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DOL PROPOSES SAFE HARBOR TIMELINE FOR DEPOSIT OF EMPLOYEE CONTRIBUTIONS

The Department of Labor ("DOL") has taken exhaustive efforts to publicize that elective deferrals should be deposited to the plan's trust as soon as possible after each payroll date. In most of its plan investigations, the DOL has determined that the deposit should be made within a few days after the payroll date. However, the result has been that different DOL agents and district offices have made inconsistent determinations of what this reasonable timeline should be based on relevant facts and circumstances, which has created uncertainty for many plan sponsors.

On 2/29/2008, the DOL released proposed regulations that provide a safe harbor regarding timely deposit of 401(k) elective deferrals and loan payments withheld from the employees' pay. Under this proposed rule, the deposit is deemed timely if made no later that the 7th business day following the payroll date, even if the deposit could have been made quicker. The proposed safe harbor only applies to plans with fewer than 100 participants as of the first day of the plan year.

While these proposed regulations are not technically effective until the final version is released, applicable plans can rely on this guidance until that time. The DOL notes that the application of a safe harbor standard to plans with 100 or more participants will be addressed and requests comments on this issue. The DOL indicates that the final regulations may include a similar rule for these larger plans. The DOL hints that their research indicates that small plans have generally needed more time compared to large plans, so it is unclear whether the potential safe harbor for larger plans will be 7 business days or quicker.

A recommended action for all plan sponsors is to review the timeliness of their current elective deferral (and loan payment) deposit process and determine all possible enhancements in effort to comply with these DOL requirements.