(2) The participant or beneficiary directs in writing that the plan trustee(s) shall pay a named third party all or a specified portion of the sum of money which would otherwise be paid under the plan to him or her; and

(3) A payment is made to a third party only when or after the money would otherwise be payable to the plan participant or beneficiary.

In the case of a multiple employer plan (as defined in Prohibited Transaction Exemption 76–1, Part C, Section III), if the arrangement to make payments to a third party is a prohibited transaction under ERISA, the arrangement will comply with the above-mentioned sections of ERISA if the conditions of Prohibited Transaction Exemptions 76–1, Part C, and 77–10 and the above three paragraphs are met. In this regard, it is the view of the Department that the mere payment of money to which a participant or beneficiary is entitled, at the direction of the participant or beneficiary, to a third party who is a party in interest would not constitute a transfer of plan assets prohibited under section 406(a)(1)(D). It is also the view of the Department that if a trustee or other fiduciary of a plan, in addition to his duties with respect to the plan, serves in a decisionmaking capacity with another party, the mere fact that the fiduciary effects payments to such party of money to which a participant is entitled at the direction of the participant and in accordance with specific provisions of governing plan documents and instruments, does not amount to a prohibited transaction under section 406(b)(2).

It should be noted that the interpretation set forth herein deals solely with the application of the provisions of title I of ERISA to the arrangements described herein. It does not deal with the application of any other statute to such arrangements. Specifically, no opinion is expressed herein as to the application of section 302 of the Labor Management Relations Act, 1947 or the Internal Revenue Code of 1954 (particularly the provisions of section 501(c)(9) of the Code).

[43 FR 58565, Dec. 15, 1978]

§ 2509.94–3 Interpretive bulletin relating to in-kind contributions to employee benefit plans.

(a) *General.* This bulletin sets forth the views of the Department of Labor (the Department) concerning in-kind contributions (*i.e.*, contributions of property other than cash) in satisfaction of an obligation to contribute to an employee benefit plan to which part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA) or a plan to which section 4975 of the Internal Revenue Code (the Code) applies. (For purposes of this document the term ''plan'' shall refer to either or both types of such entities as appropriate). Section 406(a)(1)(A) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange of any property between a plan and a ''party in interest'' as defined in section 3(14) of ERISA. The Code imposes a two-tier excise tax under section 4975(c)(1)(A) an any direct or indirect sale or exchange of any property between a plan and a ''disqualified person'' as defined in section 4975(e)(2) of the Code. An employer or employee organization that maintains a plan is included within the definitions of ''party in interest'' and ''disqualified person.''[1]

In *Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, ____ U.S. ____, 113 S. Ct. 2006 (1993), the Supreme Court held that an employer's contribution of unencumbered real property to a tax-qualified defined benefit pension plan was a sale or exchange prohibited under section 4975 of the Code where the stated fair market value of the property was credited against the employer's obligation to the defined benefit pension plan. The parties stipulated that the property was contributed to the plan free of encumbrances and the stated fair market value of the property was not challenged. 113 S. Ct. at 2009. In reaching its holding the Court construed section 4975(f)(3) of the Code (and therefore section 406(c) of ERISA), regarding transfers of encumbered property, not as a limitation but rather as extending the reach of section 4975(c)(1)(A) of the Code (and thus section 406(a)(1)(A) of ERISA) to include contributions of encumbered property that do not satisfy funding obligations. *Id.* at 2013. Accordingly, the Court concluded that the contribution of unencumbered property was prohibited under section 4975(c)(1)(A) of the Code (and thus section 406(a)(1)(A) of ERISA) as ''at least both an indirect type of sale and a form of exchange, since the property is exchanged for diminution of the employer's funding obligation.'' 113 S. Ct. at 2012.

(b) *Defined benefit plans.* Consistent with the reasoning of the Supreme Court in *Keystone*, because an employer's or plan sponsor's in-kind contribution to a defined benefit pension plan is credited to the plan's

[1] Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under the prohibited transactions provisions of section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Except with respect to the types of plans covered, the prohibited transaction provisions of section 406 of ERISA generally parallel the prohibited transaction of provisions of section 4975 of the Code.

funding standard account it would constitute a transfer to reduce an obligation of the sponsor or employer to the plan. Therefore, in the absence of an applicable exemption, such a contribution would be prohibited under section 406(a)(1)(A) of ERISA and section 4975(c)(1)(A) of the Code. Such an in-kind contribution would constitute a prohibited transaction even if the value of the contribution is in excess of the sponsor's or employer's funding obligation for the plan year in which the contribution is made and thus is not used to reduce the plan's accumulated funding deficiency for that plan year because the contribution would result in a credit against funding obligations which might arise in the future.

(c) *Defined contribution and welfare plans.* In the context of defined contribution pension plans and welfare plans, it is the view of the Department that an in-kind contribution to a plan that reduces an obligation of a plan sponsor or employer to make a contribution measured in terms of cash amounts would constitute a prohibited transaction under section 406(a)(1)(A) of ERISA (and section 4975(c)(1)(A) of the Code) unless a statutory or administrative exemption under section 408 of ERISA (or sections 4975(c)(2) or (d) of the Code) applies. For example, if a profit sharing plan required the employer to make annual contributions ''in cash or in kind'' equal to a given percentage of the employer's net profits for the year, an in-kind contribution used to reduce this obligation would constitute a prohibited transaction in the absence of an exemption because the amount of the contribution obligation is measured in terms of cash amounts (a percentage of profits) even though the terms of the plan purport to permit in-kind contributions.

Conversely, a transfer of unencumbered property to a welfare benefit plan that does not relieve the sponsor or employer of any present or future obligation to make a contribution that is measured in terms of cash amounts would not constitute a prohibited transaction under section 406(a)(1)(A) of ERISA or section 4975(c)(1)(A) of the Code. The same principles apply to defined contribution plans that are not subject to the minimum funding requirements of section 302 of ERISA or section 412 of the Code. For example, where a profit sharing or stock bonus plan, by its terms, is funded solely at the discretion of the sponsoring employer, and the employer is not otherwise obligated to make a contribution measured in terms of cash amounts, a contribution of unencumbered real property would not be a prohibited sale or exchange between the plan and the employer. If, however, the same employer had made an enforceable promise to make a contribution measured in terms of cash amounts to the plan, a subsequent contribution of unencumbered real property made to offset such an obligation would be a prohibited sale or exchange.

(d) *Fiduciary standards.* Independent of the application of the prohibited transaction provisions, fiduciaries of plans covered by part 4 of title I of ERISA must determine that acceptance of an in-kind contribution is consistent with ERISA's general standards of fiduciary conduct. It is the view of the Department that acceptance of an in-kind contribution is a fiduciary act subject to section 404 of ERISA. In this regard, sections 406(a)(1)(A) and (B) of ERISA require that fiduciaries discharge their duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable administrative expenses, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. In addition, section 406(a)(1)(C) requires generally that fiduciaries diversify plan assets so as to minimize the risk of large losses. Accordingly, the fiduciaries of a plan must act ''prudently,'' ''solely in the interest'' of the plan's participants and beneficiaries and with a view to the need to diversify plan assets when deciding whether to accept in-kind contributions. If accepting an in-kind contribution is not ''prudent,'' not ''solely in the interest'' of the participants and beneficiaries of the plan, or would result in an improper lack of diversification of plan assets, the responsible fiduciaries of the plan would be liable for any losses resulting from such a breach of fiduciary responsibility, even if a contribution in kind does not constitute a prohibited transaction under section 406 of ERISA. In this regard, a fiduciary should consider any liabilities appurtenant to the in-kind contribution to which the plan would be exposed as a result of acceptance of the contribution.

[59 FR 66736, Dec. 28, 1994]

§ 2509.95–1 Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104–1114, applicable to the selection of an annuity provider for the purpose of benefit distributions from a defined benefit pension plan (hereafter ''pension plan'') when the pension plan intends to transfer liability for benefits to an annuity