

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

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Bernard F. O'Hare
Partner
(212) 336-2613
Direct Fax (212) 336-2222
bfohare@pbwt.com

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e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attn: Participant Contribution Regulation Safe Harbor

Re: Comment on Participant Contribution Regulation Safe Harbor

Dear Sir or Madam:

We are counsel to a number of multiple employer pension plans and we write to comment on the recently published proposed rule (the "Proposed Rule") regarding a 7-business day safe harbor period for employers to transmit participant contributions to employee benefit plans (the "Safe Harbor"), which was published in the Federal Register on February 29, 2008. The focus of this comment letter is to urge the U.S. Department of Labor (the "DOL") to clarify and confirm that the application of the Safe Harbor to "small plans" would apply, in the case of multiple employer and multiemployer plans, on an employer-by-employer basis, and not on a plan-wide basis. In addition, we believe the DOL should expand the application of the Safe Harbor to cover all participating employers in multiple employer and multiemployer plans regardless of the number of participants any such participating employer has in such a plan.

The DOL's regulations under Title I of ERISA currently provide that, as a general rule, participant contributions to an employee benefit plan are "plan assets" as of the earliest date on which such contributions (or payments, as applicable) can be reasonably segregated from the

employer's general assets.¹ Pursuant to the Proposed Rule, the Safe Harbor would treat employee benefit *plans* with fewer than 100 participants as of the beginning of the plan year (i.e., "small plans") as having satisfied the general rule when contributions are deposited with the plan no later than the seventh business day following either the day on which such amount is received by the employer or the day such amount would otherwise have been payable to the participant in cash, as applicable. For the reasons set forth below, we think that the same Safe Harbor should be afforded to small *employers* who participate in multiple employer and multiemployer plans (i.e., employers with fewer than 100 participants in the plan). Further and as an extension thereof, the Safe Harbor should be applied more expansively to *all employers* that participate in multiple employer and multiemployer plans.

The Proposed Rule provides that the purpose of the Safe Harbor is to assist plan sponsors, employers, participants and beneficiaries by providing "a higher degree of compliance certainty with respect to when an employer has made timely deposits of participant contributions to the plan" and to protect participants by "encouraging employers to deposit participant contributions with plans within the safe harbor period." More specifically, the Regulatory Impact Analysis of the Proposed Rule, indicates that the increased certainty that the Safe Harbor will bring to employers will reduce disputes over compliance, allow for easier oversight of remittance practices, reduce variations in remittance times, and provide increased investment earnings for plan participants if employers expedite their remittance practices to take advantage of the Safe Harbor.

¹ DOL Regulation § 2510.3-102(a).

The need for the Safe Harbor, however, is not limited to only small single employer plans. Rather, small employers that participate in large multiple employer and multiemployer plans face the same challenges as small single employer plans and would also be significantly benefited by the Safe Harbor. For example, in the preamble to the Proposed Rule, the DOL recognized that employers with small plans typically need more time than larger plans to segregate participant contributions from general company assets. We note that small employers who participate in large multiple employer and multiemployer plans are likely to have the same asset segregation issues as those that the DOL recognized are faced by employers that maintain small single employer plans. Like their counterparts who maintain single employer plans, small employers that participate in multiple employer and multiemployer plans often have payroll systems that are less sophisticated than the larger participating employers (i.e., employers with 100 or more participants in the plan) in such plans. The economies of scale in plan administration and plan investments that small employers benefit from by participating in multiple employer and multiemployer plans do not affect the individual employers' less sophisticated payroll and human resources functions. These payroll and remittance functions continue to be independently maintained at the employer level, not the plan or fund level. The fact that these employers send participant contributions to a large plan does not translate into a quicker, more efficient payroll process for the individual employers. Accordingly, small employers that participate in large multiple employer and multiemployer plans would benefit from the certainty afforded by the Safe Harbor in the same way as small single employer plans, which, ultimately, as noted in the Proposed Rule, benefit plan participants and beneficiaries of

such participating employers through enhanced compliance with the regulatory requirements and expedited remittances of participant contributions to the plan.

Although we think the application of the Safe Harbor to small employers participating in multiple employer or multiemployer plans is a necessary change to the Proposed Rule, because of the special dynamics of multiple employer and multiemployer plans, we urge the DOL to take one step further and extend the Safe Harbor to *all participating employers in multiple employer and multiemployer plans*—i.e., not just to the small employers that participate in such plans. Multiple employer and multiemployer plans have employers of varying sizes contributing to the plans. It would create an undue administrative burden, which would increase the cost of administering the plans, to have different remittance rules and safe harbors for different contributing employers. For example, with respect to meeting legal requirements for the timely remittance of employee contributions, a multiple employer plan administrator would often take the following actions: (i) communicate with participating employers about the requirements regarding timely remittance; (ii) monitor remittance of contributions to ensure timeliness; and (iii) hold participating employers accountable for untimely remittance. At each of these steps, the added time and complexity that having varying rules for many, and in many cases hundreds of, contributing employers could impact otherwise bona fide and strong collection procedures in a negative manner. Further, costs could rise on both a time- and staffing-basis if this bifurcated treatment were to be implemented. So, while we see the significant need for the Safe Harbor to apply to multiple employer and multiemployer plans' small contributing employers, we think that the unique structure of multiple employer and

multiemployer plans, including the challenges presented in administering such plans, necessitate that the Safe Harbor apply to all participating employers in multiple employer and multiemployer plans.

We believe that expanding the Safe Harbor to all participating employers in multiple employer and multiemployer plans would not pose additional risk to plan participants and beneficiaries. As the DOL recognized in the Proposed Rule for small plans, it is unlikely that the contributing employers to multiple employer and multiemployer plans that currently take less than 7-business days to deposit participants' contributions would incur the costs or time to modify their processes and systems to delay contributions to the outer limits of the Safe Harbor period. Indeed, the Safe Harbor would provide greater certainty to all participating employers, even those with 100 or more participants, in complying with the requirements of the general rule under the DOL's participant contributions regulation. A greater level of overall compliance by plan sponsors of, and participating employers in, multiple employer and multiemployer plans is in the interest of all interested parties—plan participants and beneficiaries, plan sponsors, participating employers and the DOL.

We greatly appreciate the opportunity to comment on the Proposed Rule and the DOL's consideration of the discussion above.

Respectfully submitted,



Bernard F. O'Hare

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