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(delivered electronically to e-ori@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
United States Department of Labor
Washington, DC

RE: Proposed Rule under 29 CFR 2510.3-102, Definition of Plan Assets-
Timely Deposit of Participant Contributions

We are pleased to provide comments on the proposed regulation under ERISA Section 408(b)(2) on behalf of our multiemployer 401(k) plan clients. For example, one of our clients sponsors a 401(k) Plan, which has 63 contributing employers and has 3,268 participants and beneficiary accounts under the Plan and assets of approximately \$31,730,000. Another client sponsors a 401(k) Plan, which has 226 contributing employers and has 15,700 participants and beneficiaries with accounts under the Plan and assets of approximately \$100 million.

We recommend that the proposed rule under Section 2510.3-102 be expressly limited to single employer pension plans and that a new separate safe harbor be established for multiemployer plans. It appears that the data that the Department relied upon in developing this proposed rule was limited to 487 single employer plans. Consistent with Field Assistance Bulletin 2003-2, multiemployer 401(k) plans should be considered separate and apart from single employer plans with respect to this issue because of the added complexities of the application of the various collective bargaining or participation agreements, which often provide for contributions to be remitted to the plan at specific times. In addition, multiemployer plans have an added safety net in that the employees are represented by a union collective bargaining representative and the plan is administered and collections are handled by an entity that is independent from the employer.¹

¹ There may be some small number of noncollectively bargained employees who participate in the plan for example employees who may work for the plan itself

Many employers that contribute to a multiemployer 401(k) plan do so on a monthly basis, pursuant to the terms of the collective bargaining or participation agreements. Different employers in the same plan may have bargained for different contribution dates. It would be administratively very difficult, if not impossible for a multiemployer plan with tens or hundreds of participating employers to follow the 7-day safe-harbor rule. The burden of collecting contributions falls on the plan and in many situations the administrative costs are typically passed on to the participants.

Based on the complexities of multiemployer plans, we respectfully suggest that a safe harbor be established for multiemployer plans, regardless of the size or number of participants. A safe harbor that would accommodate the remittance patterns and practices of multiemployer plans would bring comparable relief and benefits for participants and employers in the form of increased certainty regarding timely remittance of participant contributions to plans. It would be administratively difficult for the plan trustees to disregard the terms of the collective bargaining or participant agreements to ensure compliance with the plan asset rule. Accordingly, we recommend that multiemployer plans be protected by a safe-harbor of the 15th business day of the month following the month in which participant contributions are withheld from the participant's wages by the contributing employers.

If the proposed safe harbor is not adopted, we ask that the Department clarify the 100 participant threshold with respect to multiemployer plans. Under the proposed regulation, it appears that the 7-day safe harbor might apply in the case of a multiemployer plan if there are fewer than 100 participants at the beginning of the year determined by counting the participants of all of the participating employers. Multiemployer plans often have thousands or hundreds of thousands of participants in the aggregate but the number of participants for one or more of the participating employers might be fewer than 100. Multiemployer plans often do not have access to the books and records necessary to determine how many employees work for a contributing employer. It would be also very difficult to track and enforce the 7-day safe harbor rule with respect to certain employers and not others. Please confirm that a multiemployer plan does not count participants on an employer by employer basis.

We appreciate the Department's efforts to safeguard participants assets and we would be happy to assist the Department in reaching that goal with respect to multiemployer 401(k) plans. Thank you for your consideration of these comments.

Respectfully submitted,



Ronald E. Richman

cc: Susan Bernstein, Esq.