



## **EMPLOYEE BENEFIT PLANS – ALERT Timing of Deposit of 401(k) Deferrals**

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Plan sponsors should be aware that a subtle but important change made to Schedule H of Form 5500 for 2002 reveals the Department of Labor's continued focus on the issue of late deposits of 401(k) deferrals.

Since 1996, DOL Regulations have required that an employer deposit salary deferrals by the *earliest* day on which such contributions can reasonably be segregated from the employer's general assets, but no later than 15 days following the end of the month in which the employer withheld the deferrals. Many plan sponsors have mistakenly ignored the first part of the regulation and relied on the 15<sup>th</sup> day following the end of the month as a safe harbor, concluding that contributions deposited by such date were not late. The examples in the DOL Regulations make clear that the number of days in which an employer must deposit salary deferrals depends on the circumstances. A small employer that pays employees from a single location can reasonably be expected to make deposits within 2 days after the end of the payroll period, whereas certain large employers with multiple payroll centers and payroll periods might require as many as 10 or even 15 days following the end of the payroll period.

### **Change in Form 5500**

Prior to 2002, Schedule H to Form 5500 requested confirmation that the employer had deposited salary deferrals within the *maximum* time period permitted under DOL regulations. The revised Schedule H omits the word maximum asking only whether deferrals were deposited within the permitted DOL period. The substantive law remains unchanged: an employer must transmit salary deferrals on the earliest reasonable date; there is no safe harbor. This change in language should serve as a warning to plan sponsors who may have been wrongly assuming that salary deferrals deposited in the plan by the 15<sup>th</sup> day of the following month are considered timely.

### **What are the Consequences of Late Contributions?**

Where an employer makes a late deposit of 401(k) salary deferrals, the DOL treats the delay as a loan from the plan to the employer in violation of the prohibited transaction provisions of ERISA and the Internal Revenue Code. Consequently, besides owing the plan interest on the late deposit, the employer is required to file an IRS Excise Tax Return and pay the appropriate excise tax to the IRS.

The DOL is actively pursuing employers who are not timely depositing 401(k) deferrals. In fact, the Employee Benefits Security Administration's Director of Enforcement recently

announced that DOL ERISA investigations have shown that delinquent 401(k) contributions were the most common fiduciary breach in fiscal year 2002.

If you have questions or would like further information about this Alert, please call Norman J. Misher at (212) 903-8733; Allen J. Erreich at (212) 903-8769; Cheryl Fisher Burman at (212) 903-8770; or Ann Cochran-Becchina at (212) 903-8767.

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