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Trustees' Duty to Monitor and Collect Delinquent Contributions

The Department of Labor ("DOL") has been increasing its activity in establishing and enforcing a trustee's duty to monitor and collect delinquent contributions. Plan documents have historically provided that a trustee does not have this responsibility. In FAB 2008-01, the DOL emphasized that the "duty to enforce valid claims held by a trust has long been considered a trustee responsibility under common law." In several recent DOL investigations, the DOL has required plan sponsors to amend their trust language if the language absolved the trustee of responsibility to collect contributions and did not delegate the responsibility to another person. Thus, the plan document should be amended, and it is important that trustees understand what this duty entails. This communication will provide an overview of the fiduciary responsibility for the collection of delinquent plan contributions and discuss when this responsibility applies to trustees and how trustees can meet their obligations.

What is the duty to collect contributions?

When a contribution is delinquent, the DOL takes the position that the claim against the employer for that contribution, rather than the late contribution itself, becomes an asset of the plan. According to the DOL:

- **Employer contributions** are considered delinquent when they are due under the plan, but have not been timely transmitted to the trust.
- **Employee contributions** (*i.e.* amounts withheld from employees' wages and loan repayments) are considered delinquent if they remain in the employer's hands for longer than it reasonably takes to segregate the contributions from the employer's assets.

In the DOL's view, segregation should generally take no longer than two to three business days, starting from the date the amount payable would otherwise be available to the participant (generally the pay period). However, a safe harbor exists for small plans (fewer than 100 participants– measured at the beginning of the plan year), that gives employers up to seven business days to segregate the funds before the contribution will considered delinquent.

When the employee contributions are for non-W2 individuals (sole proprietors, partners, and members of LLCs), the DOL allows for a reasonable period of time to complete the necessary accounting to determine the earned income of such individuals, and has indicated that the individual's elected deferral amounts (elected prior to the close of the tax year) become plan assets at the earliest date that they would have otherwise been distributed to the non-W2 individual. After this date, the contribution amount will be considered delinquent if it remains in the employer's hands for longer than it reasonably takes to segregate it.

The DOL warns that if the plan is not making "systematic, reasonable, and diligent efforts" to collect delinquent employer contributions, or the failure to collect delinquent contributions is the result of an arrangement or understanding (express or implied) between the plan and a delinquent employer, such failure to collect delinquent contributions may be a prohibited transaction.

What steps should trustees take?

In light of the DOL's guidance, the plan document should specify that a trustee is responsible for the collection of contributions. Further, the responsible trustee(s) should:

- Regularly monitor contributions to determine if contributions are timely or delinquent;
- Notify the employer, in writing, of its duty to timely deposit contributions;
- Notify the employer of the trustee's responsibility to take further action if the employer fails to timely deposit contributions to the trust;
- Explain to the employer that a failure to timely deposit contributions may be a prohibited transaction; and
- Inform the employer that any failure must be corrected, and of further action to be taken if failures are not correct (may include notifying a responsible fiduciary and/or the DOL).

When considering the most appropriate actions to take, trustees should consider the value of the plan asset involved, the likelihood of a successful recovery, and the expenses expected to be incurred. Litigation is one approach, but it can be expensive. An alternative is to notify the DOL if the employer fails to timely deposit contributions.

Background and Exceptions to Trustees' Duty to Collect Delinquent Contributions

The trustee's fiduciary duty to collect delinquent contributions under ERISA arises out of Sections 403, 404, and 410. Under Section 403, trustees have exclusive authority and discretion to manage and control assets of the plan. As a result of this control, a trustee will always be a "fiduciary" under ERISA. This is significant because Section 410 of ERISA states that any provision that relieves a fiduciary of its responsibility is void as against public policy.

Trustees are relieved of exclusive authority only if one of the two exceptions is met: (1) the plan expressly provides that the trustee is subject to a named fiduciary who is not a trustee (*i.e.,* the trustee is a "directed trustee" with limited responsibilities); or (2) the authority over plan assets is delegated to an investment manager. Even when a trustee has limited duties or the duty to collect is allocated to another trustee or investment manager, all trustees remain co-fiduciaries and have a non-dischargeable duty to carry out their trustee responsibilities prudently and in the sole interest of the plan's participants and beneficiaries as required by Section 404 of ERISA.

To Whom Does This Duty Apply?

The statutory framework of ERISA creates a hierarchy of fiduciary responsibility to collect delinquent contributions, with the named or appointed trustee being first responsible for collection. A trustee will only be relieved of this duty if the named fiduciary (generally the employer) allocates the duty to either a "directed trustee," "special trustee," or an investment manager. Generally, a directed trustee, such as a bank or trust company, will not accept the duty to collect responsibility. Practically, the employer should appoint an individual as trustee, or select a "special trustee" for purposes of this duty. In addition, if a plan has two or more trustees, the duty may be allocated to a single trustee. These requirements essentially create three potential scenarios for trustees: (1) plan documents with no allocation; (2) plan documents where the allocation is ambiguous; or (3) plan documents where the allocation is clearly expressed.

Plan Documents with no Allocation. When a plan document is silent on the allocation of the duty to collect delinquent contributions, the DOL takes the position that it should be interpreted to allocate the responsibility in accordance with the statutory scheme rather than relieve all trustees and investment managers of this duty. When plan or trust documents include language waiving a trustee's obligation to monitor and collect contributions, the provision will be void as against public policy as required by Section 410 of ERISA, unless one of the above-exceptions has been met. This Section provides that if a fiduciary writes words in an instrument exonerating itself of fiduciary responsibility, the words, even if agreed upon, are generally without effect. Because trustees are a fiduciary and the collection of delinquent contributions is a fiduciary duty of trustees unless allocated to a directed trustee or investment manager by the named fiduciary, any language purporting to waive this obligation without otherwise assigning it, will be void.

A Massachusetts District Court recently affirmed the DOL's position on this issue. In *Solis v. Public Benefit Services*, the DOL brought an action against the master sponsor of a plan alleging that a provision in the plan expressly relieving the trustee from its obligation to collect employer contributions was void against public policy. The plan and trust documents did not authorize the Trustee as a "directed trustee" and also did not authorize a named fiduciary to delegate the duty to collect to a directed trustee or investment manager. Consistent with the DOL's guidance, the court held that the Trustee had a fiduciary duty to collect contributions and the provision waiving such duty was void as against public policy. The court emphasized that Section 403 imposes not only a right, but also a duty, on trustees to monitor and collect employer contributions to ERISA funds.

Plan Documents where Allocation is Ambiguous. When a named fiduciary allocates collection responsibilities to a directed trustee or investment manager, but the allocation in the plan documents is ambiguous, the DOL takes the position that the documents should be evaluated on the basis of all the facts and circumstances and in light of the statutory scheme, rather than in a manner that relieves all of the trustees and investment managers from responsibility. This ultimately means that trustees seeking to limit their liability through a directed trustee arrangement may still be at risk for liability if there are any ambiguities in the allocation of this duty.

Plan Documents that Clearly Express Allocation. In theory, a plan document that clearly allocates collection responsibilities should not create additional liability issues. However, it is important to note that under ERISA, actions speak louder than words, meaning that reliance on plan, trust, and other governing documents to define the responsibilities of plan fiduciaries may not be completely determinative if the provisions in the documents are inconsistent with the actions of the parties. For example, if a nominally directed trustee routinely assumes discretionary responsibilities, the trustee cannot seek to limit its liability with respect to exercise of that discretion on the basis that it is a directed trustee. In addition, even when a trustee is not responsible for collecting delinquent contributions, it will still have certain related co-fiduciary duties (discussed in more detail below) to remedy any breaches of which it is aware.

Who is liable for losses when delinquent contributions are not collected?

The liability for losses resulting from the failure to perform the duty to collect depends on how the duty has been allocated. When the duty to collect has not been allocated to anybody, the DOL asserts that the named or functional fiduciaries with the authority to appoint the plan's trustee(s) may face liability for losses because the fiduciary failed to specifically allocate this responsibility. In *Solis v. Public Benefit Systems* (discussed above), however, the court declined to extend this duty to a functional fiduciary based on appointment and renewal powers, stating that the court was "not persuaded that the power to remove the trustee is sufficiently tied to a decision regarding trustee responsibility such that [the plan sponsor] was acting as a fiduciary" when it designed the plan.

If the plan assets are held by two or more trustees, they will be jointly and severally liable for the management and control of the plan, including collections, unless the trust document allows the trustees to agree to allocate specific responsibilities or duties among themselves. When the duty to collect has been expressly allocated to a single trustee, only that trustee will be liable for losses resulting from the failure to perform this duty. Similarly, when plan assets are held in more than one trust, a trustee's fiduciary responsibility only extends to the plan assets in the trust for which it is a trustee.

It is important to note that even when a particular trustee is not responsible for monitoring or collecting contributions under the terms of the plan, they still have certain co-fiduciary duties. Pursuant to Section 405(a)(2) of ERISA, a co-fiduciary is liable for the a breach of another fiduciary if the co-fiduciary "participates knowingly" in the breach of another fiduciary or if the co-fiduciary's failure to comply with its own duties enables the other fiduciary to commit a breach. Under 405(a)(3), if a co-fiduciary has knowledge of a breach of the other fiduciary, the co-fiduciary will also be liable unless it takes reasonable efforts under the circumstances to remedy the breach. This is significant because it means that even if collection responsibilities have not been allocated to a trustee, that trustee must still take appropriate steps to remedy a situation where it knows that no party has assumed responsibility for the collection and monitoring of contributions and that delinquent contributions are going uncollected. The DOL suggests that, depending on the circumstances, trustees can remedy the breach by: advising the DOL or named fiduciary of the breach; reporting the breach to other fiduciaries of the plan; directly taking actions to enforce the contribution obligation on behalf of the plan; seeking an amendment of the relevant plan and trust documents; or seeking a court order mandating a proper allocation of fiduciary responsibility over contributions.

The documents and instruments governing a plan cannot serve to absolve a co-fiduciary from liability for failing to take steps to remedy a known breach of another fiduciary

