



Bi-Monthly Report

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Deposit of Participant Contributions

Introduction

Current Department of Labor (DOL) regulations require that 401(k) (and other participant) contributions must be deposited with the asset vendor as soon as they can be reasonably segregated from the general assets of the employer, but in no event later than the 15th business day of the month following the month in which the contributions are withheld or received by the Employer. It is the opinion of the Internal Revenue Service (IRS) and the DOL that, for most small and many larger companies, assets can be reasonably separated earlier than the 15th business day of the following month and that the 15th business day limit is an outside limit that might apply to a big company with complicated payrolls and several payroll centers.

5500 Filings and Plan Audits

The following question is included in the Financial Schedule (Schedule H or I) of the 2007 Form 5500. "Did the employer fail to transmit to the plan any participant contributions within the time period described in ... [the regulations] (See instructions and DOL's Voluntary Fiduciary Correction Program)." The Schedule H and Schedule I instructions state that these participant contributions become plan assets as of the earliest date on which such contributions can reasonably be separated from the employer's general assets. It is interesting to note that the instructions do not specifically mention the 15th business day outside limit. As you may know, the Form 5500 Filing is signed under penalties of perjury.

It is our understanding that the DOL has been sending letters when this question has been answered "yes" with a recommendation for correction under the Voluntary Fiduciary Correction Program (VFCP). In addition, IRS and DOL auditors are routinely checking this item for compliance when a 401(k) plan is audited.

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Proposed Regulations

On March 10, 2008, the DOL issued proposed regulations which generally apply to small (less than 100 participants) 401(k) plans. These regulations provide for a “safe harbor” timeframe for deposits to be made. As long as the participant contributions have been deposited in an account of the plan no later than the 7th business day following the payroll date that they were withheld or received by the employer (e.g. in the case of loan repayments), the deposit will be considered to have been timely made. Our sense is that after the required comment period, this (or a very similar) regulation will become a final regulation.

The DOL expects that the safe harbor will be effective on the date of publication of the final regulation in the Federal Register. However, the Department has stated it will not assert a violation before the effective date for small plans if the deposits are made within the safe harbor (7th business day) timeframe.

What happens if deposits are not timely made?

If deposits are not timely made, then the employer is treated as being in possession of plan assets, resulting in a pyramiding “prohibited transaction” excise tax. In addition, the employer may be responsible for the investment gains that the participants would have earned if the 401(k) contributions were timely deposited. Other expenses the plan sponsor might incur include the payment of a Voluntary Fiduciary Correction Program fee, and fees to pay us or another pension consultant to determine what actions need to be taken, to calculate penalties, excise taxes, and adjusted investment earnings, and to prepare the necessary IRS or DOL paperwork.

What to Do

If you are a plan sponsor of a small 401(k) or other defined contribution plan that has participant contributions, then we strongly suggest that you should make sure that the participant contributions are deposited with the asset vendor no later than the 7th business day following the payroll date that they were withheld or received by the employer. You should contact us if you cannot meet this deadline, or if you have any questions.

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