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DOL Field Assistance Bulletin 2008-04 Clarifies ERISA Fidelity Bonding Requirements

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Background

Section 412 of ERISA requires every plan fiduciary and every plan official who handles the funds of an employee benefit plan to be bonded. The purpose of the bond is to protect the plan's assets in the event of fraud or dishonesty on the part of these individuals.

Generally, the amount of the bond must be at least 10% of the plan's assets, as determined at the beginning of the plan year, and is subject to a bonding minimum of $1,000 and a maximum of $500,000. Plans with employer securities are subject to a $1,000,000 maximum.

The Department of Labor has issued Field Assistance Bulletin (FAB) 2008-04 (http://www.dol.gov/ebsa/regs/fab2008-4.html) to provide guidance to field offices concerning ERISA's bonding requirements, including changes brought about by the Pension Protection Act of 2006. This guidance supplements the DOL's 1995 Fidelity Bonding booklet (http://www.form5500help.com/fidelity_bonds.pdf) and the DOL's FAQs for small plan audit waivers (http://www.dol.gov/ebsa/faqs/faq_auditwaiver.html).

Selected Items from FAB 2008-04

FAB 2008-04 contains 42 FAQs about ERISA's bonding requirements. Here are highlights:

- A fidelity bond is not the same as fiduciary liability insurance – fidelity bonds are *required* by ERISA to protect the plan against fraud or dishonesty of individuals who handle plan assets. Fiduciary liability insurance, although not required under ERISA, protects the plan against losses due to breaches of fiduciaries' responsibilities.

Plan assets can be used to purchase either type of coverage, but in the case of fiduciary liability insurance the policy must permit recourse by the insurer against the fiduciary (FAQ 1-2).

- There is a DOL approved list of surety companies for purposes of ERISA fidelity bonds – see http://www.fms.treas.gov/c570/c570.html (FAQ 4).
- Not all fiduciaries and plan officials have to be bonded – only those who directly handle plan funds (FAQ 7). Service providers must be bonded if they handle plan funds. Several administrative exemptions may apply for employees of certain banks and insurance companies (FAQ 15).
- "Handling of plan funds or other property" is a central question for bonding purposes. Cash, checks, other negotiable instruments, marketable securities, and all other property that is convertible into cash or has a cash value are considered plan funds. Physical contact with checks, cash, securities and other property generally constitutes handling, as well as the power to transfer the plan's funds or assets (such as disbursement authority). (FAQ 18).

In both FAQs 17 and 18 the DOL stresses the standard for determining whether a person is handling funds: *if the person's relationship with those funds is such that he or she can cause a loss to the plan through fraud or dishonesty acting alone or in collusion with others.*

- Unfunded plans are not required to maintain fidelity bonds. "Unfunded" for this purpose is defined as all of the plan's benefits payable from the general assets of the *employer or union*. The existence of an insurance arrangement or a trust fund or even a segregated fund will automatically make the plan subject to bonding requirements (FAQ 13).

Any benefit plan that accepts employee contributions is generally subject to bonding requirements, with a narrow exception for welfare benefit plans associated with Section 125 cafeteria plans (see DOL technical release 92-01).

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- Plans that are not subject to Title I of ERISA are not subject to these bonding requirements (FAQ 12). There is no specific exemption for SEPs and SIMPLE plans for bonding purposes, although the DOL seems to indicate that most such plans will fall under one of the administrative exemptions that apply to financial institutions such as banks and insurance companies (FAQ 16).

403(b) plans with limited employer involvement are not subject to ERISA Title I and therefore are not subject to bonding requirements, but 403(b) plans with employer contributions or involvement are subject to ERISA's bonding requirements.

- Where a plan committee makes final decisions regarding plan benefit payments or investments, each member of the committee is considered to be handling plan funds and must be bonded (FAQ 19 -20).
- The DOL makes it clear that the choice of fidelity bond types and coverage is a fiduciary decision in and of itself. There is no specifically mandated type of fidelity bond – either a blanket bond or a schedule bond can be used (FAQ 22 & 40).
- There is no specific monetary or other penalty in the Field Assistance Bulletin (nor in ERISA) for failure to maintain a fidelity bond. In the past, the DOL has sometimes sued plan fiduciaries in an effort to enforce ERISA's bonding rules.

One significant operational problem facing small plans that do *not* maintain adequate fidelity bonding is the possibility of triggering the requirement to obtain an accountant's audit and opinion to submit with the Form 5500 report. Small plans with more than 5% "non-qualifying" plan assets are exempt from the annual audit requirement for Form 5500 purposes *only* if the plan maintains a fidelity bond sufficient to cover the "non-qualifying plan assets". If such a plan has no fidelity bond, or has inadequate bonding, the plan is no longer eligible for the waiver of the audit requirement and will have to retain an independent accountant to provide an opinion for Form 5500 (FAQ 36).

▲Conclusion

Fidelity bonding is required for all funded plans that are subject to Title I of ERISA. Fidelity bonding protects the plan from fraud or dishonesty of individuals who handle plan assets. Plan fiduciaries are responsible for securing and maintaining adequate fidelity bonds for their plans. Failure to provide adequate bonding will subject the plan fiduciaries to action by the DOL, and could trigger the need for an audit for certain small retirement plans.