

December 18, the payment amount would become plan assets as soon as they could reasonably be segregated from the employer's general assets, but no later than the following Friday, December 22.

Because the IRS tax deposit rules are generally applicable to employers, the Department expects that employers who sponsor contributory employee benefit plans are familiar with and have systems in place to comply with the IRS requirements.<sup>8</sup> Thus, the Department believes that applying these same rules in determining when the maximum period beyond which participant contributions must be treated as plan assets should not result in serious inconvenience or expense for such employers. The Department believes that currently available cash management and payroll processing technology allows the segregation of participant contributions within the maximum period proposed in this document. Furthermore, the final regulation published in 1988 requires that participant contributions be treated as plan assets as soon as they can reasonably be segregated from the employer's general assets. As a result, this proposed change will not be material for many employers who have complied with the final regulation published in 1988. The Department recognizes that some employers perceive difficulties in the transfer of participant contributions to the plan that they do not have in the deposit of federal employment taxes. The Department solicits comments as to any specific burdens and associated costs of this kind. The Department also requests comments on the transition period needed for employers and service providers, especially small businesses, to make changes in practices that may be necessary to comply with the proposal if it is adopted.

Although the proposed rule would not change the requirement that participant contributions be treated as plan assets at the earliest date they can reasonably be segregated from the employer's general assets, changing the regulations to provide for an outer limit that conforms to IRS requirements will allow the Department and plan participants to more quickly and easily determine that a violation has occurred. This will assist the Department in its increased monitoring and enforcement in this area, as it reduces the room for argument as to how rapidly participant contributions must be segregated from

the employer's general assets. In addition, changing the ninety-day limit for treating participant contributions as other than "plan assets" reduces the risk of loss that exists when employers improperly hold participant contributions in their general assets for the maximum period rather than segregating them from the employer's general assets at the earliest reasonable date.

The proposed rule does not include an alternative proposal for a maximum period based on a fixed period of days (such as 15 days), but the Department may consider adopting such a rule in place of the rule described above if adopting the IRS tax deposit rules as the maximum period for segregating participant contributions would place an undue burden on plan sponsors. Commenters may wish to address the advantages or disadvantages of using a fixed period of days or some other formulation for a maximum period when they provide comments on the proposed rule.

The Department also welcomes comments on the advisability of other measures that it might consider to address the problem of delays in transmitting participant contributions to plans, such as, for example, requirements for more frequent disclosure to participants of participant contributions and account balances by the plan.

This document also modifies the language in section 2510.3-102 to emphasize that the assets of a plan include participant contributions as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. Although this modification would not change the effect of the existing regulation, the Department expects that the proposed new language will reduce the likelihood that employers will incorrectly believe that the maximum period in the proposed rule is a safe harbor and that they may delay the segregation of participant contributions up to the maximum period.

#### Effective Date of Regulation

Pursuant to the requirements of the Administrative Procedure Act at 5 U.S.C. 553(b), the Department is publishing this notice of proposed rulemaking for notice and comment and will promulgate this rule in final form subsequent to such comment period. The Department expects to issue a final rule 45 days following the close of the comment period. The Department has determined to propose that the final rule will be effective 60 days after its

publication, which the Department believes will allow sufficient time for an appropriate transition to the new maximum periods. The Department solicits comments regarding the appropriate effective date for the final regulation.

#### Regulatory Flexibility Act

The Department has determined that this regulation would not have a significant economic impact on small plans or other small entities. The regulation would describe when contributions made by a participant of a plan subject to ERISA or to the related prohibited transaction excise tax provisions of the Internal Revenue Code must be transmitted to the plan by an employer withholding the contributions. The Department solicits comments on whether the proposal is likely to have a significant economic impact on small entities. The Department also requests comments 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.

#### Executive Order 12866

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. The Department also solicits comments on potential economic effects of this proposed rule in the context of Executive Order 12866, and any evidence with respect to whether or not this proposed rule may be "economically significant".

#### Paperwork Reduction Act

The regulation being issued here is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) because it does not

<sup>8</sup> The Department understands that most employers who sponsor section 401(k) plans are "semi-weekly depositors" under the IRS rules.