AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement
4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

June 7, 2018

Ms. Mabel Capolongo, Director
Office of Enforcement
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, STE 600
Washington, DC 20210

Re: Letters Threatening "Alternative Enforcement Measures"

Dear Ms. Capolongo,

I am writing today on behalf of the American Retirement Association (ARA) to object to language being used in recent letters to plan sponsors from Chris Davis, Associate Regional Director of the Chicago Regional Office of the Department of Labor (DOL). An example is attached for your review. The letters threaten "alternative enforcement measures" against plan fiduciaries who choose to correct the late deposit of employee contributions outside of the Voluntary Fiduciary Correction Program (VFCP). Such threats are inappropriate and clearly are intended to scare plan sponsors into participating in what is supposed to be a voluntary program. It is contradictory to the DOL's own long standing guidance with regard to VFCP and flies in the face of the President's efforts to reduce regulatory burdens. ARA respectfully requests that DOL immediately cease using such threats as a means to increase VFCP filings. In addition, ARA recommends that DOL immediately add a self-correction component to VFCP in fulfilment of the President's directive to reduce regulatory burdens.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA"), the ASPPA College of Pension Actuaries ("ACOPA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 20,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

VFCP has been a very successful program since it was made permanent 16 years ago. Certainly, one of the most common corrections effected under the program relates to the late deposit of participant contributions and/or loan repayments to a pension plan (late deposit violations). Unfortunately, inadvertent errors occur and mistakes happen. VFCP is very helpful in providing clear guidelines on how to correct a late deposit violation. It

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is a very straight forward process, i.e., deposit the late amounts (if not already deposited) and make up the lost earnings for the relevant period.

Although VFCP does not require payment of a user fee, there are costs associated with the preparation and submission of a VFCP filing. 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. It is for this reason many plan sponsors effect correction outside the formal parameters of VFCP. Since the correction process is straight forward, plan sponsors see little benefit to a formal VFCP submission that simply "rubber stamps" what they did. These sponsors do properly report the late deposits on the appropriate Form 5500 and indicate that the correction was made outside of VFCP.

It appears that these plan sponsors are being targeted and are receiving threatening letters from the Chicago Regional Office. As can be seen from the attached letter, "alternative enforcement measures" are threatened unless the plan administrator files a VFCP application within 60 days. In effect, the letter is telling plan sponsors the DOL may open a full blown investigation unless a VFCP application is filed right away.[1] Such a threat is contradictory to long standing guidance that the VFCP program is voluntary.[2] It also runs directly counter to the President's Executive Order to reduce the costs and burdens imposed by federal regulations.[3] Plan sponsors should not be threatened with the heavy hand of a government investigation simply because they choose not to use a voluntary government program.

Lastly, and most importantly, ARA has filed numerous comment letters recommending the addition of a self-correction component to VFCP.[4] We have regularly brought this subject up in meetings with the DOL and we are disappointed nothing has moved forward over the last nine years. We would urge the DOL to move forward on our recommendations as soon as possible. Adding a self-correction component is directly in line with the President's directive to reduce regulatory costs and burdens.

ARA respectfully requests that the DOL immediately cease threatening that "alternative enforcement measures" may be taken against plan sponsors who self-correct late deposit violations outside of VFCP.
ARA recommends that to reduce regulatory burdens, the DOL add a self-correction component to VFCP as soon as possible.

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[1] Similar letters have also been received from the Boston and Philadelphia DOL Regional Offices.
[2] See Frequently Asked Questions About the Voluntary Fiduciary Correction Program, September 2013, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/vfcp.pdf
[3] See Executive Order 13771, January 17, 2017, 82 Fed. Reg. 9339 (February 3, 2017).
[4] See comment letters filed on June 15, 2009, February 12, 2010, March 31, 2011, and September 30, 2011 available at http://www.asppa.org/Advocacy/Comment-Letters/Comment-Letters-Archives.

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We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association

/s/
Scott Hayes
President
American Retirement Association

/s/
Steve Dimitriou
President-elect
American Retirement Association

cc:
Mr. Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
Department of Labor

Ms. Jeanne Klinefelter Wilson
Deputy Assistant Secretary for Policy
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