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Department of Labor ("DOL") Provides Guidance With Respect to ERISA's Fidelity Bonding Requirements

ERISA Section 412 generally requires that every fiduciary of an employee benefit plan and every person who "handles funds or other property" of such a plan must be bonded. ERISA's bonding requirements are intended to protect employee benefit plans from the risk of loss due to fraud or dishonesty. Any such person, referred to under ERISA as a "plan official," must be bonded for at least 10% of the amount of funds that he or she handles, subject to minimum requirements of $1,000 per plan with respect to each such plan official, and a maximum amount per plan official per plan generally of $500,000, but effective for plan years beginning on or after January 1, 2007, the maximum required amount is $1,000,000 for plan officials of plans that hold employer securities.

In Field Assistance Bulletin ("FAB") 2008-04, the DOL provided guidance with respect to ERISA's fidelity bonding requirement. Among the issues addressed by the FAB:

- the difference between an ERISA fidelity bond, which is limited to protecting plans against loss due to fraud or dishonesty and the broader fiduciary liability insurance policy;
- which service providers and fiduciaries must be bonded, and the various parties who may be responsible for ensuring that all plan officials are properly bonded;
- if a service provider is required to be bonded, either the plan or the service provider may purchase the bond;
- confirmation that plan assets can be used to acquire bonds;
- when a plan is treated as unfunded and is therefore exempt from ERISA's bonding requirements;
- what constitutes "funds or other property" of an employee benefit plan;
- what it means to "handle" funds or other property, and a discussion of when plan committee members may be regarded as "handling" plan funds or other property;
- the amount of the fidelity bond, and a clarification that whether a bond should be obtained in excess of the statutory maximum is determined under ERISA's prudence rules;

- clarification that while a bond can insure more than one plan, a claim by one plan cannot reduce the amount of coverage available to other plans insured on the loss;
- flexibility in satisfying the ERISA bonding requirement, including individual, name schedule, position schedule and blanket bonds;
- use of multiple bonding companies for the same service provider or the same plan;
- permissibility of omnibus clauses and designation of plan as a named insured;
- impermissibility of a deductible under the plan, or an exclusion from coverage where the employer or plan sponsor "knew or should have known" that theft was likely; and
- the one-year discovery period.

In our experience, the bonding requirement under ERISA Section 412 is not well understood by clients and FAB 2008-04 provides a very useful standard by which existing ERISA bonds can be measured. If we can provide you with any assistance in such regard, please do not hesitate to contact us.

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