DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2510

RIN 1210–AA53

Regulation Relating to Definition of ''Plan Assets''—Participant Contributions

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final regulation revising the definition of when certain monies which a participant pays to, or has withheld by, an employer for contribution to an employee benefit plan are ''plan assets'' for purposes of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and the related prohibited transaction provisions of the Internal Revenue Code (the Code). The final regulation provides that participant contributions to employee pension benefit plans become plan assets on the earliest date that they can reasonably be 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 participant contributions are withheld or received by the employer. The final regulation establishes a procedure by which an employer that sponsors a pension plan may obtain an extension of this maximum period for an additional 10 business days with respect to participant contributions received or withheld in a single month. With respect to employee welfare benefit plans only, the final regulation leaves unchanged the current regulation, which provides that participant contributions become plan assets as of the earliest date on which they can reasonably be segregated but in no event later than 90 days from the date on which the participant contributions were received or withheld by the employer. This rule provides guidance to employers that sponsor contributory pension and welfare plans, including plans complying with section 401(k) of the Code, as well as fiduciaries, participants, and beneficiaries of such plans.

DATES: *Effective date.* This regulation is effective on February 3, 1997.

Applicability dates. The regulation also establishes a procedure by which an employer may obtain a postponement of the application of the new maximum period for pension plans for up to 90 additional days beyond the effective date. For collectively bargained plans, the new maximum period for pension plans does not apply until the later of February 3, 1997 or the first day of the plan year that begins after the last to expire of any applicable collective bargaining agreement in effect on August 7, 1996. Pending the application of the new maximum period for pension plans, plans are subject to the same maximum period that applies to employee welfare benefit plans. Except as described above with respect to the postponement procedure and collectively bargained plans, the requirements of the regulation are applicable to all plans on the effective date.

FOR FURTHER INFORMATION CONTACT: Rudy Nuissl, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC (202) 219–7461; or William W. Taylor, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC (202) 219–9141. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On December 20, 1995, the Department of Labor (the Department) published a notice of proposed rulemaking in the Federal Register (60 FR 66036) to revise a regulation at 29 CFR 2510.3–102 which had been issued by the Department in 1988. The 1988 regulation provided that the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his or her wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event to exceed 90 days from the date on which such amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or 90 days from the date on which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).[1] This final rule was based on a record developed with respect to a proposed regulation published in 1979. 44 FR 50363 (August 28, 1979).

In the December 20, 1995 notice, the Department proposed to change the maximum period during which participant contributions to an employee benefit plan may be treated as other than ''plan assets'' to the same number of days as the period in which the employer is required to deposit withheld income taxes and employment taxes under rules promulgated by the Internal Revenue Service (IRS). The Department solicited comments on the advisability of other measures that the Department might consider to address the problem of delays in transmitting participant contributions to plans. The Department received more than 600 written comments in response to the proposal. The Department held a public hearing on the proposal on February 22 and 23, 1996, in Washington DC, at which time 21 organizations provided testimony.

The following discussion summarizes the Department's proposal and the major issues raised by the commenters. It also explains the Department's reasons for the modifications reflected in the final regulation which is published with this document.

Discussion of the Final Regulation and Comments

1. The Proposed Regulation

In issuing the proposed rule the Department stated that it did not propose to change the general rule embodied in the 1988 regulation, which is that participant contributions become plan assets as of the earliest date that they can reasonably be segregated from the general assets of the employer. Instead, the Department's proposal emphasized that the maximum time period was not a safe harbor, and proposed to drastically reduce the maximum period after which participant contributions would be considered plan assets. Under the 1988 regulation, this maximum period was 90 days after the contributions were received by the employer or would otherwise have been payable to the participants in cash. The Department proposed to change the maximum period to the same number of days as the period within which the employer is required to deposit withheld income taxes and employment taxes under rules promulgated by the IRS.

The currently applicable IRS rules are codified at 26 CFR 31.6302–1. As explained in the preamble to the December 20, 1995 notice of proposed rulemaking, the IRS deposit rules generally require employers who have

[1] The Department's view is that elective contributions to an employee benefit plan, whether made pursuant to a salary reduction agreement or otherwise, constitute amounts paid to or withheld by an employer (*i.e.*, participant contributions) within the scope of § 2510.3–102, without regard to the treatment of such contributions under the Internal Revenue Code. See 53 FR 29660 (Aug. 8, 1988).

reported more than $50,000 of withheld income taxes and employment taxes for a prior 12-month ''lookback'' period (defined as ''semi-weekly depositors'') to make tax deposits to a Federal Reserve Bank or authorized financial institution within a few days of withholding from wages. Employers who have reported $50,000 or less of withheld income taxes and employment taxes in the lookback period are defined as ''monthly depositors'' and must make such deposits on or before the 15th day of the month following the month in which the employees' wages are paid. The Department specifically solicited comments on the appropriateness of including in the final regulation the following two special rules that supplement the general tax deposit rules in the IRS regulation: (1) An employer who has accumulated on any day $100,000 in withheld income taxes and employment taxes must deposit such taxes by the next banking day; (2) an employer who accumulates less than a $500 tax liability during a calendar quarter is not required to make deposits; the tax is paid with the filing of the tax return for the quarter.

The Department recognized that some employers would perceive difficulties in transferring participant contributions to an employee benefit plan that they do not have in the deposit of federal employment taxes. The Department solicited comments as to any specific burdens and associated costs of this kind. The Department also requested comments on the transition period needed for employers and service providers, especially small businesses, to make changes in practices that would be necessary to comply with the proposal if it was adopted.

Although the Department did not propose a maximum period applicable to all employers based on a fixed period of days (such as 15 days), it stated in the December 20, 1995 notice that it would consider such a rule if adopting the time periods in the IRS tax deposit rules would place an undue burden on plan sponsors. The Department solicited comments on the advantages or disadvantages of using a fixed period of days or some other formulation for a maximum period as well as to the advisability of other measures to address the problem of delays in transmitting participant contributions to plans.

2. Comments Addressed to the Maximum Period Described in the Proposed Regulation

In response to the proposed regulation, the Department received many comments[2] objecting to the use of the time periods that apply for the deposit of withheld income taxes and employment taxes as the maximum period for segregating participant contributions from the employer's general assets. Employers of different sizes represented that they would face difficulty and greatly increased costs in attempting to meet the foreshortened time frames for segregation of participant contributions set forth in the proposal. Service providers to plans stated that it would not be feasible for them to administer a rule that had a different maximum time period based on the size of the employer. There was general agreement that the 90 day maximum period in the 1988 regulation should be reduced, but many commenters regarded the proposed regulation as formulating an overly restrictive maximum period with the effect of imposing more stringent requirements on larger employers even though, they contended, most of the cases in which participant contributions were mishandled appear to have involved smaller employers.

The commenters generally represented that, under current practices, there are significant differences between the processing of withheld federal income taxes and employment taxes prior to deposit, and the processing of participant contributions to employee benefit plans. Tax deposits are made without providing any data regarding the allocation of the deposit amounts to individual employees until the end of the year. By contrast, commenters stated that each time participant contributions are transmitted to the plan, eligibility must be confirmed, contributions must be allocated to the participants' individual accounts, and the individual amounts must be reconciled to the aggregate amount. Commenters also pointed out that employees who participate in 401(k) plans may select differing amounts for contribution, and may frequently change both these amounts and the vehicles to which they are allocated.

Many commenters represented that the process of reconciling and allocating participant contribution amounts is time consuming. Because of the work involved in preparing for the transmission of participant contributions to the plan, many commenters stated that they customarily make such transmissions once a month, rather than after each pay period. The commenters stated that requiring participant contributions to be segregated as often as twice a week or more would force employers to conduct these reconciliations and allocations with the same frequency and thus would add substantially to the costs and burdens of handling participant contributions.

Other commenters maintain that the proposal would simply not allow sufficient time for the necessary review and correction of errors before the transmission of the participant contributions to the plans. These commenters pointed out that accuracy in calculating and allocating participant contributions is very important. Although some commenters acknowledged that mistakes can be corrected, including the return of mistaken contributions, frequent mistakes can present significant employee relations problems and undermine participant confidence. According to numerous commenters, it is less burdensome and costly to take additional time to assure the accuracy of participant contributions before they are transmitted to the plan than it is to find and correct mistakes afterwards. They pointed out that the more frequently reconciliation and allocation computations are made, the greater the opportunity for committing errors.

The commenters also represented that many brokerage houses, banks and mutual funds are not willing to accept lump sum payments of participant contributions from employers without at the same time receiving instructions as to the allocation of such amounts to the participants individual accounts. Some commenters also stated that investment vehicles would not be willing to accept participant contributions more frequently than once a month, even with appropriate individual participant data, without increased charges. In addition, some commenters stated that the proposal would present particular problems for plans that have participant accounts valued on a daily basis.

Smaller employers represented that they use outside service providers to assist in plan management. For such employers, participant contribution data is transmitted to the service provider and then back to the employer as part of the reconciliation process before the contributions are transmitted to the plan. It was also represented that many smaller employers handle their own payroll and participant contribution processing but lack sophisticated automation systems for this work. It was represented that, because of these factors, many smaller employers would

[2] References to ''comments'' and ''commenters'' includes both written comment letters as well as prepared statements and oral testimony at the public hearing.

have difficulty meeting the outside limits set forth in the proposed rule.

A few very large companies with sophisticated computer payroll systems indicated that they could comply with the proposed regulation. Many large companies, however, especially those with employees at various locations and decentralized payroll systems, represented that additional time is needed for processing payroll information from different locations. One commenter pointed out that the deposit schedules in the proposal would present difficulties for companies that are members of control groups. Employers which have multiple payrolls with varying cut-off dates stated that the proposal would seriously increase their costs. For such employers, the proposed rule would impede the more economical consolidation of contribution data from different payrolls into large batches for processing. Instead, it would require the processing of smaller amounts of data on an almost continuous basis.

Employers who must comply with the ''next banking day'' rule for deposits of withheld income taxes and employment taxes informed the Department that the proposed rule would not be administratively feasible because the transmission of participant contributions is far more labor intensive and time consuming than the deposit of payroll taxes. Moreover, some employers may become subject to this special deposit rule only when they have unusually large payrolls, such as when they pay large bonuses to employees.

Many commenters recognized that participant contributions could be segregated quickly and frequently into a trust established to temporarily hold participant contributions until they could be reconciled in a more practical and less costly manner. Some of these commenters, however, represented that the costs of establishing and administering a separate trust would be considerable, outweighing any additional earnings gained from using a trust, and would not be justified by the additional benefits they might produce.[3] Some commenters provided calculations to support their claim that any additional earnings derived from more frequent deposits of participant contributions, either to individual accounts or to a holding trust, would be more than offset by the increased attendant expenses.

Some commenters expressed concern that fiduciaries of participant directed plans designed in accordance with the Department's regulations at 29 CFR 2550.404c–1 would not be relieved of liability under ERISA section 404(c) for management of money deposited in these separate holding trusts. The commenters stated that requiring plan fiduciaries to manage assets of such plans is contrary to the purpose of plans designed to comply with section 404(c), which is to permit the participants to exercise control over the assets allocated to their individual accounts.

3. Comments Relating to Welfare Plans

A number of commenters recommended that the 1988 regulation remain unchanged as applied to assets of employee welfare benefit plans. Others proposed that participant contributions to welfare plans not be treated as plan assets unless the contributions are deposited with a trust. According to these commenters, welfare plan participants would derive very little benefit from application of the proposed regulation to their contributions because participant contributions to most welfare plans, particularly health benefit plans, are not meant to be invested, but are used to purchase coverage (such as medical or disability coverage or life insurance) for a given period of time, either directly from the employer in the self-insured context, or through a state-regulated insurer. For such plans, the commenters argued, there is no need to determine when or if participant contributions become plan assets because the coverage is immediately available to the participant and all the assets of the employer or of the insurer are available for the payment of the benefits under the plan. Several commenters also maintained that for many welfare plans, especially health benefit plans, the participant contributions merely reimburse the employer for expenditures on benefits or premiums that the employer has already made.

The Department does not agree that the concept of participant contributions becoming plan assets as soon as they can reasonably be segregated from the employer's general assets has no relevance to welfare plans. In the view of the Department, employees who agree to deductions from their wages for contributions to a plan are entitled to have the assurance that when the employer decides to purchase an insurance policy or medical services for the plan, it is acting as a fiduciary of the plan and is governed by the fiduciary standards of ERISA in so doing. The fact that the participant contributions may be used to repay an employer for advancing funds for the plan's expenses does not, in the view of the Department, change the character of the participant contributions. Moreover, if participant contributions to a welfare plan are not promptly devoted to benefits and expenses, the prudence and exclusive purpose requirements of ERISA may require that the contributions be invested.

In addition, the Department, in issuing the proposed regulations, did not contemplate a change in the general rule that participant contributions to pension and welfare plans become plan assets as of the earliest date on which they can reasonably be segregated from the employer's general assets. Nor were comments solicited on alternatives to the general rule. A change in the general rule is thus beyond the scope of this rulemaking. The Department, however, does not believe that the record is sufficient to support a change in the maximum time period for welfare plans. As a result, the Department has determined not to change the current maximum period of 90 days with respect to welfare plans.

The Department has recognized that for cafeteria plans and certain other types of welfare plans, the trust and certain reporting requirements of ERISA present special burdens. As a result, the Secretary issued a technical release, T.R. 92–01, which provides that the Department will not assert a violation of the trust or certain reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations involving such plans solely because of a failure to hold participant contributions in trust. 57 FR 23272 (June 2, 1992); 58 FR 45359 (Aug. 27, 1993). Several commenters sought assurance that the promulgation of this regulation does not affect the continued validity of the technical release. The Department wishes to provide such assurance. T.R. 92–01 is not affected by the final regulation contained in this document, and remains in effect until further notice.

COBRA payments were the subject of a number of comments.[4] The record indicates that participants and beneficiaries generally make COBRA payments in the form of separate checks, usually made out to the employer, and which arrive at different

[3] Some commenters assume that such earnings must be allocated to the participants' individual accounts. This is not necessarily so. A plan may provide that the earnings will be used to defray reasonable plan expenses.

[4] COBRA payments are made for continuation of coverage under certain group health plans pursuant to provisions of ERISA and the Internal Revenue Code that were enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

times over the course of each month. Commenters stated that such payments contain a high rate of errors and that the reconciliation process regarding eligibility and amount is time consuming. One commenter alleged that welfare plans that use third party service providers to receive and aggregate participant contributions, including COBRA payments, before they are applied to plan purposes need a minimum of 45 days before the participant contributions should be treated as plan assets. Because the Department has determined not to change the existing regulation as it applies to welfare benefit plans, the Department has determined not to create a special rule for COBRA payments or for welfare plans that use a third party service provider to receive participant contributions.

With regard to the continued application of T.R. 92–01, some commenters questioned whether the technical release extended relief to plans which receive COBRA contributions. It is the view of the Department that the mere receipt of COBRA contributions or other after-tax participant contributions (e.g., retiree contributions) by a cafeteria plan would not by itself affect the availability of the relief provided for cafeteria plans in the technical release. Similarly, in the case of other contributory welfare plans, the mere receipt of after-tax contributions by a plan would not affect the availability of relief under the technical release provided that such contributions are applied only to the payment of premiums in a manner consistent with 29 CFR 2520.104–20(b)(2)(ii) or (iii) or 2520.104–44(b)(1)(ii) or (iii).

4. The Final Regulation

After consideration of the comments and hearing testimony, the Department has decided to modify the outside limit set forth in the proposal. Under the final regulation, the general rule of the 1988 regulation remains unchanged for both pension and welfare benefit plans: The assets of a plan include amounts paid by a participant or withheld by an employer from a participant's wages as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. The final rule changes only the outer limit beyond which participant contributions to employee pension benefit plans become plan assets. The 1988 regulation had an outer limit of 90 days from the date of withholding from a participant's wages or from the payment of the contribution by the participant to the employer. The final regulation has an outer limit for pension benefit plans of the 15th business day of the month immediately following the month in which the participant contributions are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). Under the final rule the outside limit for welfare benefit plans is the same time period as in the 1988 regulations, 90 days from the date of the employer's withholding or receipt of the participant contributions.

Substantially all of the commenters who addressed the issue advocated a uniform maximum time period for all employers, large and small. The maximum period for pension benefit plans contained in the final regulation is slightly longer than the alternative by far the most often proposed by commenters, which was 15 days after the end of the month in which the participant contributions were received. Comment letters received from a wide range of employers, third party administrators, trustees and investment vehicles for plans indicated that a 15 day rule would not impose undue costs or burdens, or otherwise require them to change their current processes for handling participant contributions. A comment recommended that the number of days be measured in business days rather than calendar days. Because the Department realizes that, for many employers, holidays and weekends reduce the total number of days in which employers can perform the functions necessary to segregate participant contributions from their general assets in an orderly and cost efficient manner, the Department has decided to adopt a maximum period measured by business days rather than calendar days (i.e., excluding Saturdays, Sundays and national legal holidays).

The final rule for pension benefit plans accommodates employers who are unable reasonably to segregate participant contributions from their general assets more frequently than in what appears to be a fairly standard monthly processing cycle for participant contributions to pension plans. The new rule thus should not increase the costs and burdens for the great majority of employers who sponsor pension benefit plans. In addition, as requested by most commenters, the rule would apply to all such employers, regardless of size, and would simplify the compliance monitoring function performed by service providers and the Department.

At the same time, the final rule significantly reduces the maximum period during which participant contributions to pension benefit plans may be treated as other than plan assets (assuming that the participant contributions could not reasonably be segregated from the employer's general assets in a shorter time). Under the final rule, the maximum period in which employers could commingle participant contributions to pension benefit plans with their general assets would average about 35 days and would be no more than 52 days. Thus, in comparison to the 1988 regulation, the final rule enhances the security of employee retirement benefits that are funded in whole or in part through participant contributions.

The final rule does not change the requirement of the 1988 rule that participant contributions become plan assets as of the earliest date that they can reasonably be segregated from the employer's general assets. Under the final rule this general requirement remains applicable to both pension and welfare benefit plans. The final rule also retains the emphasis of the proposed rule that the maximum period does not operate as a safe harbor for either pension or welfare benefit plans. As a result, for many plans, participant contributions will become plan assets well in advance of the applicable maximum period.

Although the Department believes that the final regulation establishes a maximum period that is sufficiently long to accommodate the needs of employers that sponsor pension plans, employers who are complying with the general rule, on occasion, may be unable to transmit participant contributions to the plan within the maximum period. To accommodate such a situation, the regulation includes a procedure for an employer to extend the maximum period for an additional 10 business days with respect to participant contributions for a single month. Under this procedure, the employer must provide a true and accurate written notice to the participants that the employer has elected to take advantage of this extension period for the month. The notice must also state the reasons why the employer cannot reasonably segregate the participant contributions within the maximum time period for pension plans, and state that the participant contributions in question have in fact been transmitted to the plan and provide the date of such transmission. The notice must be provided within 5 business days after the end of the extension period. In addition, the employer must have

obtained, prior to the beginning of the extension period a performance bond or irrevocable letter of credit in favor of the plan. Within 5 business days after the end of the extension period, a copy of the notice provided to the participants must also be provided to the Secretary along with a certification that the notice was distributed to the participants and that the bond was obtained.[5]

The amount of the bond or letter of credit must be not less than the amount of the participant contributions received or withheld by the employer during the previous month. The Department is concerned that in some cases, the reasons prompting the employer to elect an extension under this procedure may recur in the immediately following months and, if so, might put the participant contributions at risk of loss. In addition, because the extensions will not be subject to prior approval by the Department, the Department has determined that the bond or letter of credit must remain in effect for at least three months following the month in which the extension period expires in order to give the Department sufficient time to confirm that the participant contributions were actually transmitted to the plan as represented in the notice.

The regulation provides that an employer may not elect an extension under this procedure more than twice in any plan year, unless the employer pays to the plan an amount representing interest on the participant contributions that were subject to all the extensions within the plan year. The interest amount is to be measured by the greater of (1) the amount that the participant contributions would otherwise have earned from the date of withholding or receipt by the employer until the date of transmission to the plan if the contributions had been invested during such period in the investment alternative available under the plan which had the highest rate of return, or (2) the underpayment rate defined in section 6621(a)(2) of the Internal Revenue Code applied to such period.

The Department emphasizes that the extension procedure is available only to extend the maximum period and has no effect on the employer's obligation to comply with the general rule that participant contributions become plan assets as soon as they can reasonably be segregated from the employer's general assets. The Department also notes that this extension procedure applies only with respect to participant contributions to pension plans; it does not apply with respect to participant contributions to welfare plans.

5. Comments Recommending Alternative Approaches

a. Other Maximum Time Periods

Many commenters recommended other maximum time periods. One commenter recommended a maximum period of the 25th day of the month following the month in which the employer withheld or received the participant contributions. A significant number recommended that the maximum period be the 30th day of the month following the month in which the employer withheld or received the participant contributions. A few recommended a maximum period of 60 days after the date of withholding or receipt by the employer. Others suggested a maximum period of 45 days after the date of withholding or receipt. Several commenters recommended maximum time periods of less than 15 days after participant contributions were withheld or received by the employer. Nearly all employers who make monthly transmissions of participant contributions to plans and who provided information concerning their current practices indicated that they transmit participant contributions to plans within several days after the end of the month in which the participant contributions are withheld or received.

The final rule, which provides a maximum period of 15 business days after the end of the month in which the employer withheld or received the participant contributions for pension plans, provides additional time for the resolution of errors or for other unforeseen delays. In light of the above, the Department believes that the final regulation provides a sufficient maximum time for employers who are not able reasonably to segregate participant contributions from their general assets and transmit them to pension plans more often than once a month.

b. Extended Maximum Time Periods When There is a Change in Trustees

Some commenters recommended that the Department provide an extended maximum period for situations where the employer changes recordkeepers or plan trustees for section 401(k) plans. One recommended that the maximum period in this situation should be the end of the third month following withholding of the participant contributions. Another commenter suggested that a rule allowing a maximum period ending on the last day of the month following the month in which the contribution is made would accommodate this situation. According to these commenters, additional time is often needed to accomplish a smooth changeover of recordkeeping and trustee functions from one party to another. The commenters, however, did not provide any detailed information as to why participant contributions could not be directed to one trust or the other during this time period. The final regulation does not contain an extended maximum period for special situations. The Department recognizes that a change in trustees or funds for a section 401(k) plan may require a period during which the outgoing fund or trustee cannot accept contributions and the participants are unable to direct changes in investment choices or contribution amounts. The Department, however, believes participant contributions should be transmittable to the new fund or trustee within the maximum time provided. In the Department's view, a change in recordkeepers or other service providers to a plan should not affect the maximum allowable period before participant contributions become plan assets. In addition, the extension procedure would be available to an employer who was complying with the general rule but, due to a change of trustees, needed a brief extension of the maximum period.

c. Administrative Waivers

Other commenters suggested that, in the event that the regulation provided a maximum period of less than 30 days after the end of the month in which the contribution is received, the Department should provide a procedure for obtaining waivers of the maximum period. These comments fall into two categories. The first category of comments asserts that certain employers may not be able to segregate participant contributions within the outside time limitation for reasons unique to the company, but the employer is nonetheless transmitting participant contributions to the plan as soon as they may reasonably be segregated from the employer's general assets and should be able to petition the Department for a waiver of the limitation. The second category of comments asserts that employers who would ordinarily remit participant contributions to the plan within the maximum period may sometimes miss the limit because they are changing trustees, or because of other factors, such as computer failures, erratic mail delivery, and employee illness.

[5] Such copy shall be addressed to: Participant Contribution Regulation Extension Notification, Office of Enforcement, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210.

With respect to the first category of comments, the Department believes that it has provided a sufficiently delayed effective date to enable the small percentage of employers who cannot currently transmit participant contributions to pension plans within 15 business days after the end of the month in which the employer received the contribution to change their practices to come into conformity with the regulation without incurring undue expense. Nevertheless, as described in the discussion of the effective date, the final regulation includes a procedure by which an employer who is complying with the general rule may obtain a postponement of the application of the maximum period for pension plans for up to 90 additional days beyond the effective date. This optional postponement will allow such employers additional time to make necessary changes in their operations to be able to comply with the final rule.

With respect to the second category of comments, the Department believes that the maximum period established by the final regulation is sufficiently long to accommodate most unanticipated events.[6] With respect to events beyond the control of the employer, the Department notes that a predicate for a prohibited transaction under section 406(a) is that the fiduciary cause the plan to engage in the prohibited transaction in question. Therefore, if the event giving rise to the delay in segregating participant contributions is, in fact, beyond the control of the employer, there would be no prohibited transaction under section 406(a). Nevertheless, as explained more fully above, in the discussion of the final regulation, the Department decided to provide a procedure by which an employer who was complying with the general rule may, on occasion, obtain a brief extension of the maximum time period for pension plans.

d. Special Rule for Simplified Employee Pensions

Two commenters stated that the proposed rule was particularly inappropriate as applied to simplified employee pensions that allow participants to elect salary reduction contributions. Although such plans are available only to employers with less than 26 employees, the commenters maintained that many sponsors of SEPs would be semi-weekly depositors. According to these comments, some SEPs allow participants to designate their own custodians and the sponsor must make separate payments to the custodian for each participant's account. The comments state that the amount deferred for a given pay period is often very small, and may well be less than the minimum deposit amount permitted by the custodian. One of these commenters recommended that, for SEPs, the time period should be 15 days from the earlier of (1) any pay period in which the largest single accumulated participant contribution exceeded $1,000, (2) the earliest date on which the total of all accumulated participant contributions exceeded $5,000, or (3) two months from the last contribution.

The Department has determined not to create a special rule for SEPs. The great majority of commenters, including third party fiduciaries, stated that it is important to have a single rule for all employers. The final rule would permit sponsors of SEPs to remit participant contributions as infrequently as once a month, if necessary. This should allow the remission of amounts sufficiently large to be accepted by custodians of SEPs.

e. Maintain the 90 day Maximum Time Period

Some commenters expressed the opinion that the 1988 regulation should remain unchanged. Many of these commenters stated that the abuses against which the proposed regulation is directed could be better addressed by non-regulatory measures. Foremost among such recommended measures was stricter enforcement efforts to identify and correct violations. Given the Department's broad enforcement responsibilities, the Department has concluded it would not be practical to rely entirely on enforcement efforts to address the abuses at issue here. The Department seeks, by reducing the maximum period during which participant contributions may be treated as other than plan assets, to reduce the amount of participant contributions that are at risk because they have not yet been deposited in trust. Participant contributions which have not been transmitted to a pension plan run two types of risk: interest lost due to delay in depositing contributions, and loss of the contributions themselves if the employer becomes bankrupt. These risks may result in sizeable losses. Through July 1, 1996, the Department's enforcement actions against 401(k) plan sponsors have retrieved $10.01 million in plan assets on behalf of participants and beneficiaries. While the Department's non-regulatory efforts have made a difference in the safeguarding of pension plans, the growth in the number of plans with participant contributions (including 401(k) plans) has made it infeasible, given the scarcity of Departmental resources, to audit or advise every plan that warrants correction. In these circumstances, the Department believes that publishing new guidelines is the appropriate and efficient method of improving pension safety.

Other commenters suggested that improving disclosure of information to participants would obviate the need for a shorter maximum period by allowing participants to better monitor their employer's handling of participant contributions. The Department believes that the establishment of meaningful and timely disclosure requirements in this area would require legislative changes to ERISA. Furthermore, imposing such requirements on employers or plans may impose a burden on them, particularly with respect to small plans that do not use third party administrators already offering this disclosure. The Department considered a suggestion that it offer enhanced disclosure as an option for smaller plans who could not reasonably segregate plan assets within the maximum period in the final regulation, but concluded that such an option may be costly for employers and plans and could be difficult to administer.

As described above, however, the Department has determined not to change the maximum 90 day period with respect to participant contributions to welfare benefit plans.

6. Other Comments

a. Comments Relating to General Rule

Several commentators suggested that the existing rule that amounts that a participant or beneficiary pays to a plan or has withheld from his wages by an employer for contribution to a plan become plan assets as of the earliest date on which such amounts can reasonably be segregated from the employer's general assets be replaced by a fixed time safe harbor. Others suggested that the existing rule be replaced by a rule that such amounts become plan assets as of the earliest date that it would be administratively feasible to transmit the assets to the plan.

The rationale generally set forth by the commenters for proposing the elimination of the rule that participant contributions become plan assets as of the earliest date on which they can reasonably be segregated from the employer's general assets is that it is difficult to determine with exactitude as to when that date is and that the rule,

[6] Where, for example, an employer mails a check to the plan, the Department is of the view that the employer has segregated participant contributions from plan assets on the day the check is mailed to the plan, provided that the check clears the bank.

if it means that participant contributions become plan assets as soon as they can be mechanically segregated from the employer's general assets, is costly and burdensome. The commenters who advocated changing the rule to state that participant contributions become plan assets as of the earliest date that it would be administratively feasible to transmit such contributions to the plan also appear to be reading the existing rule as meaning that participant contributions become plan assets as soon as they can be mechanically segregated from the employer's general assets.

After consideration of these comments, the Department has determined not to change the existing general rule. As indicated in the preamble to the proposed regulation, the Department did not propose to change the existing rule. The test remains as stated in the preamble to the 1988 regulation:

> The revised general rule relating to participant contributions is intended to reflect a balancing of the costs of promptly transmitting such contributions to the plan relative to the protections provided to participants by such transfers. In formulating the final regulation, the Department has attempted to remain consistent with one of the key purposes of the trust requirement of section 403(a) of ERISA—the segregation of plan assets so as to prevent commingling of such assets with an employer's own property.
>
> The regulation is not intended, however, to allow employers to use participant contributions for their own purposes. The Department is concerned that participant contributions be paid promptly into the plan so as to begin earning interest or other investment return and to be available for the payment of benefits. Employers should examine their current payroll procedures to ascertain whether they are indeed transmitting participant contribution amounts at the earliest reasonable time. (53 FR 17629, May 17, 1988)

b. Comments Relating to Fiduciary Duties

Several commenters urged that the Department indicate its position with respect to the fiduciary duties of the institutional trustee which receives contributions. They stated that, typically, the standard form of trust agreement provides that the trustee is accountable only for funds actually deposited and that, in their view, the trustee has no obligation to collect contributions. One commenter acknowledged that while the institutional trustee which receives contributions does not have any primary duty to enforce payment of contributions, section 405(a)(3) of ERISA imposes a fiduciary duty to remedy the breaches of other fiduciaries of which it has knowledge, but stated that a trustee would not necessarily have sufficient information to determine when there has been such a breach with respect to timely deposit of employee contributions. Finally, one commenter who receives employee contributions from many sponsors of 401(k) plans stated its belief that ''each service provider has a fiduciary responsibility to plan participants to blow the whistle on the abusers,'' and stated that its service agreement ''specifies that we will contact the Department of Labor if contributions are not made at least once a month.''

Although it is the view of the Department that the plan sponsor (usually the employer) is primarily responsible for assuring that participant contributions are transmitted to the trustee in a timely manner, section 405(a)(3) would impose a fiduciary duty on plan trustees in certain circumstances.[7] Delineating those circumstances is beyond the scope of this rulemaking.

c. Partnerships

Two comments were received relating to when contributions by partners to section 401(k) plans become plan assets. The letters represent that, under 26 CFR 1.401(k)–1(a)(6)(ii), a partner's compensation is deemed currently available on the last day of the taxable year, and an individual partner must make an election by the last day of the year. They ask when the monies, which otherwise would be paid to a partner, but for the partner's election, become plan assets, inasmuch as partners do not receive wages. In the view of the Department, the monies which are to go to a section 401(k) plan by virtue of a partner's election become plan assets at the earliest date they can reasonably be segregated from the partnership's general assets after those monies would otherwise have been distributed to the partner, but no later than 15 business days after the month in which those monies would, but for the election, have been distributed to the partner.

d. Bankruptcy Laws

Two commenters recommended that the Department seek to have the bankruptcy laws amended to provide a preference for participant contributions commingled with the employer's general assets. One commenter stated that such contributions should be elevated to the same priority as earned payroll. Because such a change cannot be accomplished through the Department's regulatory authority, these recommendations are beyond the scope of this rulemaking.

e. Participant Loans

Clarification was requested from a commenter that the time periods applicable to determining when participant contributions become plan assets also apply to determining when repayments of participant loans that are withheld or received by the employer become plan assets. Another commenter stated that monies withheld for repayment of participant loans should be afforded at least 90 days after withholding because many plans provide for quarterly repayment of loans.

The question of when participant loan repayments become plan assets is beyond the scope of this rulemaking. The notice of proposed rulemaking did not solicit comments on this matter. The record is insufficient for the Department to address this matter in the final regulation. In the Department's view, however, employers should promptly transmit participant loan repayments to plans. An employer's failure to transmit loan payments within a reasonable time after withholding or receiving them could subject the employer to liability for violations of the same provisions of ERISA and criminal law that are violated when an employer is delinquent in forwarding participant contributions to plans.

f. Bonding

Several commenters suggested that many of the problems with which the Department is concerned could be addressed by requiring that the withheld wages and participant contributions be covered by ERISA's bonding requirements prior to their transmittal to the plan. While this suggestion may have some merit with respect to safeguarding participant contributions from losses due to acts of fraud and dishonesty, it would not protect against participant contribution losses where fraud or dishonesty could not be shown. This is because the bond required under section 412 of ERISA (29 U.S.C. 1112) protects the plan only against acts of fraud or dishonesty. However, participant losses due to an employer's failure to quickly segregate participant contributions arise from numerous causes, of which provable acts of fraud or dishonesty are a relatively minor factor. In addition, it would require an amendment to the Department's existing bonding

[7] For the Department's views of the obligations imposed on a fiduciary by section 405(a)(3) in another situation, see 29 CFR 2509.75–5, Q&A FR–10.

regulations,[8] which currently require bonding with respect to participant contributions made by withholding from employees' salaries only at the point in time when they are segregated from the employer's general assets within the meaning of 29 CFR 2580.412–5. Such an amendment is beyond the scope of this regulation.[9]

g. Maritime Employers

Two commenters stated that the proposed regulation would present particularly difficult compliance problems for maritime employers. According to these commenters, participant contributions for 401(k) plans in this industry are commonly not transmitted to the plan until the end of the voyage in which the participant earned the amount of the contribution. Such voyages may last several months. The comments did not focus on when wages are withheld for transmission to the plan. If the wages are not withheld until the end of the voyage, the maximum period within which the withheld wages must be transmitted would begin at the end of the voyage. If the wages were withheld during the course of the voyage, the Department does not perceive any reason why the employer cannot remit such withheld wages to the plan within the same maximum period as any other employer.

h. Multiemployer Plans

Several commenters argued that, because of the unique nature of multiemployer plans, in that the plan trustees are independent of any individual employer, the regulation should either entirely exempt elective contributions to multiemployer plans from its provisions or exempt such contributions from the maximum period provision. The commenters noted, however, that the collective bargaining agreements governing most multiemployer plans provide for transmittal of such contributions from the employer to the plan within a fixed period, typically between 10 and 20 days after the month in which such contributions are made. The Department determined that the maximum time period for pension plans in the final regulation was sufficient to accommodate multiemployer plans and determined not to create a special rule or exemption for multiemployer plans. At the same time, and as more fully explained below in the discussion of the effective date, the Department recognized that transmission of participant contributions may be controlled by collective bargaining agreements and has addressed the special nature of collectively bargained plans, including multiemployer plans, in connection with the applicability of the new maximum period for pension plans in the final regulation.

7. Dues Financed Plans

The final regulation leaves undisturbed the effect of the 1988 regulation on amounts paid to employee organizations as union dues. It continues to be the Department's position that amounts paid as union dues should not be characterized as participant contributions merely because a portion of such dues might be used to provide benefits under a welfare or pension plan sponsored by the employee organization.

8. Consequences of Treatment of Participant Contributions as Plan Assets Before Transmission to the Plan Trustee

a. ERISA

Once participant contributions become plan assets, they become subject to the trust requirements of ERISA section 403, 29 U.S.C. 1103. Although ERISA section 403(b) contains a number of exceptions to the trust requirement for certain types of assets, including assets which consist of insurance contracts, and for certain types of plans, participant contributions generally must be held in trust by one or more trustees once they become plan assets. ERISA section 403(a), 29 U.S.C. 1103(a). Although the Secretary has authority, pursuant to ERISA section 403(b)(4), to grant exemptions for welfare plans, including health plans, from the trust requirements, this exemptive authority does not extend to most pension benefit plans. As noted above, the Secretary has issued a technical release, T.R. 92–01, which provides that, with respect to certain welfare plans (e.g., cafeteria plans), the Department will not assert a violation of the trust or certain reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations, involving such plans solely because of a failure to hold participant contributions in trust. 57 FR 23272 (June 2, 1992), 58 FR 45359 (Aug. 27, 1993). As a result, except for plans which come within T.R. 92–01, an employer's failure to transmit participant contributions to a plan trustee or investment manager by the applicable period described in the final regulation may subject the employer to liability under ERISA for failure to hold plan assets in trust.

In addition, ERISA's fiduciary responsibility provisions apply to the management of plan assets. An employer who retains plan assets commingled with its general assets would be exercising ''authority or control respecting the management or disposition of [plan] assets'' and would be a fiduciary with respect to those assets pursuant to ERISA section 3(21)(A)(i). Among other things, ERISA's fiduciary responsibility provisions make clear that the assets of a plan may not inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan. ERISA sections 403–404, 29 U.S.C. 1103–1104. Fiduciaries who violate these provisions are personally liable to the plan to, among other things, make good losses resulting from such violations and to restore to the plan any profits of such fiduciary which have been gained through the use of plan assets. ERISA section 409(a), 29 U.S.C. 1109(a).

ERISA's fiduciary responsibility provisions also prohibit certain transactions involving plan assets. ERISA sections 406–407, 29 U.S.C. 1106–1107. In particular, ERISA section 406(a)(1)(D), 29 U.S.C. 1106(a)(1)(D), provides that a plan fiduciary shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by, or for the benefit of a party in interest of any assets of the plan. The employer of employees covered by the plan is a party in interest with respect to the plan. ERISA section 3(14)(C), 29 U.S.C. 1002(14)(C). Violations of ERISA's prohibited transaction provisions subject the fiduciaries and parties in interest to liability for the plan's losses and other relief. In the case of pension plans qualified under the Code, the parties in interest (referred to as disqualified persons) are subject to excise taxes under IRC section 4975. In the case of other employee benefit plans, particularly welfare plans, the parties in interest are subject to civil penalties under ERISA section 502(i), 29 U.S.C. 1132(i).

b. Criminal Law

As was noted in the preamble to the final regulation published in 1988, the Department of Justice takes the position that, under 18 U.S.C. 664, the embezzlement, conversion, abstraction, or stealing of ''any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare

[8] See 29 CFR 2580.412.

[9] T.R. 92–1 does not extend to the enforcement of the bonding requirements of ERISA.

benefit plan or employee pension benefit plan, or any fund connected therewith'' is a criminal offense, and that under such language, criminal prosecution may go forward in situations in which the participant contribution is not a plan asset for purposes of title I of ERISA. As with the 1988 regulation, the final regulation defines when participant contributions become ''plan assets'' only for the purposes of title I of ERISA and the related prohibited transaction excise tax provisions of the Internal Revenue Code. The Department reiterates that this regulation may not be relied upon to bar criminal prosecutions pursuant to 18 U.S.C. 664.

Similarly, State criminal laws may apply when an employer converts participant contributions to the plan to the employer's own use. Although the provisions of ERISA generally supersede State laws that relate to employee benefit plans covered by title I of ERISA, generally applicable State criminal laws are not preempted. ERISA section 514(b)(4), 29 U.S.C. 1144(b)(4). This regulation may not be relied upon to bar criminal prosecutions under such generally applicable State laws.

9. Effective Date of the Final Regulation

The effective date of this regulation is February 3, 1997. The Department received relatively few comments addressing the appropriateness of the proposed delayed effective date of 60 days after the adoption of the final regulation, although the Department specifically requested comments on this matter. Of those comments received, the bulk of the comments addressing the effective date recommended a one year delay if the proposed regulation was adopted without significant change as a final rule, although several organizations serving 401(k) plans indicated that a 180-day period would not be inappropriate. However, most of the comments and hearing testimony indicated that there would be little or no difficulty for the vast majority of employers to meet the maximum period adopted in the final rule for participant contributions to 401(k) plans. Some commenters stated that while only a small percentage of employers would have difficulty meeting the maximum period adopted in the final rule, they would need a full year to change their processing systems.

The Department believes that the effective date for the regulation has been sufficiently delayed to accommodate the needs of those employers who will need to make significant changes in their payroll or other systems in order to comply with the final regulation. Nevertheless, the Department has determined to provide a procedure to allow employers who are complying with the 1988 regulation to obtain up to an additional 90 days postponement of the application of the new maximum period for pension plans. Under this procedure, prior to the effective date of the regulation, an employer must provide a true and accurate written notice to the participants that the employer has elected to postpone the application of the new maximum period for pension plans, and providing the date that the postponement will expire. The notice must also describe the reasons why the employer cannot reasonably segregate the participant contributions within the maximum time period for pension plans.

At the same time, the employer must obtain a performance bond or irrevocable letter of credit in favor of the plan in an amount not less than the total participant contributions withheld or received by the employer during the previous three months. The bond or letter of credit must be guaranteed by a government supervised bank or similar institution. The Department is concerned that in some cases, the reasons prompting the employer to elect a postponement under this procedure may recur in the immediately following months and, if so, might put the participant contributions at risk of loss. Because the postponements will not be subject to prior approval by the Department, the Department has also determined that the bond or letter of credit must remain in effect for at least three months following the month in which the postponement expires. A copy of the notice provided to the participants must also be provided to the Secretary along with a certification that the notice was distributed to the participants and that the bond was obtained.[10]

Finally, for each month in which the postponement is in effect, the employer must provide a true and accurate notice to the participants stating the date on which participant contributions received or withheld by the employer during that month were transmitted to the plan. This notice must be distributed so as to reach the participants within 10 days after the transmission. While the postponement is in effect with respect to a particular plan, the participant contributions to the plan will be subject to the same maximum period under the final regulation that applies to employee welfare benefit plans.

Many commenters representing organized labor and employer organizations pointed out that a rule requiring a change in a provision governed by a collectively bargained plan may require renegotiation of the collective bargaining agreement. These commenters also noted that the drafters of ERISA recognized the special needs of collectively bargained plans by providing special effective dates for collectively bargained plans with respect to ERISA's participation, vesting and funding provisions.[11] They asked that the Department provide a special postponement of the application of the maximum period for collectively bargained plans. The Department believes that the comments have merit and has provided for a postponement of the application to collectively bargained plans of the new maximum period for pension plans. Under the final regulation, the maximum period for pension plans does not apply to collectively bargained plans until the later of (1) the effective date or (2) the first day of the plan year that begins after the expiration of the last to expire of any applicable bargaining agreement in effect when the final regulation is issued. During this period of postponement of applicability, the maximum period for welfare plans in the final regulation will apply to collectively bargained plans.

Economic Analysis Conducted in Accordance With Executive Order 12866 and OMB Guidelines

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Department must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in, among other things, a rule raising novel policy issues arising out of the President's priorities. Pursuant to the terms of the Executive Order, the Department has determined that this regulatory action is a ''significant regulatory action'' as that term is used in Executive Order 12866 because the action would raise novel policy issues arising out of the President's priorities. Thus, the Department believes this notice is ''significant,'' and subject to OMB review on that basis.

[10] Such copy shall be addressed to: Participant Contribution Regulation Extension Notification, Office of Enforcement, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210.

[11] See ERISA sections 211(c)(1) and 308(c)(1), (29 U.S.C. sec. 1061(c)(1) and 1086(c)(1)).

Costs

In connection with the publication of the proposed regulation the Department solicited comments on potential economic effects of the proposed rule in the context of Executive Order 12866, and any evidence with respect to whether or not the proposed rule might be ''economically significant.'' The Department received many comments regarding the additional costs and burdens that would have attended the proposed regulation. Some commenters asserted that there would be increased costs but did not provide data and information to explain their assertions. The Department assumed that the information provided in the record by those who did set forth data is reflective of the additional costs which others would incur.

The Department estimated compliance costs of the plan asset regulation set forth in this notice by utilizing information placed in the record and Departmental data on industry practices.[12] Costs are separated into initial costs and ongoing costs.[13] Initial costs represent up-front expenditures for plan revisions, reprogramming, and other one-time costs; these costs were annualized over a conservative estimate of the ''life'' of the regulation, 10 years, in order to show such costs on an annual basis. Ongoing expenditures incurred annually include additional audits for those plans which need to create supplemental trust accounts, and the cost of performing administrative tasks more frequently. Total annualized initial costs and ongoing costs were aggregated to estimate total annual costs.

The plan asset regulation as originally promulgated in 1988 provides that participant contributions become plan assets as soon as they may reasonably be segregated from the employer's assets. The regulation is now being modified to shorten the maximum length of time employers would have to treat participant contributions to pension plans as other than plan assets under Title I of ERISA from 90 days after these contributions were withheld or submitted, to 15 business days after the end of the month in which the contributions were withheld or submitted. Therefore, the costs of this regulatory action are limited to the costs associated with bringing into compliance those employers that are not remitting participant contributions to pension plans within 15 business days after the close of the month.[14]

Compliance costs were estimated using information from commenters on current practices and analysis of Form 5500 annual report data to develop an estimate of the number of plans out of compliance with the revised regulation. The present value (using a 7 percent real discount rate) of the cost of compliance expressed in constant 1995 dollars ranges from $17 million for 1996 costs to $9 million for 2005 costs, totalling $107 million over the 1996–2005 period, and with a value expressed as a constant annuity of $15 million per year over ten years. Comments and survey data in the record supplied information on how different sponsors would have different burdens associated with coming into compliance, reflecting different payroll practices. Many witnesses testified that they would incur no additional burden if the standard was revised to require deposit by the fifteenth day after the previous month's end. Some testified that they would have to change their payroll practices to come into compliance; others determined that they would have to redesign their payroll systems, or make use of a short-term interest bearing trust. Comments and testimony were received regarding financial institutions' practices, including fee structures; information on compliance rates was taken from Form 5500 data, as verified by survey data supplied in the record.[15]

Data analysis indicated that approximately 15,000 (in 1996) to 27,000 (in 2005) contributory pension plans would need to take steps to come into compliance with the new provisions on participant contributions. Of an estimated 239,000[16] pension plans which receive participant contributions, approximately 94[17] percent already deposit participant contributions within 15 business days after the end of the month in which contributions were withheld or paid.

In addition to the annual costs quantified above, other unquantified costs may be recognized by employers, plans and participants. For example, certain employers or plans may be unable to accommodate the changes required by this revised regulation, and consequently may conceivably offer a different type of pension plan, reduce the employer's contribution to the plan, or cease to offer any plan. However, the marginal cost of complying with the final regulation has not been conclusively shown to have a measurable effect on rates at which employers establish or terminate plans.

Benefits

Wages which are withheld for contribution to a plan are regarded by the Department as the property of the participant from the time when they would otherwise be payable to the participant directly. Delays in the transmittal of these funds into a trust result in lost earnings to the participant. PWBA estimates that $82 million will be gained in 1997 by participants and beneficiaries through the increased

[12] For the purposes of this analysis the Department referred to data collected from the Form 5500, the annual return/report filed by pension and welfare benefit plans. In addition, the analysis also makes use of results of surveys on participant contribution plans conducted by William M. Mercer, Incorporated, the Profit Sharing Council of America, and Bankers Trust Company contained in the record.

[13] Costs are estimated based on information submitted to the record both in the form of comment letters and testimony gathered at the public hearing held on February 22 and 23, 1996.

[14] The final rule does not change the requirement of the 1988 regulation that participant contributions become plan assets as of the earliest date that they can reasonably be segregated from the employer's general assets. The economic effects of these provisions were accounted for in the issuance of the 1988 regulation. Nevertheless, in estimating the economic effects of this regulation, the Department has included the costs to plans which should have been in compliance with the regulation as originally stated, as well as with this revised regulation, but are not currently in compliance because their administrators may have misunderstood the requirements of the regulation as published in 1988.

[15] The annual cost estimate is based on commenters' estimates of $6,000–$10,000 per plan per year for those that will establish and maintain a trust for holding participant contributions short term, $4,000–$6,000 per plan that will modify its participant contribution management systems to comply with the revised regulation (a first year only cost), and $600 per plan per year for those that will be required to increase the number of deposits of participant contributions to come into compliance. Some plans that already deposit on a monthly basis will have to accelerate their deposit schedules to comply with the 15 business day rule, but will not have to pay for additional transactions. The sources used were comment letters or testimony from Bankers Trust Company, National Fuel Gas Company, American Society of Pension Actuaries, Profit Sharing Council of America, Louis Kravitz, Berry Petroleum, and Southern Champion Tray Company.

[16] Form 5500 data from 1992 (the most recent year for which complete data is available) establishes that there are approximately 172,000 contributory pension plans subject to this regulation. Data for 1989–1992 and preliminary data for 1993 show an average annual increase of 22,000 in the number of contributory plans; assuming a continuation of this rate of growth yields an estimate of 239,000 contributory plans subject to this regulation in 1995. Linear extrapolation of this rate of growth yields an estimate of 461,000 plans in 2005.

[17] This estimate is based on an analysis of Form 5500 data utilizing 27,654 Form 5500 returns submitted for the 1992 plan year by contributory plans, which showed 5% of large plans out of compliance. Compliance rates of small plans were based on an analysis of the behavior of the smallest Form 5500 filers; it is estimated that 6% of small plans are out of compliance with the revised regulation. This analysis represents the higher end of the range of noncompliance rates based on survey data submitted by commentators, none of which had a sample size of more than 317, indicating a range of 2.5 to 8 percent of respondents are not in compliance with contribution date limits in this regulation.

earnings by having their contributions placed in trust at an accelerated rate.[18] The present value (using a 7 percent real discount rate) of the increased earnings on participant contributions expressed in constant 1995 dollars ranges from $76 million in 1997 to $69 million in 2005 totalling $661 million over the 1996–2005 period, and with a 10-year annuitized value of $94 million.[19] This estimate of these savings to participants, which are a result of earlier segregation, include what is effectively a transfer from employers, some of whom are in full compliance with the 1988 regulation and act properly under their fiduciary responsibilities.

In addition, PWBA believes that the revised regulation will reduce the likelihood that some participant contributions will be lost in bankruptcy proceedings by being placed in trust sooner, which will put these contributions out of reach of the sponsor's creditors,[20] with an estimated annual savings, stated as a 10-year annuitized value, to participants and beneficiaries of $4 million. Plans will receive additional saving to participants through the reduced likelihood of litigation (both from the Department and from private sources) due to the shortened maximum time limit. Many other savings to participants associated with the revised regulation, such as reduced anxiety among participants, improved goodwill of employees toward the plan sponsors, and increased pension savings rates, have not been quantified.

Based on information submitted to the record and the Department's data, the present value (using a 7 percent real discount rate) of the quantified benefits expressed in constant 1995 dollars ranges from $79 million in 1997 to $71 million in 2005, totalling $686 million over the 1996–2005 period, and with a 10-year annuitized value of $98 million. The present value (using a 7 percent real discount rate) of the net savings to participants expressed in constant 1995 dollars ranges from $69 million in 1997 to $62 million in 2005, totalling $579 million over the 1996–2005 period, and with a 10-year annuitized value of $83 million.[21] This projection of the net savings to participants includes what is effectively a transfer from employers some of whom are in full compliance with the 1988 regulation and act properly under their fiduciary responsibilities.

Non-Regulatory Alternatives

The Department examined non-regulatory approaches for promoting the prompt deposit of participant contributions into trust, including (1) increased enforcement efforts by the Department, (2) issuance of non-regulatory guidance, (3) educating participants on their rights, and (4) seeking legislative guaranty of the protection of participant contributions, as is done by the Pension Benefit Guaranty Corporation for defined benefit plan assets. The increased enforcement approach advocated by a number of comments is more fully addressed above in the discussion of such comments.

Using its non-regulatory authority, the Department recently announced a voluntary compliance program (61 FR 9203, March 7, 1996) and a complementary class exemption (61 FR 9199, March 7, 1996) to encourage plan sponsors who are delinquent in submitting participant contributions to make their plans whole. This initiative, known as the Pension Payback Program, is targeted at persons who failed to transfer participant contributions to pension plans within the timeframes mandated by regulation. Those who comply with this program will avoid ERISA civil actions initiated by the Department, the assessment of civil penalties under ERISA section 502(l), and related Federal criminal prosecutions. The Department has received the cooperation of the Department of Justice and the IRS in creating this program.

The Department has undertaken both an enforcement initiative and a pension education campaign. One of the results of these two initiatives was the demonstration of the need for a modified plan asset regulation. An improved plan asset regulation will reduce the significant risk to the pension assets of American workers caused by certain employers' failure to modify their performance of their own accord. While most plan sponsors have used technological improvements to accelerate the date upon which participant contributions are placed in trust, the failure of some plan sponsors to adopt improved industry procedures in the years since the promulgation of the original plan asset regulation has resulted in reduced retirement savings or actual losses for their employees.[22] While some elements of the 401(k) industry voluntarily police employer transmittal of participant contributions[23], this appears to be rare, and thus fails to provide adequate protection for employees' retirement contributions. Therefore, the Department has determined that revision of the 1988 regulation is necessary to provide greater protection against loss of pension income.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires each Federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions; under ERISA, a ''small plan'' is one with less than 100 participants. ERISA section 104(a)(2), 29 U.S.C. 1024 (a)(2).

This notice describes the economic impact that the changes to the existing regulation on participant contributions will have on small entities. A summary of the analysis for this finding follows; these points are explained in greater detail above:

(1) The Department is promulgating this regulation because it believes that modifying the regulatory guidance in this area is necessary to better protect the security of participant contributions to pension benefit plans. Reducing the maximum period during which participant contributions may be treated as other than plan assets is expected to reduce the amount of plan contributions that are at risk because they have not yet been deposited in trust. This regulation preserves the existing rule that

[18] This figure was reached by multiplying the additional number of days funds will be in trust by the portion of the estimated $63.7 billion (in 1997) in annual participant contributions that would be deposited earlier by an annual rate of return. A 2.1 percent annual real rate of return was used for contributions deposited by those large plans which place funds in short-term interest bearing trusts. A 10.1 percent real rate of return was used for contributions deposited by the remainder of the large plans and the small plans, representing an estimate of the rate of return of 401(k) funds held in trust.

[19] Although the Department expects plan sponsors to incur costs in 1996 in anticipation of the final regulation's effective date in 1997, the Department has assumed that no savings to participants will accrue in 1996.

[20] Several commenters recommended that the Bankruptcy Code be amended to exclude participant contributions from the bankrupt employer's estate. Such an amendment would require legislation and is beyond the scope of this regulation.

[21] The costs and savings to participants resulting in the use of the postponement of applicability and extension procedures are not included here. It is expected that the incidence of utilization of these procedures will be so minimal as to have no measurable or material effect on aggregate costs and benefits.

[22] This is demonstrated by the interim results of the enforcement initiative: over $10.01 million has been recovered for contributory pension plans and their participants.

[23] For example, a prominent third party administrator states in its contract that it will notify the Department of Labor's enforcement personnel should participant contributions become overdue.

participant contributions become plan assets as soon as they can reasonably be segregated from the plan sponsor's general assets. Under the 1998 regulation, this maximum period of time is 90 days from the date of withholding from a participant's wages or from the payment of the contribution by the participant to the employer; under the revised regulation, this date is the 15th business day of the month following the month in which the contribution would have been payable to the participant. The revised regulation provides that the maximum time period applicable for pension plans may be extended upon meeting certain conditions specified in the regulation. The rule has not been changed for welfare benefit plans.

(2) The proposed regulation requested comments on the initial regulatory flexibility analysis and from small entities regarding what, if any, special problems they anticipate they may encounter if the proposal were to be adopted, and what changes, if any, could be made to minimize these problems. In excess of half of the comments received were received from small entities, their representatives, or businesses that provide employee benefit services to small employers. Comments received included concern about the increased administrative costs associated with the need for an increased number of transactions, that employers would respond to the increased costs by avoiding establishing or terminating plans, and that costs would be passed on to employees. Commenters also expressed concern that inaccuracies in the reconciliation of accounts could be introduced by the number of transactions and short time provided to contribute in the proposed regulation. Two-thirds of the comments received from small businesses, third party administrators, or their representatives recommended that contributions to pension plans be made by the 15th day of the month following the month of withholding. Some commenters recommended other time periods, such as 30 to 60 days from the day of withholding, or the last day of the month following the month of withholding. It was also suggested that Department pursue a course of increased enforcement rather than alter the regulation. A few commenters suggested that the effective date be delayed, in some instances up to a year. Five commenters suggested that a waiver or exemption procedure be established. Most of the commenters did not distinguish between maximum periods for compliance for large and small entities. Some commenters, particularly service providers to small plans, advocated that the same rule apply to large and small entities. Only three comments recommended that a different period for transmittal be provided for large and small entities. Other comments received requested special consideration for COBRA payments or Simplified Employee Pensions (SEPs) (available only to employers with fewer than 26 employees). A few commenters suggested that a bonding or disclosure option be included as an alternate form of compliance.

The Department believes that most of the comments expressing concern about increased administrative costs were in response to the time frames provided in the NPRM for transmittal of withheld contributions to the plan. Commenters generally indicated that additional time was needed for transactions and reconciliations of accounts. Most small entities found that a fifteen day maximum period for transmittal of contributions would address their concerns. The provisions setting the maximum period at 15 business days address the concerns of those plans that requested additional time for compliance (including SEPs). Based on the comments and testimony received, the Department decided not to determine the maximum period based on the size of the plan (as was proposed), but did change the maximum period based on the type of plan, i.e., the outer limit for welfare benefit plans was not changed. Provisions permitting an extension of time to comply with the regulation were included for entities that would, on occasion, have difficulty meeting the maximum time period of the regulation, and for those entities that would have difficulty revising their benefits systems prior to the effective date of the regulation.

Based on the comments received, including many from small employers and the businesses that provide payroll and plan administration services to them, it was determined that there should be a single outer limit, rather than a tiered regulation providing less rigid alternatives for small plans. However, to the extent that the provisions for extensions of time respond to small plan concerns, those procedures may be considered an alternative form of compliance.

(3) Of the estimated 283,000 pension plans that will receive participant contributions subject to the regulation (in 1997), an estimated 245,800 are small plans (plans with less than 100 participants). Based on Form 5500 filings and comments received on the proposed regulation, only six percent (14,748) will not be in compliance with the revised regulation, and will therefore have to change their practices to comply with the new standard. Testimony and comments also indicate that a high percentage of small plans already act in compliance with the revised standard. No small governmental jurisdictions will be affected.

(4) In response to specific requests from employers, including small employers, the Department is establishing procedures for extension of the maximum time period for transmittal of contributions. The disclosure and bonding provisions in the procedure provide an alternative to plans that find compliance with the maximum period for pension plans to be burdensome. The projected reporting, recordkeeping and other compliance requirements of these procedures are described below. The professional skills necessary for meeting these requirements are those expected to be available to small plans in their ordinary course of business.

(5) To the extent that small plan concerns have not been met by setting the maximum period at 15 business days, several alternatives which could minimize the impact on small entities have been identified, and have been included in this final regulation. These alternatives include a procedure allowing for a postponed application of the new maximum period for pension plans, and a procedure allowing for an occasional longer maximum period for transmittal of contributions, with heightened disclosure and bonding requirements. In order to achieve the Department's policy objectives, these alternative procedures require significant safeguards for the security of participants' contributions. It would be inappropriate to create an alternative with lower compliance criteria, or an exemption under the proposed regulation, for small plans because those are the entities which pose a higher degree of risk of loss due to the delay in depositing participant contributions into trust. The need for improved compliance by small plans is demonstrated by the Department's findings, through its employee contribution investigations, that of closed 401(k) plan cases with monetary recovery, 75% of these cases involved plans with fewer than 100 participants.

It should be noted that the Department's proposed regulation created three tiers of compliance, based on the size of payroll. However, the overwhelming majority of the comments, including those from representatives of small plans,

specifically opposed that approach, asking that a single compliance schedule remain in effect. Moreover, from the comments received, it appears that creating a less stringent outside limit exclusively for small plans might prove more costly because outside service providers would then have to maintain two sets of software and protocols, reducing economies of scale. The additional costs would be passed on to their clients, including small plans.

In addition, many of the reasons set forth in the comments for having alternative forms of compliance are based on the proposed regulation, which had significantly more rigid time frames for compliance. Because the requirements of the final regulation were drafted in response to those comments, it is the Department's belief that most of the concerns of small businesses have been addressed in a manner favorable to them.

This modification of the existing plan asset regulation does not eliminate protections already provided by the rule, but simply reduces the outside limit on the existing rule to enhance compliance in light of improved technology, thereby further improving employee protections.

The Department believes that it has minimized the economic impact of the revised regulation on small entities in accordance with the Regulatory Flexibility Act, while accomplishing the objectives of ERISA.

Paperwork Reduction Act

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the proposed new collection of the Notice of Extension of Time for Compliance with 29 C.F.R. 2510.3–102.

Written comments must be submitted on or before October 7, 1996. The Department of Labor is particularly interested in comments which:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Address comments to Mr. Gerald B. Lindrew, U.S. Department of Labor, PWBA/OPLA, Room N–5647, 200 Constitution Avenue, N.W., Washington, DC 20210, telephone 202–219–4782 (this is not a toll-free number).

I. Background

In response to comments received regarding the revised regulation below, it was deemed appropriate to offer an optional procedure for those plans that would incur difficulty or undue expense in complying with the deadlines of the regulation. This notice-and-bonding procedure serves as an alternate form of compliance while protecting the security of the participant contributions to pension plans and providing the Department with adequate notice of the plans' actions.

II. Current Actions

The collection has two components: the first provides a 90 day extension of time for plans that cannot comply with the revised regulation prior to the effective date of the regulation. This effectively gives those plans 270 days to comply. The second component extends the maximum time period under paragraph (b) by ten business days.

In order to comply with one of these options, notice must be provided to the participants of the plan, a performance bond or irrevocable letter of credit at least equal to the amount of participant contributions at risk must be secured, and the Department must be given a copy of the notice and certification that the notice was sent and the bond was secured.

Based on past experience, the staff believes that none of the materials required to be submitted under the procedure for postponement of application of the maximum period for pension plans will be prepared by the respondents; rather, the respondents are expected to contract with service providers such as attorneys, accountants, and third-party administrators to prepare the materials. Therefore, the Department has inserted one hour as a placeholder for the estimated burden, in light of the current requirements that time spent by service providers not be included in the hourly burden estimate, but rather as a cost. The annual cost of using service providers for this collection of information is estimated to be $249,000 in the first year only. In contrast, because the Department believes that those respondents who seek an extension of the maximum period are likely to seek such extensions more than once and therefore are more likely to use their own personnel, the Department has estimated the burden based wholly on use of in-house personnel.

Type of Review: New.

Agency: U.S. Department of Labor, Pension and Welfare Benefits Administration.

Title: Notice of Extension of Time for Compliance with 29 C.F.R. 2510.3–102.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; Farms.

Burden:

Cite/reference	Total respondents	Frequency	Total responses	Average time per response	Burden
Extension of Effective Date	166	Occasionally	166		1 hour.
Extension of Maximum Time	166	Occasionally	166	6 hours	996 hours.
Totals			332		997

Estimated Total Burden Cost:

Applicability Postponement: $249,000 (first year only).

Extension of Maximum Time: $124,000.

Total: $373,000.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in increased expenditures by State, local or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

Statutory Authority

The final regulation is adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1–87, 52 FR 13139 (Apr. 21, 1987).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

In view of the foregoing, Part 2510 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as set forth below:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority citation for part 2510 continues to read as follows:

Authority: Secs. 3(2), 111(c), 505, Pub. L. 93–406, 88 Stat. 852, 894, (29 U.S.C. 1002(2), 1031, 1135) Secretary of Labor's Order No. 27–74, 1–86, 1–87, and Labor-Management Services Administration Order No. 2–9.

Section 2510.3–101 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332, and sec. 11018(d) of Pub. L. 99–272, 100 Stat. 82.

Section 2510.3–102 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 477133, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332.

2. Section 2510.3–102 is revised to read as follows:

§ 2510.3–102 Definition of ''plan assets''—participant contributions.

(a) *General rule.* For purposes of subtitle A and parts 1 and 4 of subtitle B of title I of ERISA and section 4975 of the Internal Revenue Code only (but without any implication for and may not be relied upon to bar criminal prosecutions under 18 U.S.C. 664), the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets.

(b) *Maximum time period for pension benefit plans.* With respect to an employee pension benefit plan as defined in section 3(2) of ERISA, in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

(c) *Maximum time period for welfare benefit plans.* With respect to an employee welfare benefit plan as defined in section 3(1) of ERISA, in no event shall the date determined pursuant to paragraph (a) of this section occur later than 90 days from the date on which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date on which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

(d) *Extension of maximum time period for pension plans.* (1) With respect to participant contributions received or withheld by the employer in a single month, the maximum time period provided under paragraph (b) of this section shall be extended for an additional 10 business days for an employer who—

(i) Provides a true and accurate written notice, distributed in a manner reasonably designed to reach all the plan participants within 5 business days after the end of such extension period, stating—

(A) That the employer elected to take such extension for that month;

(B) That the affected contributions have been transmitted to the plan; and

(C) With particularity, the reasons why the employer cannot reasonably segregate the participant contributions within the time period described in paragraph (b) of this section;

(ii) Prior to such extension period, obtains a performance bond or irrevocable letter of credit in favor of the plan and in an amount of not less than the total amount of participant contributions received or withheld by the employer in the previous month; and

(iii) Within 5 business days after the end of such extension period, provides a copy of the notice required under paragraph (d)(1)(i) of this section to the Secretary, along with a certification that such notice was provided to the participants and that the bond or letter of credit required under paragraph (d)(1)(ii) of this section was obtained.

(2) The performance bond or irrevocable letter of credit required in paragraph (d)(1)(ii) of this section shall be guaranteed by a bank or similar institution that is supervised by the Federal government or a State government and shall remain in effect for 3 months after the month in which the extension expires.

(3)(i) An employer may not elect an extension under this paragraph (d) more than twice in any plan year unless the employer pays to the plan an amount representing interest on the participant contributions that were subject to all the extensions within such plan year.

(ii) The amount representing interest in paragraph (d)(3)(i) of this section shall be the greater of—

(A) The amount that otherwise would have been earned on the participant contributions from the date on which such contributions were paid to, or withheld by, the employer until such money is transmitted to the plan had such contributions been invested during such period in the investment alternative available under plan which had the highest rate of return; or

(B) Interest at a rate equal to the underpayment rate defined in section 6621(a)(2) of the Internal Revenue Code from the date on which such contributions were paid to, or withheld by, the employer until such money is fully restored to the plan.

(e) *Definition.* For purposes of this section, the term *business day* means any day other than a Saturday, Sunday or any day designated as a holiday by the Federal Government.

(f) *Examples.* The requirements of this section are illustrated by the following examples:

(1) Employer W is a small company with a small number of employees at a single payroll location. W maintains a plan under section 401(k) of the Code in which all of its employees participate. W's practice is to issue a single check to a trust that is maintained under the plan in the amount of the total withheld employee contributions within two business days of the date on which the employees are paid. In view of the relatively small number of employees and the fact that they are paid from a single location, W could reasonably be expected to transmit participant contributions to the trust within two days after the employee's wages are paid. Therefore, the assets of W's 401(k) plan include the participant contributions attributable to such pay periods as of the date two business days from the date the employee's wages are paid.

(2) Employer X is a large national corporation which sponsors a section 401(k) plan. X has several payroll centers and uses an outside payroll processing service to pay employee wages and process deductions. Each payroll center has a different pay period. Each center maintains separate accounts on its books for purposes of accounting for that center's payroll deductions and provides the outside payroll processor the data necessary to prepare employee paychecks and process deductions. The payroll processing service has adopted a procedure under which it issues the employees' paychecks when due and deducts all payroll taxes and elective employee deductions. It deposits withheld income and employment payroll taxes within the time frame specified by 26 CFR 31.6302–1 and forwards a computer data tape representing the total payroll deductions for each employee, for a month's worth of pay periods, to a centralized location in X, within 4 days after the end of the month, where the data tape is checked for accuracy. A single check representing the aggregate participant contributions for the month is then issued to the plan by the employer. X has determined that this procedure, which takes up to 10 business days to complete, permits segregation of participant contributions at the earliest practicable time and avoids mistakes in the allocation of contribution amounts for each participant. Therefore, the assets of X's 401(k) plan would include the participant contributions no later than 10 business days after the end of the month.

(3) Assume the same facts as in paragraph (f)(2) of this section, except that X takes 30 days after receipt of the data tape to issue a check to the plan representing the aggregate participant contributions for the prior month. X believes that this procedure permits segregation of participant contributions at the earliest practicable time and avoids mistakes in the allocation of contribution amounts for each participant. Under paragraphs (a) and (b) of this section, the assets of the plan include the participant contributions as soon as X could reasonably be expected to segregate the contributions from its general assets, but in no event later than the 15th business day of the month following the month that a participant or beneficiary pays to an employer, or has withheld from his wages by an employer, money for contribution to the plan. The participant contributions become plan assets no later than that date.

(4) Employer Y is a medium-sized company which maintains a self-insured contributory group health plan. Several former employees have elected, pursuant to the provisions of ERISA section 602, 29 U.S.C. 1162, to pay Y for continuation of their coverage under the plan. These checks arrive at various times during the month and are deposited in the employer's general account at bank Z. Under paragraphs (a) and (b) of this section, the assets of the plan include the former employees' payments as soon after the checks have cleared the bank as Y could reasonably be expected to segregate the payments from its general assets, but in no event later than the 90 days after a participant or beneficiary, including a former employee, pays to an employer, or has withheld from his wages by an employer, money for contribution to the plan.

(g) *Effective date.* This section is effective February 3, 1997.

(h) *Applicability date for collectively-bargained plans.* (1) Paragraph (b) of this section applies to collectively bargained plans no sooner than the later of—

(i) February 3, 1997; or

(ii) The first day of the plan year that begins after the expiration of the last to expire of any applicable bargaining agreement in effect on August 7, 1996.

(2) Until paragraph (b) of this section applies to a collectively bargained plan, paragraph (c) of this section shall apply to such plan as if such plan were an employee welfare benefit plan.

(i) *Optional postponement of applicability.* (1) The application of paragraph (b) of this section shall be postponed for up to an additional 90 days beyond the effective date described in paragraph (g) of this section for an employer who, prior to February 3, 1997—

(i) Provides a true and accurate written notice, distributed in a manner designed to reach all the plan participants before the end of February 3, 1997, stating—

(A) That the employer elected to postpone such applicability;

(B) The date that the postponement will expire; and

(C) With particularity the reasons why the employer cannot reasonably segregate the participant contributions within the time period described in paragraph (b) of this section, by February 3, 1997;

(ii) Obtains a performance bond or irrevocable letter of credit in favor of the plan and in an amount of not less than the total amount of participant contributions received or withheld by the employer in the previous 3 months;

(iii) Provides a copy of the notice required under paragraph (i)(1)(i) of this section to the Secretary, along with a certification that such notice was provided to the participants and that the bond or letter of credit required under paragraph (i)(1)(ii) of this section was obtained; and

(iv) For each month during which such postponement is in effect, provides a true and accurate written notice to the plan participants indicating the date on which the participant contributions received or withheld by the employer during such month were transmitted to the plan.

(2) The notice required in paragraph (i)(1)(iv) of this section shall be distributed in a manner reasonably designed to reach all the plan participants within 10 days after transmission of the affected participant contributions.

(3) The bond or letter of credit required under paragraph (i)(1)(ii) shall be guaranteed by a bank or similar institution that is supervised by the Federal government or a State government and shall remain in effect for 3 months after the month in which the postponement expires.

(4) During the period of any postponement of applicability with respect to a plan under this paragraph (i), paragraph (c) of this section shall apply to such plan as if such plan were an employee welfare benefit plan.

Signed at Washington, DC, this 30th day of July 1996.

Olena Berg,

Assistant Secretary for Pension and Welfare Benefits, Department of Labor.

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