



DOL Proposes Amendments to Plan Asset Regulations, Including Safe Harbor for Small Plans

The DOL recently issued [proposed regulations](#) amending its plan asset regulations to provide small ERISA plans (i.e., those with fewer than 100 participants) with a 7-business-day safe harbor for depositing participant contributions into the plans. It also requests comments on whether this safe harbor should apply to larger plans. The proposed regulations would also clarify that plan loan repayments paid to or withheld by the employer are subject to the plan asset regulations.

Background

DOL regulations provide that participants' contributions to ERISA plans that are paid to or withheld by an employer become plan assets "as of the earliest date on which [they] can reasonably be segregated from the employer's general assets." In 1996 amendments to the regulations, the DOL shortened the outside time limit for contributing these amounts to pension plans (e.g., 401(k) plans, 403(b) plans subject to ERISA) from no later than 90 days after the beginning of the month following the month in which the contributions are withheld to no later than 15 days after the beginning of such month. (The 90-day outside limit still applies to welfare plans.) In the preamble to the 1996 regulations, the DOL made clear that the 15-day rule was not a safe harbor and that amounts needed to be contributed as soon as they were available. Nonetheless, the timeliness of deposits became a frequent audit issue.

In Advisory Opinion 2002-02A, the DOL stated that participants' pension plan loan repayments are also subject to the plan asset rules.

Proposed Regulations

The DOL believes that there is still uncertainty over when to deposit participant contributions, which it is attempting to clarify in proposed amendments to the plan asset regulations.

Small Plan Safe Harbor

The proposed regulations provide a new 7-business-day safe harbor for small plans to deposit employees' contributions into ERISA plans. A "small plan" is a plan with fewer than 100 participants at the beginning of the plan year. An employer will be in compliance if participant contributions to the plan are deposited no later than

the 7th business day following the day on which such amounts are received by the employer or would have been payable to the employee in cash. As under the current regulations, participant contributions will be considered deposited to the plan without regard to whether the contributed amounts have been allocated to specific participants or their investments.

Importantly, the DOL requests comments on whether this or a similar safe harbor should also apply to larger employer plans.

BUCK COMMENT. *We believe that this or perhaps a longer safe harbor period would be appropriate for larger plans, because there are more complicated administrative issues for larger employers (e.g., separate payroll systems) that could make it difficult to meet the 7-day safe harbor. This could save both the DOL and employers from having to deal with a frequent audit issue.*

Loan Repayments

The proposed regulations also incorporate the DOL's earlier opinion that loan repayments are subject to the plan asset rules.

Effective Date

The regulations are to be effective when published in final form. In the meantime, the DOL says that it will not assert a violation of ERISA against a small plan that complies with the safe harbor prior to the effective date of the final regulations. The deadline for comments on the proposed regulations is April 29, 2008.

Conclusion

The DOL's proposed safe harbor provides some welcome compliance certainty for affected employers, which we believe should be extended to larger plans. This type of safe harbor would likely encourage earlier deposits and would help to avoid delinquent contributions. Most larger employers are likely depositing monies on a timely basis, but compliance with a similar safe harbor would avoid a frequent audit issue.

Buck's consultants are available to assist you in reviewing your compliance with the plan asset regulations.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.