U.S. Chamber of Commerce

April 29, 2008

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

Re: Participant Contribution Safe Harbor

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments from the Employee Benefits Security Administration ("EBSA") on the proposed participant contribution safe harbor for small plans. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

As the proposed regulation acknowledges, there has been a significant amount of uncertainty surrounding the plan asset rule for participant contributions. This rule must balance the interest of participants in having their contributions invested as soon as possible with the ability of plan sponsors to segregate the contributions from their general assets. Technological advances in payroll and banking systems have made it possible to segregate and allocate funds more quickly than before. At the same time, however, there remains a large variation between plan sponsors in their ability to segregate and allocate funds. We appreciate the introduction of the safe harbor as a means to provide certainty in this area. We believe that our recommendations below will further this goal and present a balance between the needs of both participants and plan sponsors.

The Safe Harbor Period Should be Extended to 10 Days. While we appreciate the implementation of a safe harbor to create certainty, we are concerned that the safe harbor will eventually become the expected practice. It is reasonable to expect that the focus of investigations will shift to whether contributions were forwarded within seven days, rather than attempt to determine when assets were reasonably segregated. Moreover, the safe harbor could become a litmus test for legal claims. Because of these concerns, we recommend implementing a 10-day safe harbor.

In the preamble to the proposed regulation, the Department states that it considered three different time periods, including a 10-day time period. Using data gathered from enforcement efforts, the DOL states that a 10-day period would capture the current practices of 81% of all single-employer plans.[1] However, the 7-day period would capture the current practices of only 61% of such plans. Nonetheless, the Department decided to use a shorter period to avoid "net investment losses for participants if employers were to delay remittances to the full extent permitted under the safe harbor."[2] We do not believe that this concern over the extension of the remittance time should outweigh the effort to provide certainty. Moreover, the financial impact of giving employers a few more days is de minimus. For example, if a plan earns 10% per annum, each day contributions are delayed costs the plan 1/365th x 10% of the late contribution. A three-day delay in transferring a participant's $100 contribution would result in a loss of less than 10 cents of interest. The point of providing certainty should be to create a reasonable time period in which most plans are capable of fulfilling their obligations.

The Final Regulation Should Include a Clear Example of Contributions Made Outside of the Safe Harbor. As mentioned above, there is concern that the safe harbor will become accepted practice and overtake the general rule. Even with improved technology and systems, there will remain circumstances of unavoidable delay – for example, payroll/HR system conversions or service provider conversions. A service provider conversion is usually accompanied by a blackout period that would almost certainly go beyond a 10-day time period. Thus, an example indicating that the employer has the ability to provide documentation to substantiate circumstances that require a deposit beyond the safe harbor period would be beneficial.

The Final Rule Should Include an Exception for De Minimis Errors. Almost every employer occasionally unintentionally and accidentally makes contributions too late. If such mistakes are timely corrected with interest, they are not prohibited transactions under ERISA because fiduciaries do not cause or permit them to happen. The DOL should "decriminalize" such minor, innocent, and corrected mistakes. For example, if an employer contributes 95% or more of contributions/repayments on a timely basis for a plan year, all late contributions should be deemed timely if (a) they were not intentionally made late, (b) the employer had reasonable procedures designed to insure timely transfers, (c) the contributions were contributed within the time prescribed by the plan

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[1] It is not clear whether this information applies to all single-employer defined contribution plans or just small plans. If the information applies to all plans, then it is even more important that the safe harbor period be expanded as the number of current small plans that would fall under the safe harbor would presumably be even smaller.

[2] 73 Fed. Reg. 11,077 (February 29, 2008).

asset rule after the plan administrator first learned they had not been timely contributed, and (d) the employer pays interest on the late contributions equal to at least its cost of funds rate.

In addition, we believe employers should be permitted to pre-fund contributions. As written, the safe harbor (and the general rule) would be not be satisfied if an employer makes its contributions to the plan in advance of withholding them, because those rules require that contribution be made within x days *after* the amount is withheld from pay. As a result, an employer that wants to avoid the occasional mistake by making an advance deposit of enough funds to cover any accidental under-contribution does not have the right to do so. Thus, we recommend allowing an employer to make contributions in advance of withholding or, in the alternative, to use amounts in the plan's forfeiture fund to fund contributions if the plan so provides.

Clarification on the Application of the Rule to Contributory Welfare Plans is Needed. Pursuant to a non-enforcement policy issued in 1992 (Technical Release No. 92-01), contributory welfare plans do not need to satisfy ERISA's trust and reporting/disclosure requirements, pending further consideration by the Department. The non-enforcement policy remains in place, as the Department has never formally articulated an exemption from ERISA trust requirement for contributory health plans. Nonetheless, both the preamble and the proposed rule state that the safe harbor is intended to apply to contributory welfare plans even though in a footnote, the DOL explains that since "most of these plans are not affected by the regulation, because they are not required to comply with ERISA's trust requirement," they need not be a part of the cost/benefit analysis.[3] Thus, the extent of the application of the proposed safe harbor to contributory welfare plans is unclear and further clarification is needed.

The DOL Should Request that the Internal Revenue Service Issue Corresponding Guidance. We have learned that when the Internal Revenue Service ("IRS") audits small plans, it often does not follow the DOL guidelines. Rather, the IRS applies an arbitrary 5-day deposit standard and occasionally finds violations to exist even though participant contributions have been deposited well within the DOL deadline. Therefore, it seems that the IRS is a applying a 5-day rule as the "as soon as administratively possible" standard and is not flexible on applying the DOL's "but no later than" clause. Consequently, we ask the DOL to request the IRS to issue a FAB (or other appropriate field communication) which states that the application of this new safe-harbor and other changes, e.g., the de minimis rule, is to be used as the IRS audit standard.

The Safe Harbor Should be Extended to Large Plans. We believe that the extension of the safe harbor to large plans would provide welcome certainty for those fiduciaries. We recommend that a 10-day safe harbor be applied as we have similarly requested for small plans. If, however, the safe harbor is not extended to large plans, then, at the least,

[3] 73 Fed. Reg. 11075, fn 6.

the de minimis violation exception and other plan asset regulation improvements should be extended to them.

Thank you for your consideration of these comments. We look forward to continued discussions with you on these very important issues.

Sincerely,

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