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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Attention: Participant Contribution Regulation Safe Harbor

Dear Sir or Madam:

This is intended to submit comments regarding the proposed change ("Proposal") to the regulation (29 C.F.R. §2510.3-102) which defines when monies contributed by participants to retirement or welfare plans become "plan assets" for purposes of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). These comments are submitted on behalf of a group of financial services companies commonly known as Fidelity Investments ("Fidelity"). The Fidelity companies provide trustee, custodial, record keeping and other administrative services to thousands of employer-sponsored employee benefit plans covering millions of participants and their beneficiaries.

The Proposal is of particular interest to Fidelity because of the magnitude of its 401(k) and other defined contribution plan recordkeeping client base. We appreciate the Department's desire, as set forth in the Proposal preamble, to address concerns about uncertainties in satisfying and enforcing the current rule. It is our understanding that these concerns have related to the imposition of overly harsh deadlines by some Department field agents.

Although the "safe harbor" in the Proposal would help eliminate compliance uncertainty for some employers, the Proposal preamble describes the proposed seven-day rule in a manner such that it may be viewed as replacing the current outside limit altogether. That would not be helpful for the majority of small plans. The Proposal preamble includes the statement that smaller plan sponsors may need more time to remit participant contributions, which also prompts concern that the seven-day rule may be viewed by the Department's field agents as the "de facto" outside limit for plan sponsors that have more than 100 eligible employees.

General Frequency Framework:

The timing rule in the plan asset regulation was revised in 1996 to provide a shorter outside limit (the 15th business day of the following month) on the general timing rule (as soon as monies "can reasonably be segregated" from the employer's general

assets). The proposal published in the Federal Register on December 20, 1995, would have adopted for Title I purposes the same time frames during which an employer is required to deposit amounts withheld for income and employment taxes. A different modification – the 15-day outside limit - was adopted after the Department's review of extensive comments received on the 1995 proposed revision to the timing rule.

Fidelity submitted detailed comments in response to the 1995 proposal and the undersigned testified on behalf of Fidelity at the public hearing on February 22, 1996. The 1996 submission detailed the elaborate contribution process required for accurate recordkeeping of participant-directed plans, and how critical that accuracy is for plans where assets are valued, investments are made, and participants are given access to account information on a daily basis.

In response to questions posed at the public hearing, we submitted additional comments in a letter dated March 20, 1996 (the "1996 Analysis"). The 1996 Analysis elaborated on three topics: (1) the frequency with which Fidelity clients make contributions to plans recordkept by Fidelity; (2) the increased cost arising from compliance with shortened contribution deadlines, and (3) the additional reconciliation required if contributions were invested in a plan-level account, but not allocated to participant accounts until participant data was available. A copy of the 1996 Analysis is enclosed for convenient reference.

The 1996 Analysis concluded that the majority of plan sponsors remitted money on a monthly cycle. Correspondingly, the preamble to the revised final regulation issued in 1996 included the following:

> The final rule for pension benefit plans accommodates employers who are unable reasonably to segregate participant contributions from their general assets more frequently then 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 cost and burdens for the great majority of employers. In addition, as requested by most commenters, the rule would apply to all such employers, regardless of size, and would simplify the compliance monitoring functions performed by service providers and the Department.

Although the average frequency has decreased over the past decade, we believe that a monthly processing cycle is still the case for a substantial number of plan sponsors. In some cases, this may reflect a monthly payroll for the employer's entire workforce. In other cases, however, even a relatively small employer may have both salaried and hourly employees or pay different groups of employees on different cycles. In addition, in the

case of plan sponsors that do remit monies on a more frequent basis, there is still the question of how soon remittance must follow a given payroll cycle.

Much of the revenue earned by Fidelity from its 401(k) business is based on assets under management. Thus, it is in the firm's financial interest to bring monies under plan management as soon as possible. However, the extensive work required both by plan sponsors and by plan service providers to handle the contribution of participant contributions (and loan repayments) on a monthly basis is greatly magnified by greater frequency. We think that these compliance concerns far outweigh the financial interest.

Remittance of Participant Contributions Before Reconciliation:

The Proposal preamble states that participant contributions are considered deposited when placed in a plan account, "without regard to whether the contributed amounts have been allocated to specific participants or investments of such participants." This statement addresses only part of the challenge in a 401(k) or other contributory defined contribution plan. Many of the comments submitted to the Department in 1996 discussed the problems inherent in a rule that only focuses in isolation on the segregation of assets by the employer.

The 1996 Analysis detailed the numerous steps that Fidelity undertakes to check participant level information for accuracy and consistency before accepting funds that will be allocated based on that information. If contributions are accepted before participant information has been received and checked, Fidelity would have no alternative but to place the money in a plan-level interest-bearing account until participant records were reconciled. Only after reconciliation of participant contributions could the initial amount of the contribution be allocated to participant accounts and investments purchased. Allocation of the interest would, however, require separate processing and reconciliation steps. The steps required multiply if there is more than one contribution per month. The net result would be to double the number of allocation cycles needed for a given month.

In addition, the Proposal preamble states that the Department has assumed an average annual return of 8.3 percent, which is an estimate of the long-term rate of return on defined contribution plan assets (footnote 13). We agree that long-term growth is the goal of defined contribution plans, but the use of such an earnings assumption for the short period during which funds may be held on an unallocated seems misplaced. Such monies would generally be invested in short-term or money market funds, currently producing a much lower rate of earnings.

Cost Estimates:

The 1996 Analysis did provide estimates of (1) the increased cost to plans of remitting contributions on a more frequent basis for the mid-to-large plan market, and (2) the additional cost to client plans if 401(k) service providers were compelled to accept money in advance of participant records. We are still evaluating the feasibility of performing an updated estimate of these costs. In addition, it should be noted that the 1996 figures only focus on annual processing costs and did not take into account the additional cost of systems development or administration of the interest spreads or the additional costs to the employer.

We think that it is also extremely important to emphasize that the 1996 Analysis did not capture the cost of reprocessing accounts and correcting errors occurring due to the large volume of manual calculations. The steps required under the Internal Revenue Code and Title I of ERISA to correct the improper allocation of contributions under a defined contribution plan are time-consuming and expensive for both the plan sponsor and for the service provider.

General Recommendations:

We respectfully ask the Department to confirm the "safe harbor" nature of the Proposal. That is, the proposed safe harbor may do more harm than good if plan sponsors would face an additional burden in demonstrating that they need more than seven business days in order to complete their contribution process in an orderly fashion. It would be helpful, for example, to confirm that the 15-business-day deadline is still the outside limit for the remittance of contributions and loan repayments. In addition, we recommend that Example 3 in the plan asset regulation be retained in its current form.

We also note that the Proposal preamble describes the analysis undertaken by the Department to determine the appropriate time frame for the remittance of participant contributions. There is the implication that the completion of the remittance process in a given period on one occasion by a plan sponsor may be used as the measure for all other payroll periods. We ask the Department to confirm that the proper analysis is specific to the payroll period in question. The completion of one cycle in a given time frame should not be presented as the mandatory deadline going forward.

Finally, in consideration of the impact that a safe harbor will undoubtedly have on Department enforcement efforts, we strongly recommend that the Department lengthen the safe harbor to 10 business days in order to allow plan sponsors to use a bi-monthly contribution cycle. This would still emphasize the short-term nature of the contribution

cycle in comparison to the long-term nature of retirement plan savings. We view the Proposal preamble statement that a 10-business-day safe harbor would be consistently reasonable for 81 percent of plans as a good measure of how best to spare the Department and plan sponsors from committing too much resource for too little gain.

Effective Date:

The Proposal would make the revisions effective immediately upon publication of the revised final regulation in the Federal Register. The Proposal also states that plan sponsors may rely on the safe harbor pending the issuance of the revisions to the regulation in final form.

The immediate effective date appears to be based on the assumption that plan sponsors and vendors would only benefit from the certainty of the new "safe harbor". Yet the Proposal preamble acknowledges the analysis that some plan sponsors will need to complete in order to determine whether the cost of compliance with the safe harbor is worthwhile. We urge the Department to provide some lead time for the final rule so that plan sponsors can properly evaluate the benefits of changing their payroll and plan contribution patterns to fit within the safe harbor time frame.

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We would be pleased to respond to any comments or request for additional information from the Department regarding the Proposal.

Sincerely yours,

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March 20, 1996

AIRBORNE EXPRESS

Pension and Welfare Benefits Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Attention: Proposed Participant Contribution Regulation

Dear Sir or Madam:

This is intended to supplement testimony submitted on behalf of Fidelity Investments at a public hearing on February 22, 1996, regarding the proposed change ("Proposal") to the regulation (29 C.F.R. §2530.3-102) which defines when monies contributed by participants to retirement or welfare plans become "plan assets" for purposes of Title I of ERISA. Written comments had also been submitted on February 2, 1996.

As mentioned in the earlier submissions, the Proposal is of particular interest to Fidelity Institutional Retirement Services Company ("FIRSCO") because of the magnitude of its 401(k) plan recordkeeping client base. We opposed the drastically shortened deadlines set out in the Proposal because those time frames would not accommodate the thorough reconciliation of contribution data at a participant level that a daily automated recordkeeping system requires. The submissions detailed the elaborate contribution process required for accurate recordkeeping of participant-directed plans, and how critical that accuracy is for plans where assets are valued, investments are made, and participants are given access to account information on a daily basis. Finally, we recommended that the maximum deadline for retirement plans be shortened to the last day of the month following the month in which the relevant payroll period falls.

At the hearing, the Department of Labor panel asked Fidelity for additional information on three topics: 1) clarification of the exact nature of the additional reconciliation required if contributions were invested in a plan-level account, but not allocated to participant accounts until participant data was available; 2) information about the frequency with which FIRSCO clients make contributions to plans recordkept by FIRSCO; and 3) the increased cost arising from compliance with the Proposal's shortened deadlines. This submission responds to those requests.

Frequency of Contributions.

FIRSCO calculated frequency of contributions to plans in each of its two major market segments, the smaller plan segment and the mid-to-large plan segment. A majority (57 percent) of the plan sponsors remit monies on a monthly basis. Employers sponsoring larger plans are more likely to remit monies on a more frequent basis. For example, 37 percent of our larger plan sponsors remit monies on a semi-monthly basis compared with 22 percent of the smaller plan sponsors. Only a small number (11 percent) remit monies four (4) times each month. Of course, updates do not necessarily occur at exactly spaced intervals. For example, four updates a month can be the result of a plan that has weekly contributions, or a plan that has two contribution cycles, one of which is biweekly and one of which is semi-monthly.

Cost to Increase Numbers of Contributions Per Month.

In order to calculate the increased cost to a plan of remitting contributions on a more frequent basis, FIRSCO used activity-based cost data derived from operations for its mid-to-large plan market. On average, those plans operate with two contribution updates per month. Assuming, conservatively, that the Proposal would require doubling the contribution frequency (from two updates per month to four updates per month), the additional yearly cost to Fidelity to process contributions for plans in that market would be $3.2 million. The burden of the increase would fall disproportionately on the smaller end of this market, where the cost of contributions per month would increase by 185%. This figure represents only the increase in the annual cost to Fidelity of processing, and does not take into account the costs of systems enhancements necessary to support more frequent contributions, or the potentially significant costs that employers would incur in providing participant contribution information to FIRSCO on a more frequent basis.

Additional Steps Required If Funds Received Before
Reconciliation of Participant Level Data.

FIRSCO's prior submission detailed the numerous steps that FIRSCO undertakes to check participant level information for accuracy and consistency before accepting funds that will be allocated based on that information. If contributions are accepted before participant information has been received and checked, Fidelity would have no alternative but to place the money in a plan-level interest-bearing account until participant records were reconciled. Only

after reconciliation of participant contributions could the initial amount of the contribution be allocated to participant accounts and investments purchased. Allocation of the interest would, however, require separate processing and reconciliation steps. The steps required multiply if there is more than one contribution per month. The following examples illustrate the "interest spread" process.

Example 1--Interest spread with one contribution per month. Assume that a plan sponsor were able to satisfy the deadlines in the Proposal with one contribution per month, but that the contribution was made on the 25th day of the month, and that participant records were not received and reconciled for one week, i.e., the 2nd of the following month. Using the January and February contribution cycle as illustration, the plan sponsor would wire the contribution amount on January 25 without supporting data, and Fidelity would invest the money in a short-term investment, such as a money market fund, selected by the plan sponsor. A money market account accrues interest daily, but interest is only posted on the final day of the month. Interest accrued during January would be posted on January 31. After the extensive contribution reconciliation process described in Fidelity's prior submission, the base amount of the participant contribution (without interest) would be allocated to participants and invested in the options selected by participants after reconciliation on February 2. FIRSCO would be required to manually calculate and post interest accrual on the January contribution through February 2nd, and would perform an interest spread of the sum of January interest and February interest on February 3rd. That amount would be spread across all participant investment options in proportion to participant mix elections, and invested as soon as the interest spread calculation was complete. The interest spreading transaction would need to be verified before allocation to participant accounts and the resulting purchase of investments, to insure that the manual calculations were correct and that the amounts at a participant level totaled the plan level interest. Because there is no interest spread functionality in the current recordkeeping system, both the calculation of partial month interest, and the calculations of interest owed to each participant would require manual calculation, with the attendant enhanced risk of error.

Example 2--Interest spread with two contributions per month. Assume that a plan sponsor were required to make two contributions per month in order to satisfy the Proposal, one on the 25th of the month and one on the 29th of the month. Using the January/February contribution time frame again, the plan sponsor would wire contribution no. 1 on January 25 without supporting participant data, and Fidelity would invest that contribution in a plan-level money market account. On January 29, contribution no. 2 would be received and invested in the money market account. As discussed above, interest would post on the balance in the money market account (contribution no. 1 and no. 2) on January 31st. After receipt and reconciliation of participant contribution data, FIRSCO would on February 2 update participant records for the amount of contribution no. 1, and would transfer that money from the plan-level

money market account to participant-directed choices. Two manual calculations of interest would be required for contribution no. 1. First, FIRSCO would have to manually calculate the amount of the interest posted January 31 that was attributable to contribution no. 1. Second, using a mil rate for February, FIRSCO would have to calculate and post interest through February 2 attributable to contribution no. 1. The total of those calculations would be spread manually to participants in proportion to the amount of contribution no. 1 each received, and would be invested in accordance with current mix elections on February 3rd. On February 5th, having received and reconciled participant level data for contribution no. 2, FIRSCO would transfer contribution no. 2 from the money market to participant-directed investments. Then FIRSCO would have to add the balance of interest earned in the plan-level account for January, calculate and post the interest earned through February 5 on contribution no. 2, and would have to manually spread the total January and February interest for contribution no. 2 across participant mixes on February 6th. A separate reconciliation of interest actually earned on the plan-level account to the various contributions would have to be performed at the time of each interest spread.

As these examples illustrate, the process of performing an interest spread for one contribution per month is quite difficult. The burden of performing interest spreads increases exponentially with additional contributions, as the number of manual intra-month interest calculations within one account increases. One FIRSCO client has already determined that, in order to adhere to the deadlines in the Proposal, it would be required to remit contribution money twelve times per month. The additional cost and burden of receiving twelve unreconciled contributions per month, and performing twelve separate interest spread transactions would be substantial.

Cost of Interest Spread Transactions.

FIRSCO studied the additional cost to its client plans if the Department were to require 401(k) service providers to accept money in advance of participant records. The increased costs would lie primarily in the additional interest spread transactions described above. Interest spread costs are determined based upon the number of different sub-accounts in any one participant's individual account that require updating. Each employee contribution money type (e.g., pre-tax deferrals, after-tax contributions) invested in a different investment vehicle constitutes a sub-account that requires updating in an interest spread transaction. Assuming, conservatively, that the Proposal would require weekly contributions, and that on average only two sub-accounts would need updating, the cost of the interest spreads to FIRSCO plans would be $3.4 million annually. Once again, this figure does not take into account the administration of the interest spreads, systems development, or the cost of reprocessing accounts and correcting errors occurring due to the large volume of manual calculations.

Transition Rule.

In closing, we want to repeat a request made at the hearing that if the Department makes any substantial change to the current timing rules, plan sponsors (and service vendors) should be allowed a year to prepare for the new rules. Systems changes and the commitment of additional human resources take time even without the need to accommodate other priority needs.

If you have any additional questions, we would welcome the opportunity to discuss these matters at your convenience.

Sincerely yours,

Douglas O. Kant

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DOK:lb
cc: Margaret Raymond, Assistant Vice President
Wayne Isaacs, Senior Legal Counsel