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Voluntary Fiduciary Compliance Program Proposal for Self-Correction Methodology for Late Deposits of Elective Deferrals

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**Employee Benefits Security Administration
Department of Labor**

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to propose modifications to the Department of Labor's ("Department") Voluntary Fiduciary Correction Program ("VFCP" or "Program") as it applies to late deposits of elective deferrals.

ASPPA is a national organization of more than 7,500 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, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system.

Summary

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") requires elective deferrals and loan repayments (collectively "deferrals") to be paid to a plan as soon as administratively feasible.¹ The Department has recognized that well meaning plan sponsors may occasionally fail to meet this requirement and permits the correction of these types of mistakes through the Program.²

ASPPA has been a strong supporter of the Program since its inception. However, we believe it would be greatly improved by the addition of a self-correction component to the Program that would allow, under certain circumstances as described herein, employers to self-correct the late

¹ Department of Labor regulations generally provide that the assets of a plan include amounts that a participant pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution or repayment of a participant loan to the plan, as of the earliest date on which such amounts can reasonably be segregated from the employer's general assets. 29 CFR § 2510.3-102(a). ERISA prohibits a fiduciary from causing the plan to engage in a transaction that constitutes the lending of plan assets or other extension of credit involving plan assets between the plan and a party in interest. ERISA § 406(a)(1)(B). ERISA's definition of a party in interest includes an employer whose employees are covered by the plan. ERISA § 3(14)(C). As a result, the failure to timely contribute employee deferrals and loan repayments is considered to be a prohibited transaction under ERISA as otherwise the fiduciary would be considered to be lending plan assets to the employer.

² Department of Labor, *Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974*, 71 Fed. Reg. 20261, 20274 (Apr. 19, 2006).

deposit of elective deferrals. Plan sponsors, plan participants and the Department would all significantly benefit by permitting this approach.

ASPPA recommends that the Program be improved by adding a formal self-correction component for the late deposit of deferrals. This component would allow employers to correct in accordance with the current VFCP methodology without having to file an application with the Department. 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 for the Form 5500, *Annual Return/Report of Employee Benefit Plan*.

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 current Program.

Discussion

I. Current Program

In the most recent iteration of the Program published in 2006, the Department 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 Department further noted that “[m]any workers have also benefited from the [Program] as a result of the restoration of plan assets and payment of promised benefits.”³

The Program generally requires a written application describing the transaction in detail and the method that will be used for correction along with a signed perjury statement. If the principal amount of late deferrals involve (a) amounts under \$50,000 or (b) amounts greater than \$50,000 that were transmitted within 180 days after receipt by the employer, applicants are permitted to submit summary documentation under the Program. If the transaction is corrected as described in the Program and all other conditions are satisfied, the Department will issue a no action letter to the applicant and the applicant will not be subject to civil monetary penalties.

A Prohibited Transaction Class Exemption (“PTCE”) is also available that provides excise tax relief for correction of a failure to timely deposit participant contributions and/or loan repayments to a plan if certain conditions are met.⁴

In developing its most recent version of the Program, the Department received comments suggesting that a self-correction component be included as part of the changes being considered.⁵ The Department 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

³ 71 Fed. Reg. at 20262.

⁴ Department of Labor, PTCE 2002-51.

⁵ 71 Fed. Reg. at 20265.

penalty of perjury in their applications.”⁶ As described herein, a self-correction component can be designed to meet this concern. Additionally, it would benefit participants by giving structure to practices and corrections that are generally not seen or reviewed by the Department.

II. The Department Should Consider a Self-Correction Component

The Department should consider adding a self-correction component for the late deposit of elective deferrals in order to encourage the reporting of corrections to the Department.

A. Need for Self-Correction

Allowing self-correction would encourage more plans to report their correction of the late deposit of deferrals. Many plans currently correct their late deposits, but do not use the Program to report them due to the time and cost required to complete an application.

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.

B. Benefits of Self-Correction

The methodology and eligibility conditions proposed in the following sections would encourage more plans to report the late deposit of deferrals, while addressing the Department’s goal of ensuring that correction conforms to the procedures that protect participants and fully restore plan assets to the plan. This approach would also provide the Department 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.”⁷

It would also allow the Department to recognize the vital role VFCP plays with respect to the many plan sponsors who self-correct in accordance with, and as a direct result of, the Program, but who have not been counted in the Program’s “official” statistics. Many plans already self-correct using 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 Department is typically not notified of the correction by the plan. As a result, self-corrections such as these are missed in the Department’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.

C. Use of Self-Correction by Other Agencies

The concept of a self-correction component to a voluntary correction program for employee benefit plans has been recognized by other government agencies. For example,

⁶ *Id.*

⁷ *Id.*

the Internal Revenue Service has included a self-correction component in its Employee Plans Compliance Resolution System for over ten years.⁸

III. Proposed Conditions for Self-Correction

ASPPA proposes that the Department impose several conditions for self-correction to be available to plans. First, the Department could require plan administrators seeking to self-correct late contributions to assume deferrals could have been segregated on the earliest possible date in making corrective contributions to the plan. In other words, plan administrators seeking to self-correct under this proposal would be required to use the payroll date as the “loss date” for purposes of calculating lost earnings on the late contributions.

Plan administrators could also be required to use the VFCP Online Calculator to calculate lost earnings on late contributions. This would further regulate and standardize the calculation of the total amount to be contributed to the plan to fully correct the late contribution.

To be eligible for self-correction, ASPPA proposes that plan administrators be required to retain documentation supporting the correction methodology, such as the dates that contributions were required, when they were made, and the amount of the payment ultimately made to the plan. Specifically, plan administrators would be required to retain data, such as payroll data or trust statements, for the statutory 6-year record retention period⁹. This data would be required to be produced by the plan administrator upon request by the Department. Additionally, to qualify for self-correction, the plan administrator would be required to produce and retain a narrative describing the applicant’s contribution and/or repayment remittance practices before and after the period of late or unpaid contributions and/or repayments, along with supporting documentation for 6 years, and to make that information available to the Department upon request.

ASPPA also proposes that, consistent with the current Program, any relief under the self-correction component would be conditioned on the truthfulness, completeness and accuracy of the statements made.¹⁰ Any material misrepresentations related to the transaction would void the relief provided through the self-correction mechanism.

IV. Proposed Reporting Methodology

Participation in the self-correction component should be reported to the Department as part of the Form 5500.

Schedules H and I currently ask the plan administrator to disclose if there were any late deposits of deferrals. The Schedules inquire “Was there a failure to transmit to the plan any participant contributions within the time period described in 29 CFR 2510.3-102? Continue to answer “Yes” for any prior year failures until fully corrected. (See instructions and DOL’s Voluntary Fiduciary

⁸ Internal Revenue Service, Revenue Procedure 2008-50. *See also*, Revenue Procedure 2000-16.

⁹ ERISA §107.

¹⁰ *See*, 71 Fed. Reg. at 20269.

Correction Program.)”¹¹ The Instructions to the Form 5500 indicate that an attachment is required when question 4A of Schedule H or I is answered yes.¹²

ASPPA recommends that to qualify for self-correction, plan administrators would need to include on the attachment a schedule with information about the delinquent participant contributions, a schedule with information about the correction of the delinquent participant contributions and an acknowledgement by the plan administrator that contributions must be placed in trust on the earliest date by which such amounts can reasonably be segregated from an employer’s general assets; and that the regulatory standard for deposit relating to the 15th business day of the month following the month in which such amounts are withheld is an “outer limit” deadline and in no way constitutes a “safe harbor.” (Additional details are provided below.)

This information would 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.”¹³ It would also allow the DOL to include in its VFCP correction figures the many plan sponsors who self-correct in accordance with and as a direct result of the Program, but who have been unaccounted for in the Program’s “official” statistics.

Provided below is a comparison of the information currently required on Schedule H or I (when late contributions are reported on Form 5500), and under VFCP (when late contributions are corrected under VFCP). We have also included suggested revised schedules to the Form 5500 to include the same information, under penalty of perjury, that is currently disclosed in the Program.

FORM 5500, SCHEDULE H/I LINE 4A. - SCHEDULE OF DELINQUENT PARTICIPATION CONTRIBUTIONS

Schedule H Line 4a — Schedule of Delinquent Participant Contributions				
Participant Contributions Transferred Late to Plan	Total that Constitute Nonexempt Prohibited Transactions			Total Fully Corrected Under VFCP and PTE 2002-51
Check here if Late Participant Loan Repayments are included: <input type="checkbox"/>	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP	

¹¹ 2010 Form 5500, Schedule H, line 4a; 2010 Form 5500, Schedule I, line 4a.

¹² Department of the Treasury, Department of Labor, Pension Benefit Guaranty Corporation, 2010 Instructions for Form 5500 at 45-46.

¹³ 71 Fed. Reg. at 20265.

VFCP REQUIREMENTS

- Relevant portions of plan document and other pertinent documents.
- Documentation that supports the narrative description of the transaction and its correction.
- Documentation establishing the Lost Earnings amount.
- Documentation establishing the Restoration of Profits, if applicable.
- Proof of payment of Principal Amount and Lost Earnings or Restoration of Profits.¹⁴
- Statement from a Plan Official identifying the earliest date on which the participant contributions and/or repayments reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion.
- If restored participant contributions and/or repayments (exclusive of Lost Earnings) (A) total \$50,000 or less; or (B) exceed \$50,000 and were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks):
 - A narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of unpaid or late contributions and/or repayments; and
 - Summary documents demonstrating the amount of unpaid or late contributions and/or repayments.
- If restored participant contributions and/or repayments (exclusive of Lost Earnings) exceed \$50,000 and were remitted more than 180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks):
 - A narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of unpaid or late contributions and/or repayments;
 - For participant contributions and/ or repayments received from participants, a copy of the accounting records which identify the date and amount of each contribution received; and

¹⁴ *Id.* at 20273.

- For participant contributions and/ or repayments withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding.¹⁵

PROPOSED NEW SCHEDULE H/I, LINE 4A

Schedule of Delinquent Participant Contributions

Participant Contributions Transferred Late to Plan	Total that Constitute Nonexempt Prohibited Transactions			Total Fully Corrected Under VFCP and PTE 2002–51	
Check here if Late Participant Loan Repayments are included: <input type="checkbox"/>	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP	Contributions Fully Corrected Using VFCP Self-Correction as Shown on Attached Schedule	Contributions Fully Corrected using VFCP Application

Schedule of Correction of Delinquent Participant Contributions

Date Due	Date Corrected	Calculation of Principal Amount and Earnings Due
<i>[PAYROLL DATE]</i>	<i>[DATE DEPOSITED TO TRUST]</i>	<i>[SHOW ONLINE CALCULATOR RESULTS]</i>

Acknowledgment

ASPPA further proposes that fiduciaries who wish to utilize a self-correction program affirmatively acknowledge the following as an attachment to the correction year's Form 5500:

- The law and regulations require contributions to be placed in trust on the earliest date by which such amounts can reasonably be segregated from an employer's general assets; and
- The regulatory standard for deposit relating to the 15th business day of the month following the month in which such amounts are withheld is an "outer limit" deadline and in no way constitutes a "safe harbor."

¹⁵ *Id.* at 20274.

V. Conclusion

ASPPA's proposal would further the Department's goals of ensuring timely deposits and in doing so protect plan participants and plan assets. ASPPA believes the proposal would provide the necessary documentation and certainty that late deposits have been fully corrected. By simplifying and expanding participation through a self-correction component, the Department would be able to verify the important role VFCP plays with respect to the many plan sponsors, who self-correct in accordance with, and as a direct result of VFCP, but are not counted in the "official" statistics.



These comments were prepared by ASPPA's Department of Labor Subcommittee of the Government Affairs Subcommittee. We welcome the opportunity to discuss these issues with the Department. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

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