NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 φ PHONE 202-737-5315 φ FAX 202-737-1308

EDWARD C. SULLIVAN
CHAIRMAN

RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

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VIA WWW.REGULATIONS.GOV
AND FIRST CLASS MAIL

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Amendment of Regulations Relating to Definition of "Plan Assets" – Participant Contributions
73 Fed. Reg. 11072 (February 29, 2008)

Dear Sir or Madam:

These comments are filed by the National Coordinating Committee for Multiemployer Plans (NCCMP) in response to the request for public comments on the Proposed Amendment to the Plan Asset regulations found at 29 CFR § 2510.3-102 establishing a safe harbor of 7 business days during which amounts that an employer has received from employees or withheld from wages for contribution to employee benefit plans with fewer than 100 participants would not constitute "plan assets" for purposes of Title I of ERISA and related prohibited transaction provisions of the Internal Revenue Code.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, and roughly twenty-six million active and retired workers and their families who receive health and other benefits from these plans. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

NCCMP members sponsor many national and local multiemployer employee pension benefit plans with cash or deferred arrangements (CODAs). It is our understanding that the regulatory uncertainty regarding the collection of 401(k) deferrals has impeded the creation of more multiemployer 401(k) plans.

A multiemployer 401(k) plan is a single plan in which the employees of many (often hundreds) employers participate. The plan is maintained pursuant to one or more collective bargaining agreements. Employees are eligible to participate in the Plan as long as they are employed by one of the employers maintaining the plan. Employees may move from employer to employer and continue to participate in the 401(k) plan. While the employer withholds an employee's elective deferrals, the plan is administered by a joint labor-management Board of Trustees that is independent of any contributing employer. The employer forwards the elective deferrals to the plan for deposit in the plan's account. Employers have different payroll cycles so elective deferrals are remitted to the plan at different times. The administrative costs of multiemployer 401(k) plans are met through an assessment on the individual accounts of the participants.

Pursuant to the collective bargaining agreement and the plan documents, the employers of the participants are required to remit employee contributions by a certain date. An employer's failure to remit the employee contributions by the deadline may result in the Trustees' assessing interest, liquidated damages and lost earnings on the employer, in the course of pursuing collection of the delinquent contributions under the provisions of ERISA 515. Despite these consequences, employers occasionally fail to forward employee elective deferrals to the 401(k) plan.[1]

Over the years, the NCCMP has had a continuing and constructive dialogue with the Department regarding the issue of how the plan asset regulations impact the efforts of multiemployer 401(k) plans to insure the prompt payment and deposit of employee elective deferrals. In 2002, the NCCMP requested an advisory opinion that the provisions of Prohibited Transaction Class Exemption 76-1 be applied to the collection of delinquent employee contributions owed to multiemployer pension plans. The NCCMP also requested that the Department confirm that multiemployer plans may require employers to remit participant contributions no later than the timeframe established in 29 CFR § 2510.3-102. On January 6, 2004, the Department advised the NCCMP that PTE 76-1 does not extend relief to arrangements, agreements, understandings or determinations that arise in connection with the failure of an employer to timely forward participant contributions to a multiple employer plan. Additionally, the Department referred the NCCMP to Field Assistance Bulletin 2003-2, (May 7, 2003) ("FAB 2003-2") for guidance with respect to when collectively bargained plans determine when participant contributions become reasonably segregated from the assets of an employer so as to become plan assets.

In FAB 2003-2 (May 7, 2003), the Department stated:

> In determining when participant contributions can be reasonably segregated from the general assets of any given contributing employer to a multiemployer defined

[1] The failure of employers maintaining multiemployer plans to make timely payments is not confined to employee elective deferrals to multiemployer 401(k) plans. The problem of employer delinquencies to various kinds of multiemployer has been recognized since the enactment of ERISA and both the statute and DOL guidance provide tools to assist the Trustees of such plans in their collection efforts. However, the legal requirements that apply to the payment and collection of elective deferrals have resulted in some unique challenges for multiemployer 401(k) plans.

> contribution plan, it is the view of this Office that the time frames established in collective bargaining, employer participation and similar agreements must be taken into account to the extent that such agreements represent the considered judgment of the plan's trustees that such time frames reflect the appropriate balancing of the costs of transmitting, receiving and processing such contributions relative to the protections provided to participants and beneficiaries, provided that such time frames do not extend beyond the maximum period prescribed in § 2510.3-102(b).

Based on the experience of its affiliated multiemployer 401(k) plans, the NCCMP believes that this standard is appropriate for multiemployer for reasons that have been presented to the Department in the past and that resulted in the issuance of FAB 2003-2. Among those reasons are the fact that multiemployer 401(k) plans are administered by a joint labor-management board of trustees, independent from the sponsoring employer, whose duty it is to insure that employee elective deferrals as well as employer contributions are promptly paid to the plan. Unlike the single-employer plan, which has no independent "watchdog", the trustees of the multiemployer 401(k) plan assume the responsibility to monitor the payment and timeliness of employee elective deferrals and take legal action to collect those that are not promptly paid.

Under FAB 2003-2, it is appropriate to consider the time frames in the collective bargaining agreements for forwarding the elective deferrals and the additional costs that will be incurred if the 401(k) plan elective deferrals must be forwarded at a different time that the employer contributions to the 401(k) plan and related plans. Since related plans sharing services under arrangements permitted by Prohibited Transaction Class Exemption 76-1 typically allocate the share staff costs based on time spent by staff for each plan, it is the experience of NCCMP affiliates that requiring the payment of 401(k) elective deferrals at different times than the contributions to related plans, significantly increases the time and, therefore, the costs allocated to the 401(k) plan. In the case of a multiemployer 401(k) plan, these added costs are born by the plan participants. As the FAB states, it is appropriate for the plan trustees to take these added costs into account in determining if the interests of plan participants are better served by requiring 401(k) deferrals at a different time than contributions to related plans.

The standard in FAB 2003-2 is workable for multiemployer 401(k) plans. However, the experience of multiemployer 401(k) plans in Department investigations suggests that the language in FAB 2003-2 regarding the deference given by the Department to the decisions of the bargaining parties in establishing when reasonable segregation occurs, has been a point of contention in some examinations. Plans that felt they were operating in conformance with the Field Assistance Bulletin were required to take corrective action. The position of the Department in these investigations has caused a great deal of confusion among fiduciaries of multiemployer 401(k) plans, who thought they understood their obligations under FAB 2003-2. Therefore, the NCCMP believes that to better serve the needs of the multiemployer 401(k) plan community, the plan asset regulations should be amended to create a "bright line" safe harbor for multiemployer 401(k) plans and to incorporate the standard established in FAB 2003-2. As discussed above, the FAB 2003-2 standard remains appropriate and the availability of a safe harbor for determining reasonable segregation of participant contributions is appropriate not only for single employer plans with 100 participants or less but also for multiemployer 401(k) plans which consist primarily of small employers.

In its Notice of Proposed Rulemaking, the Department notes that the number of contributory multiemployer defined contribution plans affected by the proposed regulation is "very small." 73 Fed. Reg. 11075 n. 6. However, the vast majority of participating employers whose employees participate in a contributory multiemployer defined contribution plan have fewer than 100 employees (in fact the vast majority have fewer than 20) and would be able to take advantage of the proposed safe harbor but for their participation in a multiemployer plan. For example, 597 of the 610 participating employers in one national multiemployer 401(k) plan have fewer than 100 employees eligible to participate in the 401(k) plan. Another multiemployer 401(k) plan sponsored by the joint board of labor-management trustees operating in a large metropolitan area in the Eastern United States has only 7 of its 236 participating employers employing more than 100 employees. As a result, the extension of the proposed regulation to all multiemployer plans will provide the benefits of the safe harbor to a larger group of small employers. NCCMP believes that these proportions of small employers are typical of multiemployer 401(k) plans.

While the Department would limit its proposed safe harbor to single employer plans with fewer than 100 participants, it is apparent from the discussion in the Preamble that the proposed safe harbor is directed to small employers as much as to small plans. Employers participating in multiemployer 401(k) plans are predominantly small employers. The NCCMP has been advised by its affiliates that small employers participating in multiemployer 401(k) plans have the same problems segregating elective deferrals from wages and transmitting them to the multiemployer 401(k) plan as discussed in the Preamble to the Proposed Amendment to the Regulation. NCCMP believes that the availability of such a safe harbor must be extended to all participating employers in a multiemployer plan in order to provide uniform administration and the certainty that the Department hopes to achieve in proposing the safe harbor. It has been the experience of our multiemployer 401(k) plans that the vast majority of contributions are being remitted or can be remitted by employers within the proposed 7 business day safe harbor. Drawing the distinction between large and small employers in a multiemployer context will increase the administrative burden to the multiemployer plan and complicate collection and delinquency efforts as the plan administration must create separate rules for different classes of employers. In addition, since the industries in which multiemployer plans predominate are typically characterized by short term employment, employees frequently move from employer to employer participating in the plan and the size of an employer's workforce may vary significantly from week to week.

Based on the foregoing, the NCCMP supports the efforts of the Department to provide clear guidance to employers and plan administrators in determining when 401(k) contributions are deemed to be plan assets. The proposed regulation establishing a 7 business day safe harbor provides a bright line for employers and plan sponsors in establishing when employee contributions are reasonably segregated from the general assets of employers. However, the Department's proposed amendment would only provide this safe harbor to individual plans with fewer than 100 participants. As discussed above, most employers whose employees participate in multiemployer 401(k) plans are also small employers with fewer than 100 employees working in a variety of industries across the United States. The extension of the availability of this safe harbor to multiemployer 401(k) plans will increase the number of small employers able to take

advantage of the safe harbor. Expanding the reach of the proposed safe harbor to multiemployer plans and incorporating the standard from FAB 2003-2 in the regulations, will permit the Department to provide certainty to the multiemployer plan community while protecting the participant and beneficiaries of those plans.

Please contact the undersigned if you should have any questions or require any additional information. The NCCMP would welcome an opportunity to meet with the Department to discuss the issues underlying this request. Thank you for your consideration of these comments.

Very truly yours,

Randy G. DeFrehn
Executive Director