



LATE DEFERRAL DEPOSITS CORRECTION



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Late Deferral
Deposits
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Description Of Late Deferral Deposits

ERISA DEFINES WHEN DEFERRAL DEPOSITS MUST BE MADE

Plan asset regulations generally state the outside limit as the 15th business day of the month following the date the employer receives the contribution

Plans with <100 participants can have a safe harbor of 7 business days to deposit the funds once the employer receives them

DOL'S ENFORCEMENT POSITION ON WHEN DEFERRALS MUST BE DEPOSITED

"...as soon as they
can be
reasonably
segregated"

Generally, deferrals must be contributed to the plan by the same date that payroll taxes are normally remitted

DESCRIPTION OF LATE DEFERRAL DEPOSITS

- Late deferrals are prohibited transactions (PT) under ERISA section 406(a) and fiduciary breaches

PT = transaction between a plan and a party in interest - under ERISA section 3(14) a plan sponsor is a party in interest

15% excise tax under IRC section 4975 on amount involved (fair market interest on late deferrals)

- Cannot be corrected under IRS EPCRS but may be corrected in the DOL's VFCP

POSSIBLE REASONS FOR LATE OR MISSED DEFERRAL DEPOSITS



Lack of internal controls



Involved and complicated internal processes



Multiple locations



Change in personnel



Company cash flow problems



DOL's Position On Self-Correction And Voluntary Fiduciary Correction Program (VFCP)

SELF-CORRECTION VS. VFCEP



VFCEP is the DOL's process for correcting late deferral deposits

DOL does not formally recognize self-correction of late deferral deposits ... yet

However, we have had success with self-correction in certain specific circumstances



Self-Correcting Late Deferral Deposits

STEPS FOR SELF CORRECTING



CAN YOU USE DOL ONLINE CALCULATOR TO DETERMINE EARNINGS WITHOUT VFCP SUBMITTAL?

DOL says it **will not accept use of online calculator unless** a VFCP application is filed

However, what they say and what they accept are two different matters

While DOL **does not formally recognize** self-correction, they are considering ASPPA's self-correction proposal

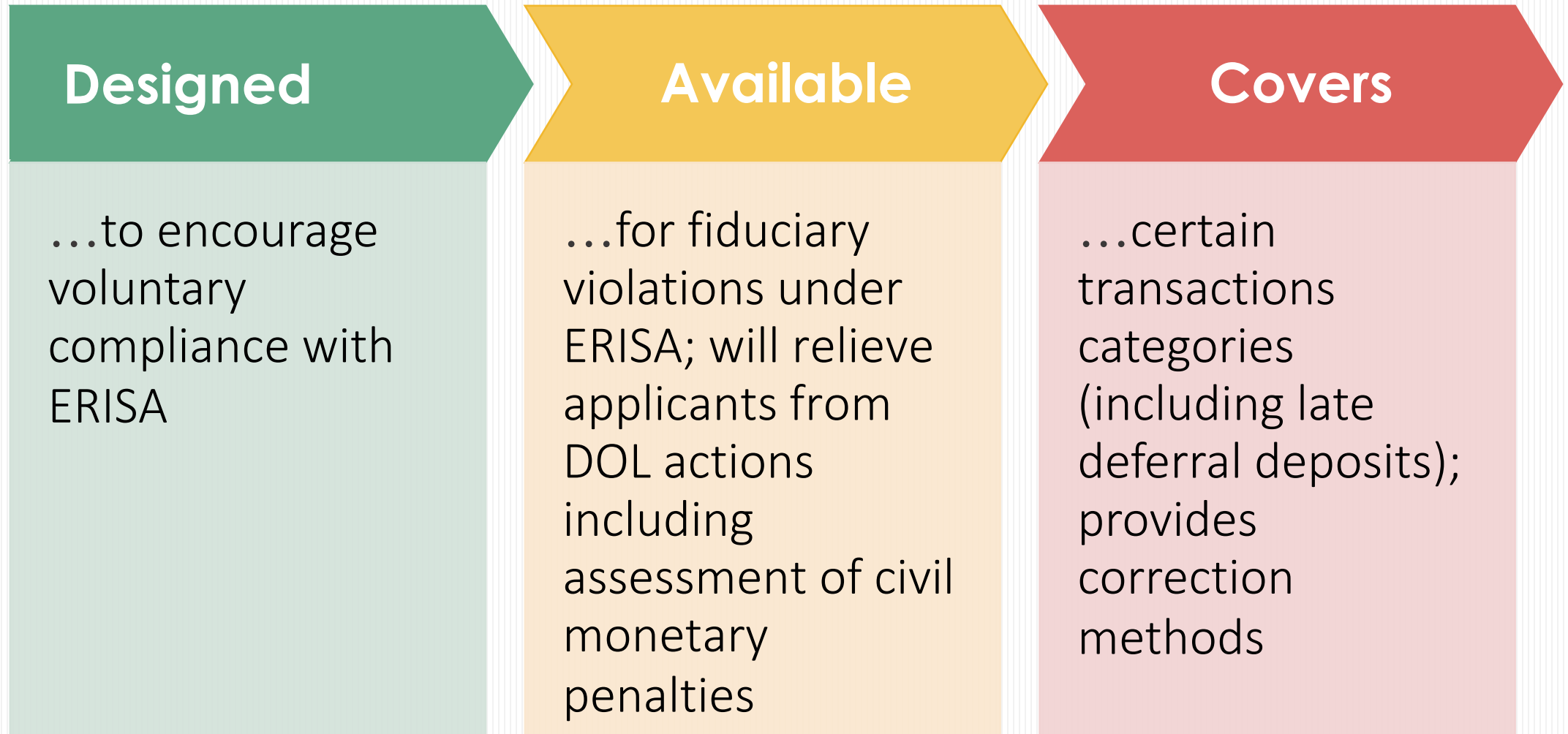
ASPPA's Self-Correction Proposal To DOL

- Make available only to plans with <100 participants
- Revise Line 4 on Schedule I to Form 5500 to include information regarding amounts either self-corrected or corrected in VFCP
- Set payroll date as the date for lost earnings calculations
- Require plan administrators to use DOL's online calculator, and retain documentation for 6 years
- Condition relief based on truthfulness and accuracy of information reported



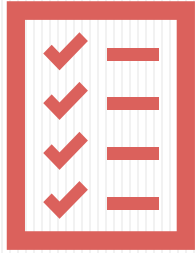
Correcting Late Deferral Deposits In VFCP

WHAT VFCEP IS



Read more: http://www.dol.gov/ebsa/compliance_assistance.html#section8

DOES VFCEP INVOLVE CIVIL PENALTIES?



DOL won't impose civil penalties under ERISA section 502(l) or 502(i) if applicant meets all conditions



DOL must refer information about PTs to the IRS



If applicant meets conditions of VFCEP PT exemption, they will be exempt from IRS PT excise taxes

DOL can still impose late filing penalties on late Forms 5500 unless one files under the DOL's VFCEP

VFCP ELIGIBILITY

DOL will consider an application if **neither plan nor applicant are "under investigation"** and if **applicant shows no signs of criminal violations**

Applicant is "under investigation" if DOL, IRS or any other government agency **is investigating the plan, or applicant or plan sponsor in connection with the plan**

DOES VFCEP COMPLIANCE MEAN NO FURTHER DOL ACTION ON THE MATTER?

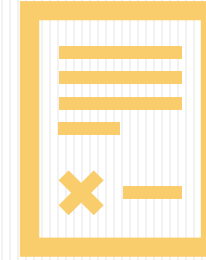
Yes – **if an applicant satisfies all terms** of the VFCEP, DOL will issue a no-action letter

No-action letter will state that **DOL will not initiate a civil investigation** regarding an applicant's responsibility for the transaction listed in the VFCEP application

APPLICATION FOR RELIEF UNDER VFCP



Submit an application with written narrative to a DOL Regional Office



Application may be drafted by applicant or one can use the DOL Model Application Form

VFCP APPLICATION ACCOMPANYING DOCUMENTATION

- ✓ VFCP Program Checklist
- ✓ Penalty of Perjury Statement
- ✓ Statement of plan official as to earliest date contributions could be made and documentation supporting this date
- ✓ Authorization of preparer
- ✓ Copy of most recently filed Form 5500

VFCP APPLICATION ACCOMPANYING DOCUMENTATION

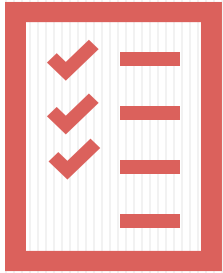
- Documentation

Showing earnings
calculations – **could
be DOL online
calculator printouts**

That deferrals and
earnings were
deposited

- Copy of relevant portion of plan and related documents

APPLICATION FOR RELIEF UNDER VFCEP



Cannot submit an application before corrections are completed



VFCEP requires that you submit proof of corrections taken, along with your application



DOL - if it enters into negotiations because corrections weren't properly done - could assess 20% ERISA section 502(I) penalty

PROHIBITED TRANSACTION EXEMPTION 2002-51

TO AVOID
15% PT
EXCISE TAX



Late deferrals must have been deposited in plan within 180 days of receipt by employer



Submit application and documentation in VFCP



Provide notice of failures to interested parties (all employees); take steps correct them; send notice to DOL within 60 days of filing VFCP application

PROHIBITED TRANSACTION EXEMPTION 2002-51

1. No separate application required but must receive no-action letter from DOL in connection w/ VFPCP application
2. Cannot have used PT Exemption for a separate transaction for 3 years. DOL says:

Exemption can be used for late deposits **for multiple pay periods that relate to same reason** and be treated as one transaction

Late deferral deposits spread out in March, July and September payrolls and no related cause **cannot be considered one transaction and cannot come within PT Exemption**

MUST INTERESTED PARTIES BE NOTIFIED?

EXEMPTION
POSSIBLE IF
THESE
REQUIREMENTS
ARE MET

Total excise tax due is less than \$100, which translates to total earnings on late deposits of less than \$666

Total of "tax" due is paid to the plan and allocated to all accounts as other earnings

IRS Form 5330 used to determine amount of excise tax (or same information that would be used) submitted to DOL

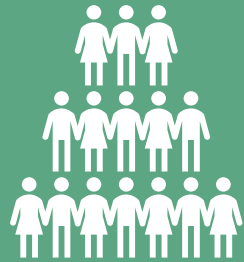
Proof of payment of amount is submitted with the application



When VFCP Is / Isn't Appropriate

WHEN VFPCP IS MOST APPROPRIATE

LARGE
EXCISE TAX
ANTICIPATED



Many participants and a large amount of very late deferrals



Many payroll periods with significant late deferrals



Large number of late deferral PTs extending over multiple years, so they are separate new PTs at beginning of each plan year in which uncorrected

WHEN VFCP IS LEAST APPROPRIATE

Excise tax amount (if self-correcting) is not large and VFCP costs of application preparation may outweigh the tax



Excise tax savings do not outweigh the negative employee relations of airing dirty laundry before all participants



VFCP PT exemption is not allowed if plan fiduciary has submitted a previous VFCP application within 3 years

WHEN IRS EPCRS IS APPROPRIATE AND VFCEP IS NOT

- Failure to deduct deferrals would be corrected in IRS EPCRS, not in VFCEP
- Make corrective contributions equal to 50% of missed deferrals and 100% of applicable match plus earnings
- Failure discovered and corrected **less** than 2 years after plan year in which it occurred use IRS SCP

Make corrective contribution equal to 25% of missed deferrals and 100 of applicable match plus earning

Send notice to affected participants within 45 days of correct deferral commencing

WHEN IRS EPCRS IS APPROPRIATE AND VFCEP IS NOT

- Failure discovered **more** than 2 years after plan year in which it occurred:

May correct in SCP if
"insignificant"

Correct through IRS Voluntary
Correction Program (VCP) if
"significant"



Case Studies

CASE STUDY #1

1

Plan sponsor had to compile deferrals from several divisions and send to custodian at same time; one division was slow to provide information

2

As a result, plan sponsor applicant submitted a VFCEP application that listed many pay periods with late deposits over 4 years

3

Plan administrator filed Forms 5330 and paid excise tax

4

DOL issued a no-action letter

CASE STUDY #2

- 1 Plan Sponsor had not corrected late deferral deposits reported on Form 5500
- 2 DOL initiated a limited investigation
- 3 Fiduciaries quickly calculated the earnings, deposited the earnings and filed Forms 5330
- 4 DOL issued no-action letter; did not require payment of ERISA section 502(l) 20% penalty
- 5 We sent copies of Forms 5330 filed with IRS to DOL to include with their referral package to the IRS

CASE STUDY #3

1

CPA discovered late deferral deposits while performing annual audit

2

Plan sponsor advised to go back for all open years and found additional years of late deferral deposits

3

Used 7-day small plan safe harbor as a timeframe to deposit deferrals and calculated earnings using online calculator

4

Filed Forms 5330 with pyramiding of uncorrected PTs, paid excise tax; did not file in VFCP

CASE STUDY #3

5

DOL initiated investigation and our firm was engaged

6

DOL determined 7-day small plan safe harbor didn't apply; required calculations and Forms 5330 to be redone

7

Lesson: Use payroll tax deposit timeframe for measuring late deferral deposits; don't assume small plan safe harbor will work for a large plan

Links For More Information

- The IRS's Employee Plans Compliance Resolution System – Five Questions, Four Categories Of Failure, Three Paths To Forgiveness
 - www.employeebenefitslawgroup.com/resources/article-library/the-irss-employee-plans-compliance-resolution-system
- Haste Does Not Always Make Waste
 - www.employeebenefitslawgroup.com/blog/retirement/employee-plans-compliance-resolution-system-epcrs

Links For More Information

- EPCRS Revenue Procedure
 - 2018-52 – <http://www.irs.gov/pub/irs-drop/rp-18-52.pdf>
- Employee Benefits Security Administration of Department of Labor
 - www.dol.gov/ebsa/
- Correcting Plan Errors Link
 - www.irs.gov; click on Retirement Plans Community; click on Correcting Plan Errors; see the Fix-it Guides
- Employee Plans Newsletters e-subscription available
 - www.irs.gov; click on Retirement Plans Community; click on Newsletters



Thank You For Attending!

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