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Re: Voluntary Fiduciary Correction Program

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to comment on, and request modifications to, the Department of Labor's (DOL) Voluntary Fiduciary Correction Program (VFCP or Program) as it applies to late deposits of elective deferrals. We appreciate the DOL's 2006 update to the Program permitting a summary application for certain corrections of late deposits of elective deferrals, and the DOL's more recent proposed regulation providing a 7-day safe harbor for small plans to use in transmitting elective contributions to an employee benefit plan. We are writing this letter to propose a self-correction component to the Program that would allow employers to correct certain late deposits of elective deferrals in accordance with VFCP methodology without filing an application with the DOL.

ASPPA is a national organization of more than 6,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Summary of Recommendations

The following is a summary of ASPPA's recommendations. These recommendations are described in greater detail in the Discussion of Issue section.

- The Program should be improved by adding a formal self-correction component for the late deposit of elective deferrals. The self-correction component would allow employers to correct in accordance with the VFCP methodology without filing an application with the DOL. Instead, the employer would report that it self-corrected under VFCP and provide information on the correction as an attachment to Schedule H or I. The self-correction data would be more detailed than contemplated by the 2009 Form 5500 instructions.

- The establishment of a recognized self-correction component to VFCP would allow correcting employers to benefit from the efficiencies and certainty of the VFCP correction methods. It would also allow the Department to quantify the many self-correction transactions that are patterned upon and directly result from the formal Program

Discussion of Issue

A. Background – Current Program

In the most recent iteration of the Program published in 2006, the DOL described the Program as intended "to encourage the voluntary correction of fiduciary violations by permitting persons to avoid potential civil actions and civil penalties if they take steps to correct identified violations in a manner consistent with the Program." The DOL further noted that "[m]any workers have also benefited from the VFC Program as a result of the restoration of plan assets and payment of promised benefits." 71 Fed. Reg. 20262 (April 19, 2006).

The Program generally requires a written application describing the transaction and its correction along with a signed perjury statement. As relevant here, there are two options under the current Program for plan sponsors to correct delinquent participant contributions or loan repayments. First, applicants correcting delays that involve (a) amounts under $50,000 or (b) amounts greater than $50,000 that were transmitted within 180 days after receipt by the employer are permitted to submit summary documentation under the Program. Second, applicants who fail to meet that standard remain eligible to correct under the Program, but may not submit "summary documentation" to substantiate their applications. If the transaction is corrected as described in the Program and all other conditions are satisfied, DOL will issue a no action letter to the applicant and the applicant is not subject to civil monetary penalties. There is also a Prohibited Transaction Class Exemption (PTCE 2002-51) that provides excise tax relief for correction of a failure to transmit participant contributions and/or loan repayments to a plan within the timeframes provided in the DOL's plan assets regulation, so long as certain conditions are met. In developing its most recent version of the Program, the DOL was asked to adopt a self-correction component as part of its changes in the Program. The DOL declined to adopt that suggestion, stating that "EBSA continues to believe that an important result under the Program is the certainty that applicants have complied with the terms of the Program and have revealed the

details of the transaction and the correction under penalty of perjury in their applications." 71 Fed. Reg. at 20265.

Nevertheless, the DOL recognizes that self-correction in this area does occur. The instructions to the 2009 Schedules H and I both mandate that if line 4A. is answered yes, then a schedule must be attached which indicates whether corrections have been made, inside or outside of VFCP. In the past, this information was not required to be disclosed as part of the Form 5500, although it is our experience that many plan sponsors included the information voluntarily.

B. ASPPA Recommends that DOL Reconsider a Self-Correction Component

ASPPA recommends that the DOL reconsider adding a self-correction component for the late deposit of elective deferrals. The formal recognition of a self-correction component would allow employers to correct in accordance with the VFCP methodology without filing a formal application with the DOL. Instead, disclosure of the self-correction would be made as part of the Form 5500 filed for the year of correction, in the attachment to Schedule H or I.

Although the VFCP does not include a filing fee, there are significant costs associated with completing an application under the Program. A large part of the cost is the preparation and submission of the VFCP filing itself. In many cases, the application is prepared by an attorney at a cost that far exceeds the cost of self-correcting in accordance with the VFCP methodology and payment of the prohibited transaction excise tax.

To avoid these costs, it is our understanding that some practitioners advise clients to resolve the failure to timely deposit elective deferrals by self-correcting using the VFCP methodology and paying the prohibited transaction excise tax by filing the Form 5330. The excise taxes paid in connection with such corrections are often quite small, because there is no de minimis exception to excise tax assessment under Code section 4975 outside of the VFCP methodology. While the plan sponsors who use the Program's methodology to correct late deposits benefit from the guidance provided in the Program, the DOL is not notified of the correction by the plan unless the plan sponsor chooses to do so. As a result, self–corrections such as these are missed in the DOL's totals for corrections accomplished through the Program. Yet, plan sponsors clearly are following the Program methodologies and their actions are directly tied to it. The DOL currently addresses this by sending letters to some plan sponsors filing Form 5330 inviting them to participate in VFCP, but because full correction at that point has already occurred, plan sponsors may reasonably choose not to formally participate in the Program.

To better and more efficiently monitor these corrections, DOL should adopt a self-correction component to the Program which would apply to the late deposit of employee contributions, Participation in the self-correction component would be reported to the DOL as part of the attachment required for 2009 Form 5500 when question 4A. of schedule H or I is answered yes. However, to qualify for self-correction, the attachment would need to include information on when contributions were due, when they were corrected and the methodologies employed to do so. Additional data on the plan sponsors processes and procedures could be solicited, if needed. This should provide the DOL with "certainty that applicants have complied with the terms of the Program and have revealed the details of the transaction and the correction under penalty of

perjury in their applications," as stated in the DOL's original review of self-correction under VFCP. 71 Fed. Reg. at 20265. It would also allow the DOL to include in VFCP correction figures the many plan sponsors who self-correct in accordance with and as a direct result of the Program but have been unaccounted for in the Program's "official" statistics.

The inclusion of a self-correction component is recognized by the IRS's Employee Plans Compliance Resolution System. Using that program's approach, which conditions use of the self-correction methodology on the "significance" of the failure, VFCP could condition use of the self-correction methodology on the "significance" of the failure. With respect to the failure to timely remit employee elective deferrals, significance could be determined based on a number of factors such as—the amount involved, the length of time before the elective deferral(s) was deposited and the frequency of the failure. In fact, VFCP currently provides some relief from the Program's notice requirement for corrections that would result in an excise tax of $100 or less. In addition, the self-correction component would include both a reporting requirement, through Form 5500 attachments, and a records retention component, so the employer could provide the DOL with proof of correction in accordance with VFCP methodology upon DOL request.

The use of Form 5500 as a reporting vehicle for self-correction would also permit the DOL to track the use of the mechanism by any single plan. To the extent that DOL wishes to continue to limit availability of this method of correcting late transmittals of participant contributions to once per 3 years, the DOL would be able to enforce such restrictions through a review of Form 5500. Alternatively, the DOL could adopt an approach similar to the IRS's Employee Plans Compliance Resolution System, which requires plans correcting through self-correction to document that the plan has established practices and procedures in place that are reasonably designed to promote and facilitate overall compliance.

As is the case with correction through VFCP, self-correction should be allowed by use of the DOL's online correction calculator, which automatically applies a market rate of earnings for corrective payments to the plan.

Self-correction should also include relief from excise taxes under Code section 4975. In order to accomplish this, PTCE 2002-51 would need to be amended, in addition to the Program, to provide relief from excise taxes for self-correction accomplished through the methodology outlined in that exemption and in the Program. Additionally, relief from excise taxes, as under the existing VFCP standards for errors resulting in excise taxes of $100 or less, should not require notice to participants of the correction.

Over the past 15 years, the DOL has worked hard to make employers aware of the strict standards that apply to transmittal of participant contributions and of the seriousness of any violation of those standards. Most recently, in 2008, DOL issued a welcome proposal providing further clarity to small employers. This proposed regulation provides a safe harbor establishing the timeliness of an employer's transmittal of participant contributions as long as amounts are deposited in the plan no later than 7 days after amounts are withheld from participants' pay.[1]

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[1] ASPPA applauded this proposal in its comments, and requested that the safe harbor be extended to large plans as well as small plans. *See* Comments on Proposed Regulations Relating to Definition of "Plan Assets" – Participant Contributions, ASPPA letter to Employee Benefits Security Administration, Department of Labor (April 29, 2008).

In light of the DOL's proposed regulation and ongoing audit activity, plan sponsors are increasingly aware of the importance of the timeliness of participant contributions. Plan sponsors may be following slower timeframes for contributions that they have followed for some time, but with clearer guidance from DOL providing a safe harbor, auditors and plan service providers may take time to further educate plan sponsors as to the shorter timeframe expected for delivery of contributions to the plan. In the short term, this may result in contributions requiring correction. By simplifying the VFCP methodology to correct late deposits, DOL can further assist plan sponsors seeking to remedy prior activity, and can benefit participants by encouraging a faster, more cost-effective method to restore assets to the plan.

Consequently, **ASPPA recommends** *that the DOL adopt a self-correction component as part of VFCP, requiring self-correction to be reported to the DOL as part of the attachments to Schedule H or Schedule I of the 5500. We are available to discuss the issues with you and to assist in the formulation of such a component.*

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These comments were prepared by ASPPA's Department of Labor Subcommittee of the Government Affairs Committee, and were primarily authored by Stephanie Bennett, APM, Vice-Chair, and Stephanie L. Napier, Esq., APM, Co-chair Administrative Relations Committee. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/
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Executive Director/CEO

/s/
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