§ 2509.75–9 Interpretive bulletin relating to guidelines on independence of accountant retained by Employee Benefit Plan.

The Department of Labor today announced guidelines for determining when a qualified public accountant is independent for purposes of auditing and rendering an opinion on the financial information required to be included in the annual report filed with the Department.

Section 103(a)(3)(A) requires that the accountant retained by an employee benefit plan be ''independent'' for purposes of examining plan financial information and rendering an opinion on the financial statements and schedules required to be contained in the annual report.

Under the authority of section 103(a)(3)(A) the Department of Labor will not recognize any person as an independent qualified public accountant who is in fact not independent with respect to the employee benefit plan upon which that accountant renders an opinion in the annual report filed with the Department of Labor. For example, an accountant will not be considered independent with respect to a plan if:

(1) During the period of professional engagement to examine the financial statements being reported, at the date of the opinion, or during the period covered by the financial statements, the accountant or his or her firm or a member thereof had, or was committed to acquire, any direct financial interest or any material indirect financial interest in such plan, or the plan sponsor, as that term is defined in section 3(16)(B) of the Act.

(2) During the period of professional engagement to examine the financial statements being reported, at the date of the opinion, or during the period covered by the financial statements, the accountant, his or her firm or a member thereof was connected as a promoter, underwriter, investment advisor, voting trustee, director, officer, or employee of the plan or plan sponsor except that a firm will not be deemed not independent in regard to a particular plan if a former officer or employee of such plan or plan sponsor is employed by the firm and such individual has completely disassociated himself from the plan or plan sponsor and does not participate in auditing financial statements of the plan covering any period of his or her employment by the plan or plan sponsor. For the purpose of this bulletin the term ''member'' means all partners or shareholder employees in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit;

(3) An accountant or a member of an accounting firm maintains financial records for the employee benefit plan.

However, an independent, qualified public accountant may permissably engage in or have members of his or her firm engage in certain activities which will not have the effect of removing recognition of his or her independence. For example, (1) an accountant will not fail to be recognized as independent if at or during the period of his or her professional engagement with the employee benefit plan the accountant or his or her firm is retained or engaged on a professional basis by the plan sponsor, as that term is defined in section 3(16)(B) of the Act. However, to retain recognition of independence under such circumstances the accountant must not violate the prohibitions against recognition of independence established under paragraphs (1), (2) or (3) of this interpretive bulletin; (2) the rendering of services by an actuary associated with an accountant or accounting firm shall not impair the accountant's or accounting firm's independence. However, it should be noted that the rendering of services to a plan by an actuary and accountant employed by the same firm may constitute a prohibited transaction under section 406(a)(1)(C) of the Act. The rendering of such multiple services to a plan by a firm will be the subject of a later interpretive bulletin that will be issued by the Department of Labor.

In determining whether an accountant or accounting firm is not, in fact, independent with respect to a particular plan, the Department of Labor will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant or accounting firm and that of the plan sponsor or any affiliate thereof, and will not confine itself to the relationships existing in connection with the filing of annual reports with the Department of Labor.

Further interpretive bulletins may be issued by the Department of Labor concerning the question of independence of an accountant retained by an employee benefit plan.

[40 FR 53998, Nov. 20, 1975, as amended at 40 FR 59728, Dec. 30, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976]

§ 2509.75–10 Interpretive bulletin relating to the ERISA Guidelines and the Special Reliance Procedure.

On November 5, 1975, the Department of Labor (the ''Department'') and the Internal Revenue Service (the ''Service'') announced the publication of a compendium of authoritative rules (hereinafter referred to as the ''ERISA Guidelines'') relating to ERISA requirements. *See* T.I.R. No. 1415 (November 5, 1975) issued by the Service. These rules were published in recognition of the need to provide an immediate and complete set of interim guidelines to facilitate (1) adoption of

new employee pension benefit plans (hereinafter referred to as ''plans''), and (2) prompt amendment of existing plans, in conformance with the applicable requirements of the Employee Retirement Income Security Act of 1974 (''ERISA'') pending the issuance of final regulations or other rules. These rules govern the application of (1) the qualification requirements of the Internal Revenue Code of 1954 (the ''Code'') added or amended by ERISA, and (2) the requirements of the provisions of parts 2 and 3 of title I of ERISA paralleling such qualification requirements (both such sets of requirements hereinafter referred to collectively as the ''new qualification requirements'').

The ERISA Guidelines incorporate by reference the documents relating to the new qualification requirements heretofore published by the Department and by the Service as temporary or proposed regulations, revenue rulings, revenue procedures, questions and answers, technical information releases, and other issuances. The ERISA Guidelines also incorporate additional documents published on November 5, 1975, or to be published forthwith, which are necessary to complete the interim guidelines relating to the new qualification requirements. See the schedule set forth below for a complete list and brief description of the documents comprising the ERISA Guidelines.

The Department and the Service emphasized that the ERISA Guidelines constitute the entire set of interim rules of the Department and the Service for satisfying the new qualification requirements, and thus provide authoritative guidance in respect of the new statutory requirements bearing on qualification. These rules are applicable to individually designed plans and to multiemployer (or other multiple employer) plans, and may be relied upon until amended or supplemented by final regulations or other rules. Moreover, the Department and the Service announced that any provisions of final regulations or other rules which amend or supplement the rules contained in the ERISA Guidelines will generally be prospective only, from the date of publication. Further, in the case of employee plan provisions adopted or amended before the date of such publication which satisfy the ERISA Guidelines, such final regulations or other rules will generally be made effective for plan years commencing after such date, except in unusual circumstances.

The Service further announced that the ERISA Guidelines incorporate the procedures that will enable employers to obtain determination letters as to the qualification of pension, annuity, profit sharing, stock bonus and bond purchase plans which satisfy the requirements of sections 401(a), 403(a) and 405(a) of the Code, as amended by ERISA. The Service also pointed out that the ERISA Guidelines will enable sponsors of master and prototype plans (whether newly established or amended) to obtain opinion letters as to the acceptability of the form of such plans, and further, that employers who establish plans designed to meet the requirements of section 301(d) of the Tax Reduction Act of 1975 (relating to employee stock ownership plans) will be able to obtain determination letters as to the acceptability of such plans (whether or not such plans are intended to be qualified).

To facilitate further the adoption of new plans and the prompt amendment of existing plans in conformance with the new qualification requirements, the Service announced on November 5, 1975, the adoption of a special procedure (hereinafter referred to as the ''Special Reliance Procedure'') pursuant to which the adoption, on or before May 30, 1976, of new plans and amendments of existing plans may be effectuated with full reliance upon the rules which comprise the ERISA Guidelines and without regard to any amendment or supplementation of such rules before such date. Therefore, except in unusual circumstances (described in Technical Information Release No. 1416 (November 5, 1975)), plans which comply with the Special Reliance Procedure shall generally be considered by the Service as satisfying the qualification requirements of the Code added or amended by ERISA for plan years commencing on or before December 31, 1976, to which such requirements are applicable, notwithstanding the date when final regulations or other rules hereafter published which amend or supplement the rules comprising the ERISA Guidelines may otherwise be made effective. Reference is hereby made to Technical Information Release No. 1416 (November 5, 1975) for a description of the Special Reliance Procedure.

The Department announced that plans which comply with the Special Reliance Procedure will be considered by the Department as satisfying the requirements of the provisions of parts 2 and 3 of title I of ERISA which parallel the qualification requirements of the Code added or amended by ERISA to the same extent as such plans are considered by the Service as satisfying, in accordance with the terms of the Special Reliance Procedure, such qualification requirements.

The availability of the Special Reliance Procedure will substantially diminish the occasions for plans to avail themselves of the right to satisfy, for tax purposes, the qualification requirements of the Code (added or amended by ERISA) by retroactive amendments adopted during or after the close of a plan year, in accordance with section 401(b) of the Code and the temporary regulations thereunder. The Department pointed out that no explicit parallel provision to section 401(b) of the Code is contained in title I of

ERISA. Nevertheless, to the extent retroactive amendments to a plan are made to satisfy the requirements of parts 2 and 3 of title I of ERISA which parallel the qualification requirements of the Code added or amended by ERISA, the Department noted that such plan will be in compliance with such requirements if such an amendment designed to satisfy such requirements (1) is adopted by the end of the plan year to which such requirements are applicable, and (2) is made effective for all purposes for such entire plan year.

The schedule of documents comprising the ERISA Guidelines follows.

ERISA GUIDELINES—SCHEDULE OF DOCUMENTS

Publication date 1975	Document	Subject	Code and ERISA sections
Jan. 8	TIR 1334	Questions and answers relating to defined contribution plans subject to ERISA.	410, 411, et al.
Apr. 21	40 FR 17576	Notice of proposed rulemaking: Qualification (and other aspects) of HR–10 plans.	401(c), 401(d), 401(e), 46, 50A, 72, 404(e), 901, and 1379.
June 4	T.D. 7358	Temporary regulations: Notification of interested parties.	7476.
July 14	T.D. 7367	Temporary regulations: Notice of determination of qualification.	7476.
Sept. 8	40 FR 41654	Department of Labor—Minimum standards for hours of service, years of service, and breaks in service relating to participation, vesting, and accrual of benefits.	401(a)(3)(B), 411(a)(5)(C), and ERISA secs. 202, 203, and 204.
Sept. 17	TIR 1403	Questions and answers relating mainly to defined benefit plans subject to ERISA (addition to TIR 1334).	410, 411, et al.
Sept. 18	40 FR 43034	Notice of proposed rulemaking: Definitions of multi-employer plan and plan administrator.	414(f) and (g).
Sept. 29	T.D. 7377	Temporary regulations: Certain retroactive amendments of employee plans.	401(b).
Oct. 3	T.D. 7379	Temporary regulations: Qualified joint and survivor annuities.	401(a)(11).
	T.D. 7380	Temporary regulations: Minimum participation standards.	410.
Oct. 8	T.D. 7381	Temporary regulations: Commencement of benefits.	401(a)(14).
Oct. 15	T.D. 7382	Temporary regulations: Requirement that benefits under a qualified plan are not decreased on account of certain social security increases.	401(a)(15).
Oct. 16	T.D. 7383	Temporary regulations: Nonbank trustees of pension and profit sharing trusts benefiting owner-employees.	401(d)(1).
	40 FR 48517	Notice of proposed rulemaking: Certain custodial accounts.	401(f).
Oct. 30	TIR 1408	Questions and answers relating to mergers, consolidations, etc.	401(a)(12) and 414(1).
Nov. 3	Rev. Rul. 75–480, 1975–44 IRB.	Updating of Rev. Rul. 71–446 to reflect changes mandated by ERISA.	401(a)(5).
	Rev. Rul. 75–481, 1975–44 IRB.	Guidelines for determining whether contributions or benefits under plan satisfy the limitations of sec. 415 of the code.	401(a)(16) and 415.
	TIR 1411, Rev. Proc. 75–49, 1975–48 IRB.	Vesting and discrimination	401(a)(4) and 411(d)(1).
Nov. 4	TIR 1413	Questions and answers relating to employee stock ownership plans.	401, 4975, and sec. 301(d) of the Tax Reduction Act of 1975.
Nov. 5	T.D. 7387	Temporary regulations on minimum vesting standards.	411.
	T.D. 7388	Controlled groups, businesses under common control, etc.	414(b) and (c).
(1)	TIR	Nonforfeiture of employee derived accrued benefit upon death.	411(a)(1).
(1)		Department of Labor—Interpretive bulletin: Definition of seasonal industries.	410(a)(3)(B), 411(a)(5)(C), and ERISA secs. 202(a)(3)(C), 203(b)(2)(C).
Nov. 7	40 FR 52008	Department of Labor—additional requirements applicable to definition of multiemployer plan.	414(f) and ERISA sec. 3(37).
(1)		Department of Labor—suspension of benefits upon reemployment of retiree.	411(a)(3)(B) and ERISA sec. 203(a)(3)(A).
Dec. 3	TIR 1422	Assignment or alienation of plan benefits	401(a)(13).

ERISA GUIDELINES—SCHEDULE OF DOCUMENTS—Continued

Publication date 1975	Document	Subject	Code and ERISA sections
Dec. 9	TIR 1424, Rev. Proc. 76–1, 1976–1 IRB..	Vesting and discrimination	401(a)(4) and 411(d)(1).
(1)	TIR, Rev. Rul	Appropriate conversion factor	411(c)(2)(B)(ii).

[1] To be published forthwith.

[41 FR 3289, Jan. 22, 1976]

§ 2509.78–1 Interpretive bulletin relating to payments by certain employee welfare benefit plans.

The Department of Labor today announced its interpretation of certain provisions of part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), as those sections apply to a payment by multiple employer vacation plans of a sum of money to which a participant of beneficiary of the plan is entitled to a party other than the participant or beneficiary.[1]

Section 402(b)(4) of ERISA requires every employee benefit plan to specify the basis on which payments are made to and from the plan.

Section 403(c)(1) of ERISA generally requires the assets of an employee benefit plan to be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries[2] and defraying reasonable expenses of administering the plan. Similarly, section 404(a)(1)(A) requires a plan fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries of the plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1)(D) further requires the fiduciary to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of title I of ERISA.

In addition, section 406(a) of ERISA specifically prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes, *inter alia*, a direct or indirect: furnishing of goods, services or facilities between the plan and a party in interest (section 406(a)(1)(C)); or transfer to, or use by or for the benefit of, a party in interest of any assets of the plan (section 406(a)(1)(D)). Section 406(b)(2) of ERISA prohibits a plan fiduciary from acting in any transaction involving the plan on behalf of a party, or representing a party, whose interests are adverse to the interests of the plan or of its participants or beneficiaries.

In this regard, however, Prohibited Transaction Exemptions 76–1, Part C, (41 FR 12740, March 26, 1976) and 77–10 (42 FR 33918, July 1, 1977) exempt from the prohibitions of section 406(a) and 406(b)(2), respectively, the provision of administrative services by a multiple employer plan if specified conditions are met. These conditions are: (a) the plan receives reasonable compensation for the provision of the services (for purposes of the exemption, ''reasonable compensation'' need not include a profit which would ordinarily have been received in an arm's length transaction, but must be sufficient to reimburse the plan for its costs); (b) the arrangement allows any multiple employer plan which is a party to the transaction to terminate the relationship on a reasonably short notice under the circumstances; and (c) the plan complies with certain recordkeeping requirements. It should be noted that plans not subject to Prohibited Transaction Exemptions 76–1 and 77–10—i.e., plans that are not multiple employer plans—cannot rely upon these exemptions.

A payment by a vacation plan of all or any portion of benefits to which a plan participant or beneficiary is entitled to a party other than the participant or beneficiary will comply with the above-mentioned sections of ERISA if the arrangement pursuant to which payments are made does not constitute a prohibited transaction under ERISA and:

(1) The plan documents expressly state that benefits payable under the plan to a participant or beneficiary may, at the direction of the participant or beneficiary, be paid to a third party rather than to the participant or beneficiary;

[1] Multiple employer vacation plans generally consist of trust funds to which employers are obligated to make contributions pursuant to collective bargaining agreements. Benefits are generally paid at specified intervals (usually annually or semi-annually) and such benefits are neither contingent upon the occurrence of a specified event nor restricted to use for a specified purpose when paid to the participant.

[2] Section 403 (c) and (d) provide certain exceptions to this requirement, not here relevant.