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Comments on Proposed Regulations Relating to Definition of “Plan Assets” – Participant Contributions

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Employee Benefits Security Administration
Department of Labor

29 CFR Part 2510
RIN 1210-AB02

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed amendments to the regulation defining when contributions that are made by participants in an employee benefit plan are “plan assets” for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) (the Proposed Regulation).

ASPPA is a national organization of more than 6,000 members 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 a 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.

The Proposed Regulation would establish a safe harbor period of seven business days following the date amounts would otherwise be payable to a participant in cash, within which employers who forward participant contributions to small employee benefit pension and welfare plans (with fewer than 100 participants) will be deemed to have transmitted such contributions as soon as they can be reasonably segregated from employer assets. ASPPA agrees that this safe harbor provides much-needed clarity for small employers on whether they have made timely deposits. A large number of ASPPA members, who work with small employers sponsoring employee benefit pension plans, will benefit from this new safe harbor. ASPPA applauds the Department of Labor (DOL) for issuing the Proposed Regulation and enthusiastically supports it. ASPPA is sending this comment letter to respond to the DOL request for comments regarding application of the safe harbor to large plans and to request clarification regarding the applicable time frame when the safe harbor is not satisfied for a particular pay period.

Summary of Recommendations

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

- A. The DOL has selected an appropriate safe harbor of seven business days for small plans, and it should be retained in the final regulation.
- B. The final regulation should make available to large plans the same safe harbor of seven business days in order to foster ease of plan administration and to recognize the similar challenges that may face large plan sponsors in remitting participant contributions, with no additional risk to plan participants than that which would be faced by small plans.
- C. The final regulation should clarify the time frame for application; specifically, the safe harbor should be available for each payroll period individually. A plan sponsor's failure to meet the safe harbor during one payroll period should not result in application of the general rule for determining when participant contributions are plan assets for an entire plan year.

Discussion of Recommendations

A. Seven Business Day Safe Harbor is Appropriate for Small Plans

ASPPA recognizes that, as the DOL noted in the preamble to the Proposed Regulation, the DOL has expended significant enforcement resources to ensure that participant contributions are forwarded to retirement plans within the required time frame—that is, on the earliest date on which those contributions can reasonably be segregated from the employer's general assets. ASPPA's members, many of whom work primarily with sponsors of small plans, have encountered similar difficulty describing the regulations governing transmittal of participant contributions to plans to their plan sponsor clients. As a result, ASPPA greatly appreciates the certainty provided by the Proposed Regulation's seven business day safe harbor. ASPPA agrees that it will be easier for plan sponsors to understand and follow and, accordingly, will provide a higher degree of compliance certainty to ASPPA's membership and the rest of the regulated community.

The preamble to the Proposed Regulation describes the DOL's review of data it has collected through investigations of the timeliness of plan sponsor deposits of participant contributions. In the preamble, the DOL notes that small plans are typically capable of depositing participant contributions consistently by the seventh business day following the date the plan sponsor receives or withholds the participant contributions. The DOL predicts that plan sponsors who do not meet this timeframe currently likely will adapt their procedures to deposit contributions more quickly to take advantage of the safe harbor, and that those plan sponsors who currently exceed the seven business day safe harbor are not likely to change

their procedures to delay transmittal of contributions to hold the participant contributions for additional days. ASPPA agrees with the DOL's assessment of these timing issues as well as the net benefit to participants that will result from the Proposed Regulation for participants in small plans.

ASPPA recommends that the seven business day safe harbor proposed for small plans in the Proposed Regulation be retained in the final regulation.

B. Seven Business Day Safe Harbor should be Made Available to Large Plans

While the Proposed Regulation included a seven business day safe harbor for participant contributions that are transmitted to small plans, the DOL requested more data and commentary regarding the appropriate length for a safe harbor for large plans. To recognize the challenges large plan sponsors may face in transmitting participant contributions, foster ease of plan administration and review and provide the same level of protection to participants in plans of all sizes, ASPPA proposes that the DOL make the same seven business day safe harbor available to large plans as the Proposed Regulation provides for small plans.

Large plan sponsors may not face the same challenges faced by small plan sponsors in transmitting participant contributions to employee plans, but they do face challenges. Specifically, large plans are more likely to have multiple locations from which participant contributions are being transmitted to the plan, multiple payroll systems to coordinate in transmitting contributions and multiple pay dates to track for transmittal of contributions withheld for different participant groups (such as hourly workers and salaried workers or unionized and non-unionized workers, who may be paid weekly, bi-weekly, semi-monthly or monthly). Large plan sponsors are also more frequently involved in corporate mergers and acquisitions, which affect plan design and can affect transmittal of participant contributions as payroll systems are coordinated. These factors can affect the ability large plan sponsors to deposit participant contributions in ways that small plans sponsors do not encounter as frequently. These challenges support a similar seven business day safe harbor in which large plan sponsors may deposit participant contributions to their plans.

In addition, many of ASPPA's members work with both large and small plan sponsors and use the same systems to administer large and small plans. It will be easier for plan service providers to monitor participant contributions if the safe harbor that applies to large and small plans is the same length. Uniformity would be particularly helpful for corporate trustees, for whom the DOL recently articulated a fiduciary duty to monitor the timeliness of participant and employer contributions to their client plans in Field Assistance Bulletin 2008-01. Auditors working for both independent auditing firms and the DOL will also find a uniform safe harbor easier to communicate and enforce for audited plans.

The safe harbor that the DOL adopts for small and large plans should make the same level of protection available to participants in either type of plan. As the DOL recognized in the preamble to the Proposed Regulation, it is unlikely that a plan with practices and procedures designed to deposit participant contributions to the plan more quickly than seven business days would incur the costs of a payroll change just to hold amounts with employer assets for

a few more days. Plans without procedures resulting in deposits within seven business days, however, would be likely to change payroll practice to remit contributions within that safe harbor time frame, if they do not currently do so. This reasoning applies equally to both small and large plans. There is no greater risk to participants in large plans than there is to participants in small plans in connection with the length of the safe harbor the DOL ultimately adopts. Indeed, because large plans are subject to an annual audit requirement in connection with Form 5500 reporting, and because auditors routinely review plan sponsors' transmittal of participant contributions to the plan, the oversight of a plan sponsor's practices with respect to participant contributions arguably is greater for large plans than it is for small plans.

ASPPA recommends that the final regulation make available to large plans the same safe harbor of seven business days that is made available to small plans.

C. Seven Business Day Safe Harbor Should Apply on a Payroll-by-Payroll Basis

The Proposed Regulation includes an enforcement policy for application before the effective date of the final regulation. Specifically, the Proposed Regulation provides that the DOL will not assert a violation of ERISA's prohibited transaction rules for late transmittal of participant contributions to a small plan as long as the small plan sponsor transfers such amounts to the plan within the Proposed Regulation's seven business day safe harbor. This enforcement policy provides immediate clarity and benefit to small plan sponsors and their service providers, and ASPPA greatly appreciates the relief.

It is not clear, however, exactly how the safe harbor is to be made available to plans if the plan does not meet the safe harbor in every payroll period under an auditor's review. We understand that when a small plan fails to meet the seven business day safe harbor for a period under audit, some DOL investigators have stated that the DOL's enforcement position is to revert to its prior practice of examining when the plan sponsor was first able to reasonably segregate participant contributions from employer assets—which can be a date earlier than the seven business day safe harbor provided in the Proposed Regulation. The effects of missing the safe harbor deadline for one payroll within an audited plan year are less clear. ASPPA proposes that the DOL's enforcement policy not foreclose a plan sponsor from relying on the safe harbor for other payroll periods during the year, even if it does not satisfy the safe harbor for every payroll period. Failure to meet the seven business day safe harbor, while it may result in application of the DOL's prior enforcement policy for that payroll period, should not result in application of the general rule for every payroll period in the year.

ASPPA recommends that the safe harbor should be reviewed on a payroll-by-payroll basis, and that one failure to satisfy the safe harbor during an audited period should not foreclose a plan sponsor from satisfying the safe harbor for the remainder of an audited period.



These comments were prepared by ASPPA's DOL Subcommittee of the Government Affairs Committee, Stephanie Napier, Chair. 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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