KRAVITZ
LOUIS KRAVITZ & ASSOCIATES INC

Information Release

March 2004

Department of Labor Requires Plan Auditor to Report Late 401(k) Deposits

Beginning with 2003 plan years, a plan's auditor is required to review deposits of participant 401(k) contributions and to confirm that the employer has deposited the contributions timely. **If contributions were not deposited timely, the auditor may be required to disclose this in the plan's audit report**. This new rule applies to all plans that are required to submit an auditor's report along with their Form 5500—this includes plans with over 100 participants and certain other plans that do not qualify for the small plan exemption.

Late deposits of participant 401(k) deferrals are prohibited transactions, which must be corrected by depositing all of the late contributions and making up "missed" investment earnings. In addition, the company may be required to pay a 15% excise tax on the make-up earnings amount.

Deposit Deadlines

Department of Labor (DOL) regulations require that 401(k) contributions be deposited **"as soon as reasonable"** following the plan sponsor's regular "payday." Unfortunately, the DOL has not defined "**as soon as reasonable**", so there is some uncertainty as to exactly when the deposits must be made. In DOL examples, they suggest making deposits as soon as two days following payday. We know that the DOL is taking a hard look at employers who take more than seven days to deposit 401(k) contributions. Remember, in no event can the deposits be made later than the 15th day of the following month and still be considered timely. This 15 day rule is not a safe harbor.

Because there is no bright line due date, we encourage plan sponsors to develop a process that results in the consistent deposit of 401(k) contributions as soon as possible after each payday. We suggest using wire transfers or other forms of electronic fund transfers to expedite the process.

On Form 5500, a plan sponsor must answer the question "Did the employer fail to transmit to the plan any participant contributions within the time period described in [the regulations]?" If the question is answered "yes", the DOL may send a letter to the plan sponsor informing them of the availability of their Voluntary Fiduciary Correction Program (VFCP). Plan sponsors who do not take advantage of VFCP are required to file a special form with the DOL. Plan sponsors are advised that the late deposits could be the subject of a DOL investigation that could result in excise taxes and civil penalties.

DOL Enforcement

Beginning with the 2003 plan year, the DOL is requiring plan auditors to confirm the accuracy of the employer's response to the Form 5500 question regarding late deposits. If the auditor believes that the employer did not respond properly to the question, he must disclose this in his audit report. (If the auditor disagrees with the way the employer answered the question on Form 5500, the employer must either change the answer or anticipate a DOL investigation.)

In addition, if the auditor finds that contributions were not deposited timely and appropriate correction procedures were not followed, he must list the late contributions as prohibited transaction in his audit report.

Small plans that are exempt from the audit requirement need not be concerned with this new rule. Nevertheless, they must make their 401(k) deposits as soon as possible and answer the Form 5500 question about timely deposits truthfully.

In the past, employers had to report late deposits of employee 401(k) contributions as prohibited transactions on Form 5500. Beginning with the 2003 plan year, this will no longer be required. However, late deposits will still be considered to be prohibited transactions, which could subject the company to an excise tax.

How Kravitz Can Help

You can find out more about the rules on 401(k) deposits at our website, www.lkravitz.com. Click on "Publications", then choose "401(k) Topics." Two documents are available: "401(k) Contribution Deposit Guidelines" and "401(k) Contribution and Loan Payment Deposit Guidelines."

If Kravitz is your 401(k) administrator and you believe your company transmitted its deposits late, contact Kravitz immediately to keep your penalties to a minimum. We will discuss how we can help you keep your plan in compliance with the law. You may be eligible for the Voluntary Fiduciary Correction Program, which would allow you to easily correct the late deposits. You may even qualify for an exemption to the prohibited transaction excise tax.

If you have any questions regarding this, or other retirement plan topics, please do not hesitate to call us.