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Re: DOL Proposes 7-Day Safe Harbor for Small Employers to Deposit 401(k) Deferrals

Dear Clients and Other Friends:

On February 29, 2008, the Department of Labor proposed regulations that would establish a 7-business day ("7-day") safe harbor for sponsors of 401(k) plans with fewer than 100 participants to deposit 401(k) deferrals and participant loan repayments. (See <http://www.dol.gov/ebsa/regs/fedreg/proposed/02292008.htm>)

This proposed regulation, together with DOL Field Assistance Bulletin 2008-1 discussed later in this letter, highlight the DOL's interest in addressing delinquent contribution problems.

Delinquent contributions to 401(k) plans have been a primary and time-consuming focus of DOL enforcement efforts in recent years. The DOL says a vast majority of applications under its Voluntary Fiduciary Correction Program involve delinquent 401(k) contributions. Also, employers and 401(k) practitioners have asked the DOL to provide a safe harbor for the timing of such contributions so as to avoid difficulties upon DOL examination.

Specifically, the safe harbor will provide that 401(k) participant contributions will be considered to have been deposited with a plan in a timely fashion when such contributions are deposited within 7 business days after the date they are withheld from pay. The DOL believes this new safe harbor will encourage employers to deposit participant contributions within the safe harbor period. By making these contributions within the 7-day deadline, employers can avoid the risk of being second-guessed by DOL later over whether the contributions could have been made sooner.

The 7-day safe harbor is proposed to be added to the DOL's plan asset regulations. The 7-day safe harbor applies to participant loan repayments and after-tax contributions as well as 401(k) deferrals. It also applies to employee welfare plan contributions that are made to a trust. Also, the DOL states that before the effective date of the safe harbor regulation, it will not assert a violation of ERISA relating to the timing of 401(k) deferrals or loan repayments for any small employer that has transferred such contributions to the plan in accordance with the proposed 7-day safe harbor rule. Finally, the DOL asks for comments about whether a safe harbor rule is needed for large employers.

We feel the proposed DOL rule is helpful, and we recommend that our small employer clients implement it immediately.

DOL Field Assistance Bulletin 2008-01
Fiduciary Responsibility for Collection of Delinquent Contributions

Additional DOL guidance about delinquent contributions was issued earlier in February. The DOL is concerned about plan and trust documents that purport to relieve plan trustees of any responsibility to monitor and collect delinquent contributions. In addition, some plan or trust documents are ambiguous as to which plan fiduciary has that responsibility.¹ These concerns led the DOL to issue Field Assistance Bulletin 2008-01, which addresses fiduciary responsibility for collection of delinquent contributions (see <http://www.dol.gov/ebsa/regs/fab2008-1.html>).

FAB 2008-01 addresses questions as to whether plan and trust documents may define the scope of trustee undertakings and exclude responsibilities for monitoring plan contributions and addressing delinquent contributions. In the FAB, the DOL provides an analysis of the legal authorities supporting a trustee's duty to enforce legal claims of a trust. The DOL notes that a claim for delinquent contributions is a legal claim of a plan's trust and, as such, the claim is an asset of the plan – which is generally the purview of a plan's trustee.

DOL Views Expressed in FAB 2008-01:

1. Responsibility for Plan's Legal Claim.

Authority over a plan's legal claim for delinquent contributions, and other plan assets, must be assigned to:

- a. A plan trustee with discretionary authority over the assets;
- b. A directed trustee subject to the proper and lawful directions of a named fiduciary; or
- c. An investment manager.

2. Plan Sponsor Assigns Responsibilities.

A named fiduciary – plan sponsor – that has authority to appoint the plan's trustee(s) must ensure that the obligation to collect contributions is appropriately allocated as a trustee responsibility or delegated to an investment manager, unless the plan sponsor as named fiduciary reserves for itself the duty to direct the trustee with respect to this obligation.

If the plan and trust documents do not allocate the responsibility to address delinquent contributions to any trustee or investment manager, the plan sponsor as named fiduciary may be liable for related plan losses since the named fiduciary failed to allocate this responsibility.

¹ Delinquent 401(k) plan contributions are determined under well-known DOL regulations specifying that participant contributions withheld from wages become plan assets in the hands of the employer on the earliest date that the amount withheld from the participant's pay can reasonably be segregated from the employer's general assets – and this date can be no later than the 15th business day of the month following the month in which participant contribution amounts were withheld from the employee's paychecks (see 29 CFR 2510.3-102).

3. All Trustees are fiduciaries.

If a directed trustee routinely assumes discretionary responsibilities, that trustee cannot seek to limit its liability with respect to the exercise of that discretion on the basis that it is a directed trustee. Similarly, a trustee cannot alter its status as fiduciary through a contractual provision that defines its trustee duties as non-fiduciary in nature.²

4. Trustee Co-Fiduciary Responsibility.

If a trustee is not responsible for monitoring and collecting contributions under the terms of the plan and trust documents, it still would need to take steps to remedy a situation where the trustee knows delinquent contributions are going uncollected. The plan and trust documents cannot serve to absolve a co-fiduciary from co-fiduciary liability for failing to take steps to remedy a known breach. Efforts to remedy such situations must take into account the applicable facts and circumstances and may involve:

- a. Advising the named fiduciary and/or DOL of the breach;
- b. Reporting the breach to other fiduciaries of the plan;
- c. Directly taking actions to enforce the contribution obligation on behalf of the plan;
- d. Seeking an amendment of the relevant plan and trust documents; or
- e. Seeking a court order mandating a proper allocation of fiduciary responsibility over contributions.

Employers that sponsor 401(k) plans are fiduciaries and, as such, are primarily responsible to assure that employee contributions are not delinquent. The DOL has noticed that other plan fiduciaries, and in particular plan trustees, may be abdicating their responsibilities to address delinquent contribution situations. By issuing this FAB and emphasizing trustee responsibilities, the DOL intends trustees as well as other plan fiduciaries to be alert for situations where 401(k) plan³ contributions may be delinquent.

Action Steps:

- Plan sponsors should confirm the plan and trust document requirements for addressing delinquent contributions, including delegated authority among plan fiduciaries. Ambiguous language regarding roles and responsibilities of plan fiduciaries should be clarified.

² See DOL Field Assistance Bulletin 2004-03 addressing the scope of directed trustee fiduciary duties under ERISA (see http://www.dol.gov/ebsa/regs/fab_2004-3.html).

³ For SIMPLE-IRAs, SEPs and most 403(b) plans, the FAB asserts that the plan sponsor is responsible to use reasonable diligence to discover the location of the plan's property, such as delinquent contributions, and to take control of it without unnecessary delay.

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- Discretionary trustees with respect to investments should confirm whether plan and trust documents assign them a discretionary role in addressing delinquent contributions or if the documents clearly assign them a directed trustee role with respect to such matters. Ambiguous language should be clarified.
- Directed trustees with respect to investments should confirm whether plan and trust documents assign them a role in addressing delinquent contributions. Ambiguous language should be clarified.
- Designated Investment Managers should confirm whether plan and trust documents and/or investment management agreements delegate to them any direct role with respect to monitoring and addressing delinquent contributions. Ambiguous language should be clarified.
- All plan fiduciaries should review their procedures and processes to address delinquent contributions in their respective roles as primary fiduciaries responsible to address such matters or as co-fiduciaries.

Please contact us if you have any questions about the DOL's proposed 7-business day safe harbor for small employers to deposit 40(k) deferrals or FAB 2008-01 relating to fiduciary responsibilities with respect to delinquent contributions.

Sincerely,

Theodore K. Rice

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