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TCRS 2008-01: Department Of Labor Proposed Amendment To Plan Asset Regulation

On February 29, 2008, the Department of Labor (DOL) published a proposed amendment to its plan asset regulation section 2510.3-102(f)(3) relating to the definition of “plan assets”. The proposed amendment, if adopted, would establish a safe harbor period of 7 business days during which amounts that a small employer has received from a participant (or beneficiary) or withheld from a participant’s wages for contribution to an employee pension benefit plan would not constitute “plan assets” for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). As proposed, the safe harbor would be available for contributions to employee pension benefit plans and to welfare benefit plans.

BACKGROUND

In 1988, the DOL published a final regulation defining when certain amounts that 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 ERISA. This final regulation included a general rule and an outside limit beyond which a participant contribution becomes plan assets. The general rule provided that a participant contribution becomes plan assets as of the earliest date it can reasonably be segregated from the employer’s general assets. Regardless of what the employer determined to be the “earliest reasonable date”, the contribution had to be remitted to the plan no later than 90 days from the date on which the contribution is received or withheld by the employer.

In 1996, the DOL amended the 1988 final regulation and modified the outside limit from 90 days to the 15th business day of the month following the month in which a contribution is received by the employer or withheld from the participant’s wages. The general rule was not changed by the 1996 amendment.

In the course of the DOL’s recent investigations of 401(k) and other contributory plans, it became clear that many employers and their advisers are still uncertain as to how soon they must forward these contribution amounts in order to meet the general rule. The DOL also indicated that the vast majority (close to 90%) of applications under its Voluntary Fiduciary Correction Program involve delinquent participant contribution violations. As a result of these findings, the DOL believes that it is in the best interest of employers, participants and beneficiaries to amend the current plan asset regulation to provide a higher degree of certainty of compliance with the general rule.

Proposed Safe Harbor Rule

Under the proposed safe harbor, participant or beneficiary contributions to a retirement plan with fewer than 100 participants (determined at the beginning of the plan year) will be treated as timely deposited if made to the plan no later than the 7th business day following the day on which the contribution is received by the employer (in the case of an amount that a participant or beneficiary pays to the employer) or the 7th business day following the day on which such contribution would otherwise have been payable to the participant in cash (in the case of a contribution withheld from the participant’s wages). If the safe harbor is satisfied, contributions are treated as timely deposited even though the contributions could have been segregated from the employer’s general assets sooner. A contribution will be considered deposited into the plan when placed in an account under the plan without regard to whether the contribution has been allocated to the investment funds of such participant.

The DOL indicated that it intends to include a safe harbor for large plans (plans with 100 or more participants) if, as a result of comments received on this proposed safe harbor rule, there is sufficient information and data to evaluate the current practices of these employers and for the DOL to conclude that a safe harbor will be beneficial.

Contributions Impacted By Proposed Safe Harbor Rule

- Participant/beneficiary after-tax contributions
- Participant deferrals
- Loan repayments

Impact On Employers And Participants

- Compliance with the safe harbor rule is not mandatory. This means a small employer may still be in compliance with the deposit requirements if it continues its practice of depositing contributions and loan repayments to the plan later than the 7-business day time limit, as long as it meets the general rule and the 15th day outside limit. It is, therefore, up to such an employer to decide whether the cost of compliance with the safe harbor rule would be sufficient to justify the cost of changing its remittance practices.
- The safe harbor will provide a means for a small employer to assure itself that it is not holding plan assets, without having to determine that a participant/beneficiary contribution was forwarded to the plan at the earliest reasonable date.
- A small employer that currently remits later than the 7-business day time limit may be encouraged to take immediate steps to review its systems and plan remittance procedures and, if necessary, shorten the period within which participant/beneficiary contributions are forwarded to the plan in order to take advantage of the safe harbor.
- Compliance with the safe harbor may reduce disputes over whether or not a small employer is in compliance with the general rule, may allow easier oversight of remittance practices and may also serve to reduce the existing variations in employer remittance periods.
- Plan participants and beneficiaries may derive an additional benefit in the form of increased investment earnings.
- Some small employers who choose to adopt the safe harbor may incur one-time costs to alter their remittance practices to conform to the safe harbor. There may also be ongoing administrative costs resulting from quicker and possibly more frequent remittances. However, the DOL believes that these costs will likely be small and that the benefit derived by employers, participants and beneficiaries alike would justify the costs.

Effective Date Of Safe Harbor Rule

- The DOL contemplates making the safe harbor effective on the date the final regulation is published in the Federal Register. In the meantime, the DOL is inviting comments from the public regarding the effective date of the safe harbor amendment. Those interested in submitting comments may send an e-mail to www.regulations.gov (follow instructions for submission of comments) or e-ORI@dol.gov. Persons interested in submitting comments on paper should send or deliver their comments to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attn: Participant Contribution Regulation Safe Harbor. The DOL prefers comments via e-mail. The deadline for submitting comments is April 29, 2008 to ensure consideration.

The Transamerica Center for Retirement Studies will be following the developments of this regulation very closely. Be sure to visit our website at www.transamericacenter.org for future updates.

This Summary is designed to provide an overview of the Department of Labor's proposed amendment relating to the plan asset regulation and is not intended to be comprehensive. The Transamerica Center for Retirement Studies® ("The Center") is a non-profit corporation and private operating foundation. The Center may be funded by contributions from Transamerica Life Insurance Company and its affiliates or other unaffiliated third-parties. For more information about The Center, please refer to www.transamericacenter.org. The Center and its representatives cannot give ERISA, tax or legal advice. This material is provided for informational purposes only and should not be construed as ERISA, tax or legal advice. Interested parties must consult and rely solely upon their own independent advisors regarding their particular situation and the concepts presented here. Although care has been taken in preparing this material and presenting it accurately, The Center disclaims any express or implied warranty as to the accuracy of any material contained herein and any liability with respect to it.