

March 2008

Department of Labor (“DOL”) Issues Guidance Concerning Fiduciary Responsibility for Collection of Delinquent Contributions

A common provision in a trust agreement under a tax-qualified plan is a provision relieving the plan trustee from any responsibility to monitor and collect delinquent contributions. In Field Assistance Bulletin 2008-1, the DOL reviewed the issue of whether and, if so, to what extent, trust agreements and other instruments may define the scope of trustee undertakings and exclude responsibility for monitoring the plan’s receipt of contributions.

The DOL noted that the duty to enforce valid claims held by a trust is a trustee responsibility under common law. For a ERISA fiduciary, the steps necessary to discharge a duty to collect contributions will depend upon the facts of each case, including the value of the assets involved, the likelihood of a successful recovery, the expenses expected to be incurred, and the solvency of the employer.

According to the DOL, authority over a plan’s assets, including a plan’s legal claim for delinquent contributions, must be assigned to:

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

The DOL stated that a named fiduciary who has the authority to appoint a plan’s trustee must ensure that the obligation to collect contributions is appropriately assigned to a trustee or investment manager. Therefore, while it is permissible under ERISA for a fiduciary to enter into a trust agreement under which a particular trustee is not responsible for monitoring and collecting contributions, if no trustee or investment manager has been assigned the responsibility, the fiduciary with the authority to hire the trustee may be liable for any plan losses due to a failure to collect contributions because the named fiduciary failed to specifically allocate this responsibility.

If you would like to discuss what types of remedial actions may be available to minimize the exposure of the plan’s named fiduciary, please contact the undersigned.

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