had segregated the assets in the past and applied that as the standard for timeliness of all deposits. This approach resulted in different standards being applied by DOL agents, resulting in inconsistent enforcement. When a deferral deposit is determined to be late the plan funds are considered to be commingled with employer funds resulting in a prohibited transaction. Consequently, the employer is required not only to make up lost earnings; they must also pay excise taxes for the breach of the "amount involved" (In the case of late deposits, the time-value of money for the late deposits.)

▲ Proposed Regulations

The proposed regulations are intended to provide small plan sponsors with a clear safe harbor to ensure compliance with the deposit standards. Under the proposed safe harbor, participant contributions to a pension or welfare benefit plan with fewer than 100 participants at the beginning of the plan year will be treated as complying with the regulations if the contributions are deposited no later than the 7th *business* day following the day on which the amounts would have been payable to the participant in cash or following the day on which such amount is received by the employer (in the case of a participant loan payment given to the employer). As a safe harbor, contribution deposits satisfying the requirements of the proposed regulation will be treated as having been made timely even if such contributions could clearly have been segregated from employer assets more rapidly.

It is important to note that eligibility for this rule is based strictly on the 100-participant threshold as of the beginning of the plan year and not on whether the plan is a large plan/small plan filer of the Form 5500 under ERISA §104(a). The 80-120 participant rule used by some plans to determine Form 5500 filing status is not applicable.

Although the regulation becomes effective on the date of publication of the final regulations, the DOL states that in the interim it will not assert a violation of ERISA if a plan satisfies the proposed safe harbor.

Prior to the issuance of the final regulations on this issue, the DOL is continuing to consider whether a similar safe harbor standard is beneficial and necessary for large plan sponsors and their participants, and the DOL requests input from concerned parties. The deadline for comments to be received by the DOL is April 29, 2008. ASPPA GAC will be commenting and recommending that the same rule applies to all plans regardless of the number of participants.