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Re: Voluntary Fiduciary Correction Program

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to provide additional detail following its letter dated June 11, 2009 commenting on, and requesting modifications to, the Department of Labor's (DOL) Voluntary Fiduciary Correction Program (VFCP or Program) as it applies to late deposits of elective deferrals. We appreciate your willingness to discuss our proposed modifications. In this letter we provide additional detail as to how a self-correction methodology would simplify and expand the availability of the Program while protecting plan assets.

ASPPA also applauds DOL for its recent issued final regulation providing a 7-day safe harbor for small plans to use in transmitting employee deferrals to an employee benefit plan. The certainty and practicality of the safe harbor will encourage better, more widespread compliance with existing regulatory requirements and will protect participants by encouraging standard plan practices to quickly segregate participant contributions from employer assets.

ASPPA is a national organization of more than 7,000 retirement plan professionals who provide consulting and administrative service 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 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.

Summary of Recommendations

In its prior letter, ASPPA made the following recommendations.

- The Program would be improved by adding a formal self-correction component for the late deposit of elective deferrals. The self-correction component would allow employers to correct in accordance with the VFCE methodology without filing an application with the DOL. Instead, the employer would report that it self-corrected under VFCE and provide information on the correction as an attachment to Schedule H or I. The self-correction data would be more detailed than contemplated by the 2009 Form 5500 instructions.
- The establishment of a recognized self-correction component to VFCE would allow correcting employers to benefit from the efficiencies and certainty of the VFCE correction method. It would also allow the DOL to quantify the many self-correction transactions that are patterned upon and directly result from the formal Program.

In this letter, ASPPA proposes specific changes to the separate schedules that are attached to Schedules H and I to reflect a filer's correction of the late deposit of elective deferrals. We also provide additional detail as to how the information the DOL currently receives through VFCE regarding such corrections may be obtained through these separate schedules.

Discussion of Issue

A. Eligibility Requirements to Qualify for Self-Correction

During our discussions of ASPPA's proposal in 2009, DOL expressed some concern regarding its ability to monitor correction by plan administrators unless correction of late deposits is completed through DOL's VFCE Program. To address this concern, ASPPA proposes that plan administrators seeking to self-correct late contributions must 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 our VFCE 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 would also be required to use the VFCE 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.

Second, to be eligible for self-correction, ASPPA proposes that plan administrators be required to retain documentation supporting the information listed on the new schedule described below,

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 must retain data, such as payroll data or trust statements, for the statutory 6-year record retention period. This data must be produced by the plan administrator upon DOL request. 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 DOL upon request to document the error and correction as reported on Form 5500.

Third, as is currently the case under the VFC Program, ASPPA proposes that any relief under the self-correction component be conditioned on the truthfulness, completeness and accuracy of the statements made on the Form 5500 (and related schedules), and any subsequent oral or written statements or submissions. Any material misrepresentations should void the relief provided through the self-correction mechanism. See 71 Fed. Reg. at 20269 (VFC Program requirements).

B. Self-Correction on Form 5500 – Proposed Reporting Methodology

During its meeting with DOL in 2009, ASPPA agreed to provide additional information showing how the separate schedules (previously used for the purpose of preparing the independent qualified public accountant's (IQPA) opinion but which are now required as an attachment to Schedule H or I) could be expanded to reflect self-correction of a late deposit of elective contributions. Summarized below is a comparison of the information currently required on Schedule H or I (when late contributions are reported on Form 5500), and under VFPCP (when late contributions are corrected under VFPCP). Also included is a description of how similar information may be provided through a revised separate schedule. Specifically, ASPPA's proposed new schedule (below) would provide essentially the same information, under penalty of perjury, regarding when contributions were due, when they were corrected, and how the correction was completed.

1. Information Currently Reported on Form 5500 Schedule H/I if Line 4(a) is answered "Yes"

Line 4(a) of Schedule H or I currently requires filers to state whether the plan sponsor transmitted participants' participant contributions to the plan later than the time allowed by regulation. If the plan sponsor did deposit participant contributions late, then the following additional information and reporting is required on Schedule H or I of Form 5500:

- The aggregate amount of all late contributions for the year must be reported.
- Participant contributions reported on line 4(a) must be treated as part of the separate schedules for purposes of preparing the independent qualified public accountant's (IQPA) opinion.
- A schedule in the following format must be attached:

SCHEDULE H/I LINE 4A.—SCHEDULE OF DELINQUENT PARTICIPATION CONTRIBUTIONS

Participant Contributions Transferred Late to Plan	Total that constitute nonexempt prohibited transactions			Total Fully Corrected Under VFCP and PTE 2002–51
	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP	
Check here if Late Participant Loan Repayments are included				

2. Proposed New Schedule H/I Line 4A Indicates Self-Correction Completed

ASPPA recommends that the DOL modify the VFC Program to permit self-correction of late deferrals with a new Schedule H or I Line 4A report (see new column below, second from the far right). This disclosure would confirm to DOL that the late transmittal of elective deferrals was corrected via the proposed self-correction methodology.

PROPOSED NEW SCHEDULE H/I LINE 4A.—SCHEDULE OF DELINQUENT PARTICIPANT CONTRIBUTIONS

Participant Contributions Transferred Late to Plan	Total that constitute nonexempt prohibited transactions			Contributions Fully Corrected using VFCP Self-Correction as Shown on Attached Schedule	Total Fully Corrected Under VFCP and PTE 2002–51
	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP		
Check here if Late Participant Loan Repayments are included					

3. Proposed Schedule of Correction Describes Correction Methodology

The current Form 5500 does not require further reporting regarding the methodology used to correct late deposits beyond the information listed above in Section B.1. ASPPA proposes that DOL revise the information reported on the separate schedules to include a brief additional “schedule of correction”, which would provide specific information about corrected late deposits. The new “schedule of correction” (described below) would incorporate the vital elements currently required to be reported in the VFC Program. Other items required to be included in the VFC Program would be reported on a standard Form 5500 as a matter of course. Additional detail listing the information required and where it would be listed is provided in the attached Appendix.

ASPPA recommends that the methodology used to correct delinquent contributions be shown as an attachment to Schedule H or I, as follows:

PROPOSED NEW SCHEDULE H/I LINE 4A.—SCHEDULE SHOWING CORRECTION OF DELINQUENT PARTICIPANT CONTRIBUTIONS

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

C. ASPPA Recommends that DOL Adopt a Self-Correction Component

As stated in its June 11, 2009 letter, **ASPPA recommends** that DOL reconsider adding a self-correction component for the late deposit of employee contributions. The methodology and eligibility requirements proposed in this letter would address DOL's goal of ensuring that correction, whether through VFCP or outside VFCP, conforms to procedures that protect participants and fully restore plan assets to the plan. This approach would also provide 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" as stated in the DOL's original review of self-correction under VFCP. 71 Fed. Reg. 20265. It would also allow the DOL 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.

The self-correction described in this letter should be available to all plan filers. In this regard, Form 5500-SF does not request a schedule of information regarding the late deposit of contributions. Instead, Form 5500-SF only asks whether there was a failure to timely transmit participant contributions during the year, and if so, in what amount (see Line 10.a). The Form 5500-EZ only requests information regarding general prohibited transactions (Line 13). Accordingly, ASPPA requests that the DOL allow a plan sponsor eligible to file Form 5500-SF or Form 5500-EZ (or eligible for a waiver from filing) to instead file the full Form 5500 as a small plan in any year it self-corrects the late deposit of participant contributions. The plan sponsor may thereafter resume filing Form 5500-SF, Form 5500-EZ, or not filing, for years it does not report self-correction of the late deposit of participant deferrals.

Due to DOL's tremendous educational and regulatory efforts over the past 15 years, plan sponsors are increasingly aware of the importance of the timeliness of participant contributions. Additional guidance from DOL, such as its recently finalized 7-day safe harbor regulation for small plans, should reduce the need for corrections such as those proposed in this letter. When delays occur, however, DOL can further assist plan sponsors seeking to remedy their actions, and can benefit participants seeking greater protection and return on their investments, by encouraging a faster, more cost-effective method to restore assets to the plan.

ASPPA recommends that the DOL adopt a self-correction component as part of VFCP, requiring self-correction to be reported to the DOL as shown on ASPPA's proposed attachments as separate schedules to the Schedule H or Schedule I of the Form 5500. We are available to discuss the issues with you and to further assist in the formulation of such a component.

These comments were prepared by ASPPA's Department of Labor Subcommittee of the Government Affairs Committee, and were primarily authored by Stephanie Bennett, Esq., APM, Vice-Chair, and Stephanie Napier, Esq., APM, Co-chair Administrative Relations Committee. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs, if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO

/s/

Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/

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/s/

James Paul,, Esq., APM, Co-chair
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APPENDIX A

Information Currently Reported with a VFCP Filing for Late Deposit of Elective Deferrals

General information that must be included with the submission

- Detailed narrative describing the breach and its correction, which must include
 - A list of all persons involved in the breach and its correction;
 - The EIN, plan number, and address of the plan sponsor;*
 - The date the plan's most recent Form 5500 was filed;*
 - An explanation of the breach, including the date it occurred;†
 - An explanation of how the breach was corrected, by whom and when;†
 - Manual calculations demonstrating how corrective amount was calculated or a copy of the DOL online calculator page showing the online calculator results;† and
 - An explanation of why payment of Lost Earnings or Restoration of Profits was chosen to correct the breach.‡
 - Supporting Documentation
 - Copies of the relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract);
 - 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;‡

* This information is currently provided on the standard Form 5500.

† This information would be provided as on the proposed schedule of correction.

‡ This information is not applicable, as the online calculator must be used to be eligible for self-correction.

** This information would be required to be developed and retained by a plan administrator for 6 years, and to be provided to DOL upon request.

- Proof of payment of Principal Amount and Lost Earnings or Restoration of Profits;^{**}
- Penalty of Perjury Statement;^{*}
- VFC checklist; and
- Documentation required with respect to the specific transaction being corrected as outlined in the VFCP.[‡]

Specific Documentation for Correction of Late Deposit of Elective Deferrals

- A statement from a Plan Official identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer’s general assets and 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 otherwise would have been paid to the employees in cash (“pay date”), the applicant must submit:
 - 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 pay date, the applicant must submit:
 - 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;^{**}

^{**} This information would be required to be developed and retained by a plan administrator for 6 years, and to be provided to DOL upon request.

^{*} This information is currently provided on the standard Form 5500.

^{††} To be eligible for self-correction, plan administrators must use payroll date as the loss date for calculation of the correction amount in DOL’s Online Calculator.

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

^{**} This information would be required to be developed and retained by a plan administrator for 6 years, and to be provided to DOL upon request.