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AT Group

## **DOL Finalizes Regulations on the Timing of Employee Contributions to the Plan's Trust and Provides Guidance on Who is Responsible for Collecting the Employee Contributions**

### **Safe Harbor for Contribution Timing**

As you may be aware, the Department of Labor (DOL) has been cracking down on ensuring that retirement plan contributions and loan repayments withheld from an employee's paycheck are submitted to the plan's trust within a reasonable timeframe. Under DOL rules, employers are to submit the employee contributions which includes 401(k) deferrals, Roth 401(k), employee after-tax and loan repayments) to the plan's trust as soon as they can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which such amounts would have otherwise been paid to the employee in cash. Failure to submit employee contributions to the plan's trust within the DOL's timing standards results in a delinquent contribution which is a prohibited transaction reportable on the plan's Form 5500 filing and subject to an excise tax.

Prior to the issuance of these regulations employers were never really sure of what "as soon as can reasonably be segregated" meant. There was no set timeframe that would guarantee that this standard was satisfied. Therefore, employers were unsure of whether a certain payroll was considered late by DOL standards which would require

correction and reporting. In addition, DOL agents auditing retirement plans may have been enforcing a certain timing standard while auditing one employer's plan and applying a more or less restrictive timing standard under the next audit.

To alleviate this confusion, the DOL issued guidance in the form of proposed regulations in 2008. The proposed rules provided a seven day safe harbor timing standard. If the safe harbor is satisfied, the employer has the assurance that the employee contributions have been segregated and submitted to the plan's trust in a timely manner. The regulations have now been issued in finalized form effective January 14, 2010, and can be relied upon immediately. Under the safe harbor, if an employer submits the employee contributions to the plan's trust within seven business days from the date, the employee would have otherwise received the pay in cash, the employer is deemed to have satisfied the timing standard. If employers fail to comply with the seven day timing described in the safe harbor, they have the burden of demonstrating that the contributions were submitted as soon as reasonably possible.

This safe harbor is only available to employers with less than 100 participants as of the first day of the plan year. The DOL has noted that smaller employers typically need more time than larger employers to segregate the participant contributions from their general assets. The DOL had considered including a safe harbor in the final regulations for employers with 100 or more participants but has decided against it. Which means employers with 100 or more participants must satisfy the “as soon as can reasonably be segregated” timing standard, which typically would be less than a seven business day timing.

### **Responsibility for Collecting Employee Contributions**

In Field Assistance Bulletin (FAB) 2008-01 the DOL indicates that investigations of retirement plans revealed that in many situations there was no named fiduciary responsible for the monitoring and collecting of delinquent employee contributions. The FAB notes that generally it is the responsibility of the trustee to take such steps as are reasonable to secure control of trust property and that trust property includes delinquent contributions. However, it was also noted that generally plan documents and trust agreements are written in a manner that relieves the trustee of such responsibility. In situations where the nature and the scope of the trustee’s responsibilities are specifically limited in the plan document or trust agreement, it is the responsibility of the named fiduciary with the authority to hire and monitor trustees (i.e., the plan administrator or retirement committee) to assure that all trustee responsibilities with respect to the management and control of the plan’s assets (including collecting of delinquent contributions) have been properly assigned to a trustee or investment manager.

### **How can American Trust Help you Comply with this Guidance?**

Employers who sponsor a retirement plan now have clear guidance from the DOL on what must be done in order to avoid a delinquent contribution situation. The FAB indicates that the employer sponsoring the plan must ensure that someone is identified as being responsible for the monitoring and collecting of delinquent employee contributions. The final regulations provide that if employee contributions are submitted to the plan’s trust within seven business days, the employer is assured they are not be considered delinquent by the DOL.

In light of the FAB, American Trust Bank has reviewed our plan document and trust agreement and has determined that, similar to the DOL’s findings within the industry in general, the language does relieve the trustee from the duty of monitoring and collecting delinquent contributions. However, as discretionary trustee, American Trust is willing to take on that responsibility. Your service agreement has been updated to reflect this service if American Trust is the discretionary trustee for your plan. This satisfies the DOL’s requirement that the monitoring and collecting of delinquent contributions be properly assigned to a trustee.

In addition, American Trust continuously monitors your plan to ensure that employee contributions are being submitted within the seven business day safe harbor. Any time you have a payroll that has not been submitted to the trust in a timely manner, American Trust contacts you and question when the payment can be expected. We continue to follow-up until the payroll has been submitted to the trust. We use this same process regardless of whether you are over the 100 participant threshold. If

you have more than 100 participants, you should submit employee contributions to the plan's trust as soon as you can reasonably segregate those dollars from your general assets, even if that is less than the seven day safe harbor.

### **What Happens When Deferral Contributions/Loan Payments are Deposited Late?**

1. "Lost earnings" related to the late deposits must be calculated and paid by the employer to participants' accounts in the plan
2. In addition, "lost earnings" must be calculated on the amount of "lost earnings" calculated under 1) above. This amount must be paid by the employer as well
3. IRS Form 5330 must be filed and a 15 percent excise tax must be paid by the employer<sup>1</sup>
4. Disclosure of the late payment of deferral contributions on Form 5500. *Please note:* we must continue to accrue the amount of late deferral contributions from year to year on the 5500 until the earnings are paid

For any payrolls that are determined late, we proceed in calculating earnings as the late contributions occur. A Form 5330 is prepared shortly after the close of the plan year. If there is more than one late payroll during the year, you will be billed a \$75 Form 5330 preparation fee. The late contributions are reported on the annual Form 5500 and noted as corrected or not corrected, depending on payment of earnings.

<sup>1</sup>Employers should consider filing under the DOL's Voluntary Fiduciary Correction Program (VFCP). If corrected under the VFCP, the 15 percent excise tax is waived. When filing under this program a notice of the problem and correction should be sent to the participants. Although filing is not required, the DOL's website states that if you do not file an application with the DOL you cannot obtain the relief available under the program. In addition, if the DOL discovers the violation in an audit and the correction was not complete for purposes of the program, a civil penalty may be assessed on any additional amount required by the DOL to fully correct the violation following the audit.

***If you have any questions, please contact your Relationship Manager at 800.548.2995.***