

## Employee Salary Deferral Deposit Timing Advisory

The Department of Labor has issued regulations that clarify the DOL enforcement standards affecting the period during which participant contributions must be deposited to 401(k) and 403(b) Plans. Ideally, the timing of employee salary deferral deposits should have always been simultaneous with each payroll period.

- ◆ There should be no exceptions to the policy of making deposits simultaneous with each payroll period. Under DOL enforcement guidelines, there is no room for a “hit or miss” method of making deposits.
- ◆ If deposits were made on a delayed basis, Form 5500 requires reporting of the delayed employee salary deferral deposits.
- ◆ Primark Benefits recommends that all 401(k) and 403(b) Plan sponsors take action to ensure that employee salary deferral deposits are made simultaneously with each and every payroll period. If, for example, contributions were previously consolidated to make one monthly deposit, this practice should be changed immediately.
- ◆ The final position of the DOL is that employers sponsoring 401(k) and 403(b) plans are required to transfer participant contributions to those Plans by the *earliest date such contributions can be reasonably segregated from the employer’s general assets, but in no event later than the 15th business day of the month following the month in which the contributions were withheld or received by the employer.* **They emphasize that the 15-day limit maximum period does not operate as a safe harbor and may only apply to companies with VERY complicated payroll structures.**
- ◆ If the DOL were to investigate your Plan, they might begin by requesting payroll and deposit information for a limited period (say 6 months to 1 year). If they find that deposits were not being made simultaneously with required withholding deposits, they could pursue a “full-blown” investigation.

### What Could Happen In A “Full-Blown” Investigation

- ◆ Require a detailed review of Plan records based on a 6-year look back period permitted under ERISA. Background information including a written payroll procedure as it relates to employee salary deferral deposits and copies of canceled checks supporting the deposits for the 6-year period would be essential to the DOL investigation.
- ◆ Mandate that your company deposit “lost earnings” based on the DOL findings over the 6-year period. The interest rate for “lost earnings” might be based on a T-Bill rate or, in some cases, the DOL has used the rate applicable to a Plan’s highest earning fund. Unfortunately, the DOL gets to choose how “lost earnings” are determined.
- ◆ Mandate that your company pay a \$502(l) penalty to the DOL based on 20% of the “lost earnings” amount.
- ◆ The estimated consulting fees for representation in a “full-blown” DOL audit: \$4,000–\$12,000.