



**FIELD ASSISTANCE BULLETIN NO. 2008-01**

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MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT  
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE  
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: FIDUCIARY RESPONSIBILITY FOR COLLECTION OF DELINQUENT  
CONTRIBUTIONS

ISSUE: What are the responsibilities of named fiduciaries and trustees of ERISA-covered plans for the collection of delinquent employer and employee contributions?

BACKGROUND

A number of pension plan investigations have revealed agreements that purport to relieve the financial institutions serving as plan trustees of any responsibility to monitor and collect delinquent contributions. The investigations have revealed circumstances where no other trust agreement or plan document assigns those obligations to another trustee or imposes the obligations on a named fiduciary with the authority to direct a trustee. In other cases, the plan documents and trust agreements are silent or ambiguous on the matter. Questions have been raised as to whether, and if so, to what extent, trust agreements and other instruments may define the scope of trustee undertakings and exclude responsibilities for monitoring the plan's receipt of contributions, determining when they are delinquent and taking appropriate steps for collection.

Employer contributions are delinquent when they are due and owing to the plan under the documents and instruments governing the plan but have not been transmitted to the plan in a timely manner.<sup>1</sup> The Department has taken the position that employer

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<sup>1</sup> In the event that those instruments are ambiguous, promised employer contributions are delinquent if not transmitted to the plan within a reasonable time after the legally enforceable obligation to make the contribution arises.

contributions become an asset of the plan only when the contribution has been made.<sup>2</sup> However, when an employer fails to make a required contribution to a plan in accordance with the plan documents, the plan has a claim against the employer for the contribution, and that claim is an asset of the plan. Participant contributions that are withheld from wages or paid to the employer are delinquent if they become plan assets while still in the hands of the employer. Under the Department's regulations, participant contributions become plan assets in the hands of the employer on the earliest date that the amount withheld from the participant's pay or paid to the employer reasonably can be segregated from the employer's general assets. With respect to an employee pension benefit plan, this date can be no later than the 15<sup>th</sup> business day of the month following the month in which participant contribution amounts were withheld from the employee's paychecks or paid to the employer.<sup>3</sup>

### ANALYSIS

The duty to enforce valid claims held by a trust has long been considered a trustee responsibility under common law. IIA Austin W. Scott & William E. Fratcher, *The Law of Trusts* § 177 (4th ed. 1989); Restatement (Third) of Trusts, § 76 (2007). See also George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 583 at p.355 (2d rev. ed. 1980) (where the settlor retains possession of trust assets, "the trustee must hold the settlor to [his] obligation"); Scott 175, at 1415 ("trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it"). The Supreme Court affirmed that the collection of contributions is a trustee responsibility under ERISA in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 571 (1985). The Court noted that:

One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets, and this encompasses "determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries." The trustee is thus expected to "use reasonable diligence to discover the location of the trust property and to take control of it without unnecessary delay." A trustee is similarly expected to "investigate the identity of the beneficiary when the trust documents do not clearly fix such party" and to "notify the beneficiaries under the trust of the gifts made to them" (citations omitted).

Section 404(a) of ERISA requires that a fiduciary discharge his duties prudently and solely in the interests of the participants and beneficiaries of the plan. The steps

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<sup>2</sup> See Advisory Opinion 93-14; Preamble to Prohibited Transaction Exemption 76-1, 41 FR 12740 at 12741 (Mar. 26, 1976).

<sup>3</sup> See 29 CFR 2510.3-102. An employer continuing to hold participant contribution commingled with its general assets after the participant contributions reasonably could have been segregated will have engaged in a prohibited transaction in violation of ERISA section 406. This memorandum is not intended to address any civil or criminal liability that may attach to an employer as a result of such a prohibited transaction.

necessary to discharge a duty to collect contributions will depend on the facts of each case. In determining what collection actions to take, a fiduciary should weigh the value of the plan assets involved, the likelihood of a successful recovery, and the expenses expected to be incurred. Among other factors, the fiduciary may take into account the employer's solvency in deciding whether to expend plan assets to pursue a claim. *Diduck v. Kaszycki & Sons Contractors*, 874 F. 2d 912 (2nd Cir. 1989). The Department of Labor has also long held the view that if the plan is not making systematic, reasonable and diligent efforts to collect delinquent employer contributions, or the failure to collect delinquent contributions is the result of an arrangement, agreement or understanding, express or implied, between the plan and a delinquent employer, such failure to collect delinquent contributions may be deemed to be a prohibited transactions under section 406 of ERISA.<sup>4</sup>

Section 402(a)(1) provides that every employee benefit plan shall be established and maintained pursuant to a written instrument, and that the instrument "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."<sup>5</sup> Section 403(a) of ERISA provides, with certain exceptions, that all assets of an employee benefit plan must be held in trust by one or more trustees, who are to be named in the plan or trust instrument or appointed by a person who is a named fiduciary. Section 403(a) further provides that "upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . . ." A plan trustee, therefore, will, by definition, always be a "fiduciary" under ERISA as a result of its authority or control over plan assets and, accordingly, is required to discharge its trustee responsibilities prudently and solely in the interest of the plan's participants and beneficiaries. Although trust documents cannot excuse trustees from their duties under ERISA, ERISA clearly gives named fiduciaries the authority to appoint multiple trustees and to allocate trustee responsibilities among those trustees (including directed trustees).

Section 403(a) recognizes two exceptions to the general rule that exclusive authority and discretion to manage and control the assets of a plan must be vested in one or more plan trustees. The first exception, at section 403(a)(1), applies when "the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee." In such instances, the trustee, commonly referred to as a "directed trustee," is subject to the proper directions of the named fiduciary. As the Department noted in Field Assistance Bulletin No. 2004-03 (Dec. 17, 2004), directed trustees are fiduciaries, and as such, are subject to ERISA's fiduciary rules, but the scope

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<sup>4</sup> See the preamble to Prohibited Transaction Exemption 76-1, 41 FR 12740, 12741 (Mar. 26, 1976).

<sup>5</sup> Section 402(a)(2) of ERISA defines the term "named fiduciary" to mean "a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."

of their duties is “significantly narrower than the duties generally ascribed to a discretionary trustee under common law trust principles.” The second exception to the “exclusive authority” provision in section 403(a)(1) applies when the authority to manage, acquire or dispose of plan assets is delegated to one or more investment managers pursuant to section 402(c)(3).

Additionally, section 405(b)(1)(B) provides, in relevant part, that, except as set forth in section 403(a)(1), if the assets of a plan are held by two or more trustees they shall jointly manage and control the assets of a plan except that nothing shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations or duties have been assigned. Similarly, in those cases where the assets of a plan are held in more than one trust, a trustee is responsible only for those acts or omissions of the trustees of the trust for which it is trustee.<sup>6</sup>

Thus, in accordance with the statutory framework described above, authority over a plan’s assets subject to the trust requirement of section 403(a) of ERISA, including a plan’s legal claim for delinquent contributions, must be assigned to i) a plan trustee with discretionary authority over the assets, ii) a directed trustee subject to the proper and lawful directions of a named fiduciary, or iii) an investment manager.

Accordingly, it is the view of the Department that a named or functional fiduciary who has authority to appoint the plan’s trustee(s) must ensure that the obligation to collect contributions is appropriately assigned to a trustee, unless the plan expressly provides that the trustee will be a directed trustee with respect to contributions pursuant to section 403(a)(1) or the authority to collect contributions is delegated to an investment manager pursuant to section 403(a)(2).

Thus, although a fiduciary may enter into a trust agreement under which a particular trustee is not responsible for monitoring and collecting contributions, if no trustee or investment manager has this responsibility, the fiduciary with authority to hire the trustees may be liable for plan losses due to a failure to collect contributions because the fiduciary failed to specifically allocate this responsibility.<sup>7</sup>

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<sup>6</sup> See discussion below on co-fiduciary liability under section 405(a).

<sup>7</sup> Under ERISA section 403(b), employee benefit plans are not subject to section 403(a)’s trust requirement if the plan’s assets consist entirely of insurance contracts or policies issued by an insurance company qualified to do business in a State, or individual retirement accounts, such as SIMPLE-IRA plans and SEPS, with assets held in custodial accounts under Code section 408(h), or contracts established and maintained under Code section 403(b) with assets held in custodial accounts under Code section 403(b)(7). In such cases, the duty to use reasonable diligence to discover the location of the plan’s property (such as delinquent contributions) and to take control of it without unnecessary delay is, in the

These situations should be evaluated on the basis of all the facts and circumstances. Where the provisions in trust instruments and plan documents are ambiguous, they should generally be interpreted in a manner that corresponds to the statutory scheme, rather than in a manner that relieves all of the trustees and investment managers from responsibility.<sup>8</sup> Reliance on plan, trust and other governing documents to define the responsibilities of plan fiduciaries, however, may not be completely determinative if the provisions in the documents are inconsistent with the actions of the parties. For example, if a nominally directed trustee routinely assumes discretionary responsibility, the trustee cannot seek to limit its liability with respect to the exercise of that discretion on the basis that it is a directed trustee. Similarly, a trustee cannot alter its status as fiduciary through a contractual provision that defines its trustee duties as non-fiduciary in nature.

If a particular trustee is not responsible for monitoring and collecting contributions under the terms of the trust instrument, that trustee (including a directed trustee) nonetheless would have an obligation under sections 404 and 405(a) to take appropriate steps to remedy a situation where the trustee knows that no party has assumed responsibility for the collection and monitoring of contributions and that delinquent contributions are going uncollected. As explained in Field Assistance Bulletin No. 2004-03, a fiduciary, pursuant to section 405(a)(1), is liable for the breach of another fiduciary if the fiduciary “participates knowingly” in the breach of the other fiduciary. In addition, under section 405(a)(2), a fiduciary is liable for a breach of another fiduciary if the fiduciary’s failure to comply with section 404(a)(1) in the administration of his specific fiduciary responsibilities enables the other fiduciary to commit a breach. Under section 405(a)(3), a fiduciary is liable for a breach of another fiduciary if the fiduciary has knowledge of the breach of the other fiduciary, unless the fiduciary takes reasonable efforts under the circumstances to remedy the breach. Efforts to remedy may, depending on the circumstances, include advising the named fiduciary or the Department of Labor of the breach, reporting the breach to other fiduciaries of the plan, directly taking actions to enforce the contribution obligation on behalf of the plan, seeking an amendment of the relevant plan and trust documents, or seeking a court order mandating a proper allocation of fiduciary responsibility over contributions. The documents and instruments governing a plan cannot serve to absolve a co-fiduciary from liability for failing to take steps to remedy a known breach of another fiduciary.<sup>9</sup>

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view of the Department, part of the named fiduciary’s duties under ERISA section 402(a)(1) to control and manage the operation and administration of the plan. In the case of SIMPLE-IRAs and SEPS, the plan sponsor generally will be a named fiduciary because the documents establishing the plan typically provide the employer with authority with respect to management and administration of the plan notwithstanding that the plan documents may fail to state expressly that the plan sponsor is a “named fiduciary.”

<sup>8</sup> See *Best v. Cyrus*, 310 F.3d 932, 935 (6<sup>th</sup> Cir. 2002)

<sup>9</sup> See ERISA section 410 (which provides, subject to certain exceptions, that “any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any

Whether and to what extent information concerning the failure of an employer to forward contributions to a plan constitutes knowledge of a breach that would give rise to co-fiduciary liability will depend upon the facts and circumstances of each case.

#### CONCLUSION

The responsibility for collecting contributions is a trustee responsibility. If a plan has two or more trustees, the duty may be allocated to a single trustee. A plan may also provide that a named fiduciary may direct a trustee as to this responsibility or may appoint an investment manager to take on this duty. To the extent the nature and scope of the trustee's responsibilities are specifically limited in the plan documents or trust agreement, it is generally the responsibility of the named fiduciary with the authority to hire and monitor trustees to assure that all trustee responsibilities with respect to the management and control of the plan's assets (including collecting delinquent contributions) have been properly assigned to a trustee or investment manager.

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responsibility, obligation, or duty under this part shall be void as against public policy." ). *See also* 29 CFR § 2509.75-4.