

MEMO# 15019

August 9, 2002

DOL ISSUES FAQs ON DELINQUENT CONTRIBUTIONS UNDER VOLUNTARY FIDUCIARY CORRECTION PROGRAM

[15019] August 9, 2002 TO: PENSION MEMBERS No. 38-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 56-02 RE: DOL ISSUES FAQs ON DELINQUENT CONTRIBUTIONS UNDER VOLUNTARY FIDUCIARY CORRECTION PROGRAM The Department of Labor has published guidance on frequently asked questions ("FAQs") regarding the application of the Voluntary Fiduciary Correction Program ("VFCP") to delinquent participant contributions. As you may recall, the Department earlier this year issued guidance that modified the program.¹ The FAQs refer to the Department's "plan asset" regulations for determining when the transmittal of participant contributions to pension plans is considered delinquent.² Notably, the FAQs observe that the date when participant contributions reasonably can be segregated from the employer's general assets — a standard provided in the plan asset regulations — usually will be earlier than the maximum time period set forth in the regulations (i.e., no later than the 15th business day of the month following the month in which the participant contribution was received by the employer). Hence, the FAQs provide that where "contributions reasonably can be segregated from the employer's general assets in a shorter time period, delay in forwarding the contributions, even a delay that does not exceed the maximum time period under the regulation, may cause a breach of fiduciary duty under Title I of ERISA that may be corrected under the Voluntary Fiduciary Correction Program." ¹ See Institute Memorandum to Pension Members No. 13-02 and Pension Operations Advisory Committee No. 21-02, dated April 5, 2002. The VFC program was established in interim form in March 2000. See Institute Memorandum to Pension Members No. 18-00 and Pension Operations Advisory Committee No. 19-00, dated March 21, 2000. ² See 29 C.F.R. 2510.3-102. Under the regulations, the assets of a plan generally include amounts that a participant or beneficiary pays to an employer or amounts withheld by an employer for contribution to the plan as of the earliest date on which such contributions can be reasonably segregated from the employer's general assets. The regulations further provide that the maximum time period for plans to transmit such contributions may not be later than the 15th business day of the month following the month in which the participant contribution was received by the employer, or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). ² In addition, the FAQs address the methods by which earnings should be calculated for late contributions, including the determination of the applicable rate of return. Examples of calculation methods as applied to hypothetical examples are also set forth in the FAQs. Other areas addressed in the guidance include: (1) the methods by which VFCP applicants may demonstrate the earliest date contributions could have been

segregated; (2) the application of VFCP to delinquent contributions that are very small; and (3) the ability to correct failures to forward participant loan repayments under VFCP. Thomas T. Kim Associate Counsel Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 15019, or call the ICI Library at (202) 326-8304 and request the attachment for memo 15019. Attachment (in .pdf format)

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