SUBCHAPTER A—GENERAL

PARTS 2500–2508 [RESERVED]

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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§2509.2016–01 Interpretive Bulletin relating to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.

AUTHORITY: 29 U.S.C. 1135. Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

§2509.75–2 Interpretive bulletin relating to prohibited transactions.

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75–2, with respect to whether a party in interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested.

On November 13, 1986 the Department published a final regulation dealing with the definition of ''plan assets''. See §2510.3–101 of this title. Under that regulation, the assets of certain entities in which plans invest would include ''plan assets'' for purposes of the fiduciary responsibility provisions of the Act. Section 2510.3–101 applies only for purposes of identifying plan assets on or after the effective date of that section, however, and §2510.3–101 does not apply to plan investments in certain entities that qualify for the transitional relief provided for in paragraph (k) of that section. The principles discussed in paragraph (a) of this Interpretive Bulletin continue to be applicable for purposes of identifying assets of a plan for periods prior to the effective date of §2510.3–101 and for investments that are subject to the transitional rule in §2510.3–101(k). Paragraphs (b) and (c) of this Interpretive Bulletin, however, relate to matters outside the scope of §2510.3–101, and nothing in that section affects the continuing application of the principles discussed in those parts.

(a) *Principles applicable to plan investments to which §2510.3–101 does not apply*. Generally, investment by a plan in securities (within the meaning of section 3(20) of the Employee Retirement Income Security Act of 1974) of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity ''plan assets'' and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.

For example, where a plan acquires a security of a corporation or a limited partnership interest in a partnership, a subsequent lease or sale of property between such corporation or partnership and a party in interest will not be a prohibited transaction solely by reason of the plan's investment in the corporation or partnership.

This general proposition, as applied to corporations and partnerships, is consistent with section 401(b)(1) of the Act, relating to plan investments in investment companies registered under the Investment Company Act of 1940. Under section 401(b)(1), an investment by a plan in securities of such an investment company may be made without causing, solely by reason of such investment, any of the assets of the investment company to be considered to be assets of the plan.

(b) [Reserved]

(c) *Applications of the fiduciary responsibility rules.* The preceding paragraphs do not mean that an investment of plan assets in a security of a corporation or partnership may not be a prohibited transaction. For example, section 406(a)(1)(D) prohibits the direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan and section 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan in his own interest or for his own account.

Thus, for example, if there is an arrangement under which a plan invests in, or retains its investment in, an investment company and as part of the arrangement it is expected that the investment company will purchase securities from a party in interest, such arrangement is a prohibited transaction.

Similarly, the purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.

Moreover, notwithstanding the foregoing, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

Similarly, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if such party in interest, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest may, with the aid of the plan but without the aid of any other persons, require the corporation or partnership to engage in such a transaction. However, the preceding sentence does not apply if the parties in interest engaging in the transaction, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest, may, by themselves, require the corporation or partnership to engage in the transaction.

Further, the Department of Labor emphasizes that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act.

[51 FR 41280, Nov. 13, 1986, as amended at 61 FR 33849, July 1, 1996]

§ 2509.75–3 Interpretive bulletin relating to investments by employee benefit plans in securities of registered investment companies.

On March 12, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75–3, with regard to its interpretation of section 3(21)(B) of the Employee Retirement Income Security Act of 1974. That section provides that an investment by an employee benefit plan in securities issued by an investment company registered under the Investment Company Act of 1940 shall not by itself cause the investment company, its investment adviser or principal underwriter to be deemed to be a fiduciary or party in interest ''except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter.''

The Department of Labor interprets this section as an elaboration of the principle set forth in section 401(b)(1) of the Act and ERISA IB 75–2 (issued February 6, 1975) that the assets of an investment company shall not be deemed to be assets of a plan solely by reason of an investment by such plan in the shares of such investment company. Consistent with this principle, the Department of Labor interprets this section to mean that a person who is connected with an investment company, such as the investment company itself, its investment adviser or its principal underwriter, is not to be deemed to be a fiduciary of or party in interest with respect to a plan solely because the plan has invested in the investment company's shares.

This principle applies, for example, to a plan covering employees of an investment adviser to an investment company where the plan invests in the securities of the investment company. In such a case the investment company or its principal underwriter is not to be deemed to be a fiduciary of or party in interest with respect to the plan solely because of such investment.

On the other hand, the exception clause in section 3(21) emphasizes that if an investment company, its investment adviser or its principal underwriter is a fiduciary or party

in interest for a reason other than the investment in the securities of the investment company, such a person remains a party in interest or fiduciary. Thus, in the preceding example, since an employer is a party in interest, the investment adviser remains a party in interest with respect to a plan covering its employees.

The Department of Labor emphasized that an investment adviser, principal underwriter or investment company which is a fiduciary by virtue of section 3(21)(A) of the Act is subject to the fiduciary responsibility provisions of part 4 of title I of the Act, including those relating to fiduciary duties under section 404.

[40 FR 31599, July 28, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976]

§ 2509.75–4 Interpretive bulletin relating to indemnification of fiduciaries.

On June 4, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75–4, announcing the Department's interpretation of section 410(a) of the Employee Retirement Income Security Act of 1974, insofar as that section relates to indemnification of fiduciaries. Section 410(a) states, in relevant part, that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."

The Department of Labor interprets this section to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under part 4 of title I. Indemnification provisions which leave the fiduciary fully responsible and liable, but merely permit another party to satisfy any liability incurred by the fiduciary in the same manner as insurance purchased under section 410(b)(3), are therefore not void under section 410(a).

Examples of such indemnification provisions are:

(1) Indemnification of a plan fiduciary by (a) an employer, any of whose employees are covered by the plan, or an affiliate (as defined in section 407(d)(7) of the Act) of such employer, or (b) an employee organization, any of whose members are covered by the plan; and

(2) Indemnification by a plan fiduciary of the fiduciary's employees who actually perform the fiduciary services.

The Department of Labor interprets section 410(a) as rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan. Such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations.

While indemnification arrangements do not contravene the provisions of section 410(a), parties entering into an indemnification agreement should consider whether the agreement complies with the other provisions of part 4 of title I of the Act and with other applicable laws.

[40 FR 31599, July 28, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976]

§ 2509.75–5 Questions and answers relating to fiduciary responsibility.

On June 25, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75–5, containing questions and answers relating to certain aspects of the recently enacted Employee Retirement Income Security Act of 1974 (the "Act").

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretative bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

An index of the questions and answers, relating them to the appropriate sections of the Act, is also provided.

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KEY TO QUESTION PREFIXES

D—Refers to Definitions.

FR—Refers to Fiduciary Responsibility.

Section No.	Question No.
3(21)	D–1.
3(38)	FR–6, FR–7.
402(a)	FR–1, FR–2, FR–3.
402(b)(1)	FR–4, FR–5.
402(c)(3)	FR–6, FR–7.
404(a)	FR–10.
405(a)(3)	FR–10.
405(b)(1)(A)	FR–10.
406(a)	FR–9.
409(a)	FR–10.
412(a)	FR–8, FR–9.

D–1 Q: Is an attorney, accountant, actuary or consultant who renders legal, accounting, actuarial or consulting services to an employee benefit plan (other than an investment adviser to the plan) a fiduciary to the plan solely by virtue of the rendering of such

services, absent a showing that such consultant (a) exercises discretionary authority or discretionary control respecting the management of the plan, (b) exercises authority or control respecting management or disposition of the plan's assets, (c) renders investment advice for a fee, direct or indirect, with respect to the assets of the plan, or has any authority or responsibility to do so, or (d) has any discretionary authority or discretionary responsibility in the administration of the plan?

A: No. However, while attorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries, if the factual situation in a particular case falls within one of the categories described in clauses (a) through (d) of this question, such persons would be considered to be fiduciaries within the meaning of section 3(21) of the Act. The Internal Revenue Service notes that such persons would also be considered to be fiduciaries within the meaning of section 4975(e)(3) of the Internal Revenue Code of 1954.

FR–1 Q: If an instrument establishing an employee benefit plan provides that the plan committee shall control and manage the operation and administration of the plan and specifies who shall constitute the plan committee (either by position or by naming individuals to the committee), does such provision adequately satisfy the requirement in section 402(a) that a ''named fiduciary'' be provided for in a plan instrument?

A: Yes. While the better practice would be to state explicitly that the plan committee is the ''named fiduciary'' for purposes of the Act, clear identification of one or more persons, by name or title, combined with a statement that such person or persons have authority to control and manage the operation and administration of the plan, satisfies the ''named fiduciary'' requirement of section 402(a). The purpose of this requirement is to enable employees and other interested persons to ascertain who is responsible for operating the plan. The instrument in the above example, which provides that ''the plan committee shall control and manage the operation and administration of the plan'', and specifies, by name or position, who shall constitute the committee, fulfills this requirement.

FR–2 Q: In a union negotiated employee benefit plan, the instrument establishing the plan provides that a joint board on which employees and employers are equally represented shall control and manage the operation and administration of the plan. Does this provision adequately satisfy the requirement in section 402(a) that a ''named fiduciary'' be provided for in a plan instrument?

A: Yes, for the reasons stated in response to question FR–1. The joint board is clearly identified as the entity which has authority to control and manage the operation and administration of the plan, and the persons designated to be members of such joint board would be named fiduciaries under section 402(a).

FR–3 Q: May an employee benefit plan covering employees of a corporation designate the corporation as the ''named fiduciary'' for purposes of section 402(a)(1) of the Act?

A: Yes, it may. Section 402(a)(2) of the Act states that a ''named fiduciary'' is a fiduciary either named in the plan instrument or designated according to a procedure set forth in the plan instrument. A fiduciary is a ''person'' falling within the definition of fiduciary set forth in section 3(21)(A) of the Act. A ''person'' may be a corporation under the definition of person contained in section 3(9) of the Act. While such designation satisfies the requirement of enabling employees and other interested persons to ascertain the person or persons responsible for operating the plan, a plan instrument which designates a corporation as ''named fiduciary'' should provide for designation by the corporation of specified individuals or other persons to carry out specified fiduciary responsibilities under the plan, in accordance with section 405(c)(1)(B) of the Act.

FR–4 Q: A defined benefit pension plan's procedure for establishing and carrying out a funding policy provides that the plan's trustees shall, at a meeting duly called for the purpose, establish a funding policy and method which satisfies the requirements of part 3 of title I of the Act, and shall meet annually at a stated time of the year to review such funding policy and method. It further provides that all actions taken with respect to such funding policy and method and the reasons therefor shall be recorded in the minutes of the trustees' meetings. Does this procedure comply with section 402(b)(1) of the Act?

A: Yes. The above procedure specifies who is to establish the funding policy and method for the plan, and provides for a written record of the actions taken with respect to such funding policy and method, including the reasons for such actions. The purpose of the funding policy requirement set forth in section 402(b)(1) is to enable plan participants and beneficiaries to ascertain that the plan has a funding policy that meets the requirements of part 3 of title I of the Act. The procedure set forth above meets that requirement.

FR–5 Q: Must a welfare plan in which the benefits are paid out of the general assets of the employer have a procedure for establishing and carrying out a funding policy set forth in the plan instrument?

A: No. Section 402(b)(1) requires that the plan provide for such a procedure ''consistent with the objectives of the plan'' and requirements of title I of the Act. In situations in which a plan is unfunded and title I

of the Act does not require the plan to be funded, there is no need to provide for such a procedure. If the welfare plan were funded, a procedure consistent with the objectives of the plan would have to be established.

FR–6 Q: May an investment adviser which is neither a bank nor an insurance company, and which is neither registered under the Investment Advisers Act of 1940 nor registered as an investment adviser in the State where it maintains its principal office and place of business, be appointed an investment manager under section 402(c)(3) of the Act?

A: No. The only persons who may be appointed an investment manager under section 402(c)(3) of the Act are persons who meet the requirements of section 3(38) of the Act—namely, banks (as defined in the Investment Advisers Act of 1940), insurance companies qualified under the laws of more than one state to manage, acquire and dispose of plan assets, persons registered as investment advisers under the Investment Advisers Act of 1940, or persons not registered under the Investment Advisers Act by reason of paragraph 1 of section 203A(a) of that Act who are registered as investment advisers in the State where they maintain their principal office and place of business in accordance with ERISA section 3(38) and who have met the filing requirements of 29 CFR 2510.3–38.

FR–7 Q: May an investment adviser that has a registration application pending for federal registration under the Investment Advisers Act of 1940, or pending with the appropriate state regulatory body under State investment adviser registration laws if relying on the provisions of 29 CFR 2510.3–38 to qualify as a state-registered investment manager, function as an investment manager under the Act prior to the effective date of their federal or state registration?

A: No, for the reasons stated in the answer to FR–6 above.

FR–8 Q: Under the temporary bonding regulation set forth in 29 CFR 2550.412–1, must a person who renders investment advice to a plan for a fee or other compensation, direct or indirect, but who does not exercise or have the right to exercise discretionary authority with respect to the assets of the plan, be bonded solely by reason of the provision of such investment advice?

A: No. A person who renders investment advice, but who does not exercise or have the right to exercise discretionary authority with respect to plan assets, is not required to be bonded solely by reason of the provision of such investment advice. Such a person is not considered to be "handling" funds within the meaning of the temporary bonding regulation set forth in 29 CFR 2550.412–1, which incorporates by reference 29 CFR 464.7. For purposes of the temporary bonding regulation, only those fiduciaries who handle funds must be bonded. If, in addition to the rendering of investment advice, such person performs any additional function which constitutes the handling of plan funds under 29 CFR 464.7, the person would have to be bonded.

FR–9 Q: May an employee benefit plan purchase a bond covering plan officials?

A: Yes. The bonding requirement, which applies, with certain exceptions, to every plan official under section 412(a) of the Act, is for the protection of the plan and does not benefit any plan official or relieve any plan official of any obligation to the plan. The purchase of such bond by a plan will not, therefore, be considered to be in contravention of sections 406(a) or (b) of the Act.

FR–10 Q: An employee benefit plan is considering the construction of a building to house the administration of the plan. One trustee has proposed that the building be constructed on a cost plus basis by a particular contractor without competitive bidding. When the trustee was questioned by another trustee as to the basis of choice of the contractor, the impact of the building on the plan's administrative costs, whether a cost plus contract would yield a better price to the plan than a fixed price basis, and why a negotiated contract would be better than letting the contract for competitive bidding, no satisfactory answers were provided. Several of the trustees have argued that letting such a contract would be a violation of their general fiduciary responsibilities. Despite their arguments, a majority of the trustees appear to be ready to vote to construct the building as proposed. What should the minority trustees do to protect themselves from liability under section 409(a) of the Act and section 405(b)(1)(A) of the Act?

A: Here, where a majority of trustees appear ready to take action which would clearly be contrary to the prudence requirement of section 404(a)(1)(B) of the Act, it is incumbent on the minority trustees to take all reasonable and legal steps to prevent the action. Such steps might include preparations to obtain an injunction from a Federal District court under section 502(a)(3) of the Act, to notify the Labor Department, or to publicize the vote if the decision is to proceed as proposed. If, having taken all reasonable and legal steps to prevent the imprudent action, the minority trustees have not succeeded, they will not incur liability for the action of the majority. Mere resignation, however, without taking steps to prevent the imprudent action, will not suffice to avoid liability for the minority trustees once they have knowledge that the imprudent action is under consideration.

More generally, trustees should take great care to document adequately all meetings where actions are taken with respect to management and control of fplan assets. Written minutes of all actions taken should be kept describing the action taken, and

stating how each trustee voted on each matter. If, as in the case above, trustees object to a proposed action on the grounds of possible violation of the fiduciary responsibility provisions of the Act, the trustees so objecting should insist that their objections and the responses to such objections be included in the record of the meeting. It should be noted that, where a trustee believes that a cotrustee has already committed a breach, resignation by the trustee as a protest against such breach will not generally be considered sufficient to discharge the trustee's positive duty under section 405(a)(3) to make reasonable efforts under the circumstances to remedy the breach.

[40 FR 31599, July 28, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976; 69 FR 52125, Aug. 24, 2004]

§ 2509.75–6 Interpretive bulletin relating to section 408(c)(2) of the Employee Retirement Income Security Act of 1974.

The Department of Labor today announced guidelines for determining when a party in interest with respect to an employee benefit plan may receive an advance for expenses to be incurred on behalf of the plan without engaging in a transaction prohibited by section 406 of the Employee Retirement Income Security Act of 1974. That section prohibits, among other things, any lending of money from a plan to a party in interest, or transfer to, or use by or for the benefit of, a party in interest of any assets of the plan, as well as any act whereby a fiduciary deals with the assets of a plan in his own interest or for his own account.

However, section 408(c)(2) of the Act provides that nothing in section 406 of the Act shall be construed to prohibit the reimbursement by a plan of expenses properly and actually incurred by a fiduciary in the performance of his duties with the plan. Questions have arisen under section 408(c)(2) of the Act as to whether a plan may reimburse a party in interest in the performance of his duties with the plan and as to whether a plan might make an advance to a fiduciary or other party in interest for expenses to be incurred in the future.

The Department of Labor views the relevant provisions of section 408(c)(2) as clarifying the scope of section 406 so as to permit reimbursement of fiduciaries for expenses incurred in the performance of their duties with a plan. Similarly, consistent with section 408(c)(2), section 406 is construed to permit the reimbursement by the plan of expenses properly and actually incurred by a party in interest in the performance of his duties with the plan.

If a plan makes an advance to a fiduciary or other party in interest to cover expenses to be properly and actually incurred by such person in the performance of his duties with the plan, a prohibited transaction within the meaning of section 406 shall not occur when the plan makes the advance if—

(a) The amount of such advance is reasonable with respect to the amount of the expense which is likely to be properly and actually incurred in the immediate future (such as during the next month), and

(b) The party in interest accounts to the plan at the end of the period covered by the advance for the expenses actually incurred (whether computed on the basis of actual expenses incurred or on the basis of actual transportation costs plus a reasonable per diem allowance, where appropriate).

It should be noted, however, that despite the reasonableness of the amount of the advance and of the expenses underlying it, the question of whether incurring such expenses was prudent, and thus whether the advance was for reasonable expenses, is to be judged pursuant to section 404 of the Act (relating to fiduciary responsibilities).

[40 FR 31755, July 29, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976]

§ 2509.75–8 Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.

The Department of Labor today issued questions and answers relating to certain aspects of fiduciary responsibility under the Act, thereby supplementing ERISA IB 75–5 (29 CFR 2555.75–5) which was issued on June 24, 1975, and published in the FEDERAL REGISTER on July 28, 1975 (40 FR 31598).

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretive bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

An index of the questions and answers, relating them to the appropriate sections of the Act, is also provided.

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Key to question prefixes: D—refers to definitions; FR—refers to fiduciary responsibility.

Section No.	Question No.
3(21)(A)	D–2, D–3, D–4, D–5.
3(38)	FR–15.
402(c)(1)	FR–12.
402(c)(2)	FR–15.
402(c)(3)	FR–15.
403(a)(2)	FR–15.
404(a)(1)(B)	FR–11, FR–17.
405(a)	FR–13, FR–14, FR–16.
405(c)(1)	FR–12, FR–15.
405(c)(2)	D–4, FR–13, FR–14, FR–16.
412	D–2.

NOTE: Questions D–2, D–3, D–4, and D–5 relate to not only section 3(21)(A) of title I of the Act, but also section 4975(e)(3) of the Internal Revenue Code (section 2003 of the Act). The Internal Revenue Service has indicated its concurrence with the answers to these questions.

D–2 Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:

(1) Application of rules determining eligibility for participation or benefits;

(2) Calculation of services and compensation credits for benefits;

(3) Preparation of employee communications material;

(4) Maintenance of participants' service and employment records;

(5) Preparation of reports required by government agencies;

(6) Calculation of benefits;

(7) Orientation of new participants and advising participants of their rights and options under the plan;

(8) Collection of contributions and application of contributions as provided in the plan;

(9) Preparation of reports concerning participants' benefits;

(10) Processing of claims; and

(11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

However, although such a person may not be a plan fiduciary, he may be subject to the bonding requirements contained in section 412 of the Act if he handles funds or other property of the plan within the meaning of applicable regulations.

The Internal Revenue Service notes that such persons would not be considered plan fiduciaries within the meaning of section 4975(e)(3) of the Internal Revenue Code of 1954.

D–3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, be the very nature of his position, have "discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries.

Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act. For example, a plan might designate as a "benefit supervisor" a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula contained in the written instrument pursuant to which the plan is maintained. The benefit supervisor, after calculating the benefits, would then inform the plan administrator of the results of his calculations, and the plan administrator would authorize the payment of benefits to a particular plan participant. The benefit supervisor does not perform any of the functions described in section 3(21)(A) of the Act and is not, therefore, a plan fiduciary. However, the plan might designate as a "benefit supervisor" a plan employee who has the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits. Under these circumstances, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A) of the Act.

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

D–4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addition, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c)(2).

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

D–5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in section 3(21)(A) of the Act?

A: No, for the reasons stated in response to question D–2.

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

FR–11 Q: In discharging fiduciary responsibilities, may a fiduciary with respect to a plan rely on information, data, statistics or analyses provided by other persons who perform purely ministerial functions for such plan, such as those persons described in D–2 above?

A: A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

FR–12 Q: How many fiduciaries must an employee benefit plan have?

A: There is no required number of fiduciaries that a plan must have. Each plan must, of course, have at least one named fiduciary who serves as plan administrator and, if plan assets are held in trust, the plan must have at least one trustee. If these requirements are met, there is no limit on the number of fiduciaries a plan may have. A plan may have as few or as many fiduciaries as are necessary for its operation and administration. Under section 402(c)(1) of the Act, if the plan so provides, any person or group of persons may serve in more than one fiduciary capacity, including serving both as trustee and administrator. Conversely, fiduciary responsibilities not involving management and control of plan assets may, under section 405(c)(1) of the Act, be allocated among named fiduciaries and named fiduciaries may designate persons other than named fiduciaries to carry out such fiduciary responsibilities, if the plan instrument expressly provides procedures for such allocation or designation.

FR–13 Q: If the named fiduciaries of an employee benefit plan allocate their fiduciary responsibilities among themselves in accordance with a procedure set forth in the plan for the allocation of responsibilities for operation and administration of the plan, to what extent will a named fiduciary be relieved of liability for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities allocated to them?

A: If named fiduciaries of a plan allocate responsibilities in accordance with a procedure for such allocation set forth in the plan, a named fiduciary will not be liable for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities which have been allocated to them, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary responsibility, and section 405(c)(2)(A) of the Act, relating in relevant part to standards for establishment and implementation of allocation procedures.

However, if the instrument under which the plan is maintained does not provide for a procedure for the allocation of fiduciary responsibilities among named fiduciaries, any allocation which the named fiduciaries may make among themselves will be ineffective to relieve a named fiduciary from responsibility or liability for the performance of fiduciary responsibilities allocated to other named fiduciaries.

FR–14 Q: If the named fiduciaries of an employee benefit plan designate a person who is not a named fiduciary to carry out fiduciary responsibilities, to what extent will the named fiduciaries be relieved of liability for the acts and omissions of such person in the performance of his duties?

A: If the instrument under which the plan is maintained provides for a procedure under which a named fiduciary may designate persons who are not named fiduciaries to carry out fiduciary responsibilities, named fiduciaries of the plan will not be liable for acts and omissions of a person who is not a

named fiduciary in carrying out the fiduciary responsibilities which such person has been designated to carry out, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary liability, and section 405(c)(2)(A) of the Act, relating in relevant part to the designation of persons to carry out fiduciary responsibilities.

However, if the instrument under which the plan is maintained does not provide for a procedure for the designation of persons who are not named fiduciaries to carry out fiduciary responsibilities, then any such designation which the named fiduciaries may make will not relieve the named fiduciaries from responsibility or liability for the acts and omissions of the persons so designated.

FR–15 Q: May a named fiduciary delegate responsibility for management and control of plan assets to anyone other than a person who is an investment manager as defined in section 3(38) of the Act so as to be relieved of liability for the acts and omissions of the person to whom such responsibility is delegated?

A: No. Section 405(c)(1) does not allow named fiduciaries to delegate to others authority or discretion to manage or control plan assets. However, under the terms of sections 403(a)(2) and 402(c)(3) of the Act, such authority and discretion may be delegated to persons who are investment managers as defined in section 3(38) of the Act. Further, under section 402(c)(2) of the Act, if the plan so provides, a named fiduciary may employ other persons to render advice to the named fiduciary to assist the named fiduciary in carrying out his investment responsibilities under the plan.

FR–16 Q: Is a fiduciary who is not a named fiduciary with respect to an employee benefit plan personally liable for all phases of the management and administration of the plan?

A: A fiduciary with respect to the plan who is not a named fiduciary is a fiduciary only to the extent that he or she performs one or more of the functions described in section 3(21)(A) of the Act. The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan. With respect to the extent of liability of a named fiduciary of a plan where duties are properly allocated among named fiduciaries or where named fiduciaries properly designate other persons to carry out certain fiduciary duties, see question FR–13 and FR–14.

In addition, any fiduciary may become liable for breaches of fiduciary responsibility committed by another fiduciary of the same plan under circumstances giving rise to co-fiduciary liability, as provided in section 405(a) of the Act.

FR–17 Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?

A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.

[40 FR 47491, Oct. 9, 1975. Redesignated at 41 FR 1906, Jan. 13, 1976]

§ 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.

ERISA GUIDELINES—SCHEDULE OF DOCUMENTS—Continued

Publication date 1975	Document	Subject	Code and ERISA sections
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).
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;

(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

[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.

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 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

[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.

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 provider. For guidance applicable to the selection of an annuity provider for benefit distributions from an individual account plan see 29 CFR 2550.404a–4.

(b) In General. Generally, when a pension plan purchases an annuity from an insurer as a distribution of benefits, it is intended that the plan's liability for such benefits is transferred to the annuity provider. The Department's regulation defining the term ''participant covered under the plan'' for certain purposes under title I of ERISA recognizes that such a transfer occurs when the annuity is issued by an insurance company licensed to do business in a State. 29 CFR 2510.3–3(d)(2)(ii). Although the regulation does not define the term ''participant'' or ''beneficiary'' for purposes of standing to bring an action under ERISA § 502(a), 29 U.S.C. 1132(a), it makes clear that the purpose of a benefit distribution annuity is to transfer the plan's liability with respect to the individual's benefits to the annuity provider.

Pursuant to ERISA section 404(a)(1), 29 U.S.C. 1104(a)(1), fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries. Section 404(a)(1)(A), 29 U.S.C.

1104(a)(1)(A), states that the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses. In addition, section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires a fiduciary to act with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use.

(c) Selection of Annuity Providers. The selection of an annuity provider for purposes of a pension benefit distribution, whether upon separation or retirement of a participant or upon the termination of a plan, is a fiduciary decision governed by the provisions of part 4 of title I of ERISA. In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise. In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

(1) The quality and diversification of the annuity provider's investment portfolio;

(2) The size of the insurer relative to the proposed contract;

(3) The level of the insurer's capital and surplus;

(4) The lines of business of the annuity provider and other indications of an insurer's exposure to liability;

(5) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

(6) The availability of additional protection through state guaranty associations and the extent of their guarantees. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. A fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.

(d) Costs and Other Considerations. The Department recognizes that there are situations where it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity. Such situations may occur where the safest available annuity is only marginally safer, but disproportionately more expensive than competing annuities, and the participants and beneficiaries are likely to bear a significant portion of that increased cost. For example, where the participants in a terminating pension plan are likely to receive, in the form of increased benefits, a substantial share of the cost savings that would result from choosing a competing annuity, it may be in the interest of the participants to choose the competing annuity. It may also be in the interest of the participants and beneficiaries to choose a competing annuity of the annuity provider offering the safest available annuity is unable to demonstrate the ability to administer the payment of benefits to the participants and beneficiaries. The Department notes, however, that increased cost or other considerations could never justify putting the benefits of annuitized participants and beneficiaries at risk by purchasing an unsafe annuity.

In contrast to the above, a fiduciary's decision to purchase more risky, lower-priced annuities in order to ensure or maximize a reversion of excess assets that will be paid solely to the employer-sponsor in connection with the termination of an over-funded pension plan would violate the fiduciary's duties under ERISA to act solely in the interest of the plan participants and beneficiaries. In such circumstances, the interests of those participants and beneficiaries who will receive annuities lies in receiving the safest annuity available and other participants and beneficiaries have no countervailing interests. The fiduciary in such circumstances must make diligent efforts to assure that the safest available annuity is purchased.

Similarly, a fiduciary may not purchase a riskier annuity solely because there are insufficient assets in a defined benefit plan to purchase a safer annuity. The fiduciary may have to condition the purchase of annuities on additional employer contributions sufficient to purchase the safest available annuity.

(e) Conflicts of Interest. Special care should be taken in reversion situations where fiduciaries selecting the annuity provider have an interest in the sponsoring employer which might affect their judgment and therefore create the potential for a violation of ERISA §406(b)(1). As a practical matter, many fiduciaries have this conflict of interest and therefore will need to obtain and follow independent expert advice calculated to identify those insurers with the

highest claims-paying ability willing to write the business.

[60 FR 12329, Mar. 6, 1995, as amended at 72 FR 52006, Sept. 12, 2007; 73 FR 58447, Oct. 7, 2008]

§ 2509.99–1 Interpretive Bulletin Relating to Payroll Deduction IRAs.

(a) *Scope.* This interpretive bulletin sets forth the Department of Labor's (the Department's) interpretation of section 3(2)(A) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) and 29 CFR 2510.3–2(d), as applied to payroll deduction programs established by employers[1] for the purpose of enabling employees to make voluntary contributions to individual retirement accounts or individual retirement annuities (IRAs) described in section 408(a) or (b) or section 408A of the Internal Revenue Code (the Code).

(b) *General.* It has been the Department's long-held view that an employer who simply provides employees with the opportunity for making contributions to an IRA through payroll deductions does not thereby establish a ''pension plan'' within the meaning of section 3 (2) (A) of ERISA. In this regard, 29 CFR 2510.3–2 (d) sets forth a safe harbor under which IRAs will not be considered to be pension plans when the conditions of the regulation are satisfied. Thus, an employer may, with few constraints, provide to its employees an opportunity for saving for retirement, under terms and conditions similar to those of certain other optional payroll deduction programs, such as for automatic savings deposits or purchases of United States savings bonds, without thereby creating a pension plan under Title I of ERISA. The guidance provided herein is intended to clarify the application of the IRA safe harbor set forth at 29 CFR 2510.3–2 (d) and, thereby, facilitate the establishment of payroll deduction IRAs.

(c) *Employee communications.* (1) It is the Department's view that, so long as an employer maintains neutrality with respect to an IRA sponsor in its communications with its employees, the employer will not be considered to ''endorse'' an IRA payroll deduction program for purposes of 29 CFR 2510.3–2(d).[2] An employer may encourage its employees to save for retirement by providing general information on the IRA payroll deduction program and other educational materials that explain the advisability of retirement savings, including the advantages of contributing to an IRA, without thereby converting the program under which the employees' wages are withheld for contribution into the IRAs into an ERISA covered plan. However, the employer must make clear that its involvement in the program is limited to collecting the deducted amounts and remitting them promptly to the IRA sponsor and that it does not provide any additional benefit or promise any particular investment return on the employee's savings.

(2) The employer may also do the following without converting a payroll deduction IRA program into an ERISA plan: An employer may answer employees' specific inquiries about the mechanics of the IRA payroll deduction program and may refer other inquiries to the appropriate IRA sponsor. An employer may provide to employees informational materials written by the IRA sponsor describing the sponsor's IRA programs or addressing topics of general interest regarding

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[1] The views expressed in this Interpretive Bulletin with respect to payroll deduction programs of employers are also generally applicable to dues checkoff programs of employee organizations.

[2] The Department has specifically stated, in its Advisory Opinions, that an employer may demonstrate its neutrality with respect to an IRA sponsor in a variety of ways, including (but not limited to) by ensuring that any materials distributed to employees in connection with an IRA payroll deduction program clearly and prominently state, in language reasonably calculated to be understood by the average employee, that the IRA payroll deduction program is completely voluntary; that the employer does not endorse or recommend either the sponsor or the funding media; that other IRA funding media are available to employees outside the payroll deduction program; that an IRA may not be appropriate for all individuals; and that the tax consequences of contributing to an IRA through the payroll deduction program are generally the same as the consequences of contributing to an IRA outside the program. The employer would not be considered neutral, in the Department's view, to the extent that the materials distributed to employees identified the funding medium as having as one of its purposes investing in securities of the employer or its affiliates or the funding medium in fact has any significant investments in such securities. If the IRA program were a result of an agreement between the employer and an employee organization, the Department would view informational materials that identified the funding medium as having as one of its purposes investing in an investment vehicle that is designed to benefit an employee organization by providing more jobs for its members, loans to its members, or similar direct benefits (or the funding medium's actual investments in any such investment vehicles) as indicating the employee organization's involvement in the program in excess of the limitations of 29 CFR 2510.3–2 (d).

investments and retirement savings, provided that the material does not itself suggest that the employer is other than neutral with respect to the IRA sponsor and its products; the employer may request that the IRA sponsor prepare such informational materials and it may review such materials for appropriateness and completeness. The fact that the employer's name or logo is displayed in the informational materials in connection with describing the payroll deduction program would not in and of itself, in the Department's view, suggest that the employer has ''endorsed'' the IRA sponsor or its products, provided that the specific context and surrounding facts and circumstances make clear to the employees that the employer's involvement is limited to facilitating employee contributions through payroll deductions.[3]

(d) *Employer Limitations on the number of IRA sponsors offered under the program.* The Department recognizes that the cost of permitting employees to make IRA contributions through payroll deductions may be significantly affected by the number of IRA sponsors to which the employer must remit contributions. It is the view of the Department that an employer may limit the number of IRA sponsors to which employees may make payroll deduction contributions without exceeding the limitations of 29 CFR 2510.3–2(d), provided that any limitations on, or costs or assessments associated with an employee's ability to transfer or roll over IRA contributions to another IRA sponsor is fully disclosed in advance of the employee's decision to participate in the program. The employer may select one IRA sponsor as the designated recipient for payroll deduction contributions, or it may establish criteria by which to select IRA sponsors, e.g., standards relating to the sponsor's provision of investment education, forms, availability to answer employees' questions, etc., and may periodically review its selectees to determine whether to continue to designate them. However, an employer may be considered to be involved in the program beyond the limitations set forth in 29 CFR 2510.3–2(d) if the employer negotiates with an IRA sponsor and thereby obtains special terms and conditions for its employees that are not generally available to similar purchasers of the IRA. The employer's involvement in the IRA program would also be in excess of the limitations of the regulation if the employer exercises any influence over the investments made or permitted by the IRA sponsor.

[3] For example, if the employer whose logo appeared on the promotional materials provided a statement along the lines of in the first sentence of footnote 5, the employer would not be considered to have endorsed the IRA product.

(e) *Administrative fees.* The employer may pay any fee the IRA sponsor imposes on employers for services the sponsor provides in connection with the establishment and maintenance of the payroll deduction process itself, without exceeding the limitations of 29 CFR 2510.3–2(d). Further, the employer may assume the internal costs (such as for overhead, bookkeeping, etc) of implementing and maintaining the payroll deduction program without reimbursement from either employees or the IRA sponsor without exceeding the limits of the regulation. However, if an employer pays, in connection with operating an IRA payroll deduction program, any administrative, investment management, or other fee that the IRA sponsor would require employees to pay for establishing or maintaining the IRA, the employer would, in the view of the Department, fall outside the safe harbor and, as a result, may be considered to have established a ''pension plan'' for its employees.

(f) *Reasonable Compensation for Services.* 29 CFR 2510.3–2(d) provides that an employer may not receive any consideration in connection with operating an IRA payroll deduction program, but may be paid ''reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.'' Employers have asked whether ''reasonable compensation'' under section 2510.3–2(d) includes payments from an IRA sponsor to an employer for the employer's cost of operating the IRA payroll deduction program. It is the Department's view that the IRA sponsor may make such payments, to the extent that they constitute compensation for the actual costs of the program to the employer. However, ''reasonable compensation'' does not include any profit to the employer. *See* 29 CFR 2510.3–1(j), relating to group or group-type insurance programs. For example, if an IRA sponsor offers to pay an employer an amount equal to a percentage of the assets contributed by employees to IRAs through payroll deduction, such an arrangement might exceed ''reasonable compensation'' for the services actually rendered by the employer in connection with the IRA payroll deduction program. An employer will also be considered to have received consideration that is not ''reasonable compensation'' if the IRA sponsor agrees to make or to permit particular investments of IRA contributions in consideration for the employer's agreement to make a payroll deduction program available to its employees, or if the IRA sponsor agrees to extend credit to or for the benefit of the employer in return for the employer's making payroll deduction available to the employees.

(g) *Additional rules when employer is IRA sponsor or affiliate of IRA sponsor.* Under certain circumstances, an employer that offers IRAs in the normal course of its business to

the general public or that is an affiliate[4] of an IRA sponsor may provide its employees with the opportunity to make contributions to IRAs sponsored by the employer or the affiliate through a payroll deduction program, without exceeding the limitations of § 2510.3–2(d). If the IRA products offered to the employees for investment of the payroll deduction contributions are identical to IRA products the sponsor offers the general public in the ordinary course of its business, and any management fees, sales commissions, and the like charged by the IRA sponsor to employees participating in the payroll deduction program are the same as those charged by the sponsor to employees of non-affiliated employers that establish an IRA payroll deduction program, the Department has generally taken the position that this alone will not cause the employer to be sufficiently involved in the IRA program as an employer or to have received consideration of the type prohibited under § 2510.2(d)(iv) to warrant the program being considered outside the safe harbor of the regulation.[5] Under such circumstances, the employer, in offering payroll deduction contribution opportunities to its employees, would appear to be acting generally as an IRA sponsor, rather than as the employer of the individuals who make the contributions.[6]

[64 FR 33001, June 18, 1999]

§ 2509.2015–01 Interpretive bulletin relating to the fiduciary standard under ERISA in considering economically targeted investments.

This Interpretive Bulletin sets forth the Department of Labor's interpretation of sections 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA), as applied to employee benefit plan investments in ''economically targeted investments'' (ETIs), that is, investments selected for the economic benefits they create apart from their investment return to the employee benefit plan. Sections 403 and 404, in part, require that a fiduciary of a plan act prudently, and to diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. In addition, these sections require that a fiduciary act solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to their participants and beneficiaries. The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.

With regard to investing plan assets, the Department has issued a regulation, at 29 CFR 2550.404a–1, interpreting the prudence requirements of ERISA as they apply to the investment duties of fiduciaries of employee benefit plans. The regulation provides that the prudence requirements of section 404(a)(1)(B) are satisfied if (1) the fiduciary making an investment or engaging in an investment course of action has given appropriate consideration to those facts and circumstances that, given the scope of the fiduciary's investment duties, the fiduciary knows or should know are relevant, and (2) the fiduciary acts accordingly. This includes giving appropriate consideration to the role that the investment or investment course of action plays (in

[4] For purposes of this interpretive bulletin, the definition of ''affiliate'' in ERISA section 407(d)(7) applies.

[5] While the funding medium offered by an employer that is an IRA sponsor or an affiliate of an IRA sponsor might be considered an employer security when offered to its own employees, the fact that informational materials provided to employees identify the funding medium as having as one of its purposes investing in securities of the employer would not, in the Department's view, involve the employer beyond the limits of 29 CFR 2510.3–2(d). Neither would the fact that the funding medium may actually be so invested. However, the Department would consider that an employer may have exceeded the limitation of 2510.3–2(d) if the informational materials the employer provides to employees suggest that the employer, in providing the IRA payroll deduction program for purposes of investing in employer securities, is acting as an employer in relation to persons who participate in the program, rather than as an IRA sponsor acting in the course of its ordinary business of making IRA products available to the public.

[6] However, if an employer that is an IRA sponsor waives enrollment and management fees for its employees' IRAs, and it normally charges those fees to members of the public who purchase IRAs, the employer would be considered to be so involved in the program as to be outside the safe harbor of the regulation.

terms of such factors as diversification, liquidity, and risk/return characteristics) with respect to that portion of the plan's investment portfolio within the scope of the fiduciary's responsibility.

Other facts and circumstances relevant to an investment or investment course of action would, in the view of the Department, include consideration of the expected return on alternative investments with similar risks available to the plan. It follows that, because every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

The fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally. Therefore, if the above requirements are met, the selection of an ETI, or the engaging in an investment course of action intended to result in the selection of ETIs, will not violate section 404(a)(1)(A) and (B) and the exclusive purpose requirements of section 403.

[80 FR 65137, Oct. 26, 2015]

§ 2509.2015–02 Interpretive bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974.

(a) *Scope.* This document sets forth the views of the Department of Labor (Department) concerning the application of the Employee Retirement Income Security Act of 1974 (ERISA) to certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans. Concern over adverse social and economic consequences of inadequate retirement savings levels has prompted several states to adopt or consider legislation to address this problem.[1] An impediment to state adoption of such measures is uncertainty about the effect of ERISA's broad preemption of state laws that "relate to" private sector employee benefit plans. In the Department's view, ERISA preemption principles leave room for states to sponsor or facilitate ERISA-based retirement savings options for private sector employees, provided employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to the state programs.

(b) *In General.* There are advantages to utilizing an ERISA plan approach. Employers as well as employees can make contributions to ERISA plans, contribution limits are higher than for other state approaches that involve individual retirement plans (IRAs) that are not intended to be ERISA-covered plans,[2] and ERISA plan accounts have stronger protection from creditors. Tax credits may also allow small employers to offset part of the costs of starting

[1] For information on the problem of inadequate retirement savings, *see* the May 2015 Report of the United States Government Accountability Office (GAO), RETIREMENT SECURITY—Most Households Approaching Retirement Have Low Savings (GAO Report–15–419) (available at *www.gao.gov/assets/680/670153.pdf*). *Also see* GAO's September 2015 Report–15–566, RETIREMENT SECURITY—Federal Action Could Help State Efforts to Expand Private Sector Coverage (available at *www.gao.gov/assets/680/672419.pdf*).

[2] Some states are developing programs to encourage employees to establish tax-favored IRAs funded by payroll deductions rather than encouraging employers to adopt ERISA plans. Oregon, Illinois, and California, for example, have adopted laws along these lines. Oregon 2015 Session Laws, Ch. 557 (H.B. 2960) (June 2015); Illinois Secure Choice Savings Program Act, 2014 Ill. Legis. Serv. P.A. 98–1150 (S.B. 2758) (West); California Secure Choice Retirement Savings Act, 2012 Cal. Legis. Serv. Ch. 734 (S.B. 1234) (West). These IRA-based initiatives generally require specified employers to deduct amounts from their employees' paychecks, unless the employee affirmatively elects not to participate, in order that those amounts may be remitted to state-administered IRAs for the employees. The Department is addressing these state "payroll deduction IRA" initiatives separately through a proposed regulation that describes safe-harbor conditions for employers to avoid creation of ERISA-covered plans when they comply with state laws that require payroll deduction IRA programs. This Interpretive Bulletin does not address those laws.

certain types of retirement plans.[3] Utilizing ERISA plans also provides a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, automatic enrollment rules, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections.

The Department is not aware of judicial decisions or other ERISA guidance directly addressing the application of ERISA to state programs that facilitate or sponsor ERISA plans, and, therefore, believes that the states, employers, other plan sponsors, workers, and other stakeholders would benefit from guidance setting forth the general views of the Department on the application of ERISA to these state initiatives. The application of ERISA in an individual case would present novel preemption questions and, if decided by a court, would turn on the particular features of the state-sponsored program at issue, but, as discussed below, the Department believes that neither ERISA section 514 specifically, nor federal preemption generally, are insurmountable obstacles to all state programs that promote retirement saving among private sector workers through the use of ERISA-covered plans.

MARKETPLACE APPROACH

One state approach is reflected in the 2015 Washington State Small Business Retirement Savings Marketplace Act.[4] This law requires the state to contract with a private sector entity to establish a program that connects eligible employers with qualifying savings plans available in the private sector market. Only products that the state determines are suited to small employers, provide good quality, and charge low fees would be included in the state's ''marketplace.'' Washington State employers would be free to use the marketplace or not and would not be required to establish any savings plans for their employees. Washington would merely set standards for arrangements marketed through the marketplace. The marketplace arrangement would not itself be an ERISA-covered plan, and the arrangements available to employers through the marketplace could include ERISA-covered plans and other non-ERISA savings arrangements. The state would not itself establish or sponsor any savings arrangement. Rather, the employer using the state marketplace would establish the savings arrangement, whether it is an ERISA-covered employee pension benefit plan or a non-ERISA savings program. ERISA's reporting and disclosure requirements, protective standards and remedies would apply to the ERISA plans established by employers using the marketplace. On the other hand, if the plan or arrangement is of a type that would otherwise be exempt from ERISA (such as a payroll deduction IRA arrangement that satisfies the conditions of the existing safe harbor at 29 CFR 2510.3–2(d)), the state's involvement as organizer or facilitator of the marketplace would not by itself cause that arrangement to be covered by ERISA. Similarly, if, as in Washington State, a marketplace includes a type of plan that is subject to special rules under ERISA, such as the SIMPLE–IRA under section 101(h) of ERISA, the state's involvement as organizer or facilitator of the marketplace would not by itself affect the application of the special rules.

[3] For more information, *see Choosing a Retirement Solution for Your Small Business*, a joint project of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) and the Internal Revenue Service. Available at *www.irs.gov/pub/irs-pdf/p3998.pdf*.

[4] 2015 Wash. Sess. Laws chap. 296 (SB 5826) (available at *http://app.leg.wa.gov/billinfo/summary.aspx?bill=5826&year=2015*).

PROTOTYPE PLAN APPROACH

Another potential approach is a state sponsored ''prototype plan.'' At least one state, Massachusetts, has enacted a law to allow nonprofit organizations with fewer than 20 employees to adopt a contributory retirement plan developed and administered by the state.[5] Banks, insurance companies and other regulated financial institutions commonly market prototype plans to employers as simple means for them to establish and administer employee pension benefit plans.[6] The financial institutions develop standard form 401(k) or other tax-favored retirement plans (such as SIMPLE–IRA plans) and secure IRS approval. Typically, employers may choose features such as contribution rates to meet their specific needs. Each employer that adopts the prototype sponsors an ERISA plan for its employees. The individual employers would assume the same fiduciary obligations associated with sponsorship of any ERISA-covered plans. For example, the prototype plan documents often specify that the employer is the plan's ''named fiduciary'' and ''plan administrator'' responsible for complying with ERISA, but they may allow the employer to delegate these responsibilities to others. The plan documents for a state-administered prototype plan could designate the state or a state designee to perform these functions. Thus, the state or a designated third-party could assume responsibility for most administrative and asset management functions of an employer's prototype plan. The state could also designate low-cost investment options and a third-party administrative service provider for its prototype plans.

MULTIPLE EMPLOYER PLAN (MEP) APPROACH

A third approach, (referenced, for example, in the ''Report of the Governor's Task Force to Ensure Retirement Security for All Marylanders''),[7] involves a state establishing and obtaining IRS tax qualification for a ''multiple employer'' 401(k)-type plan, defined benefit plan, or other tax-favored retirement savings program. The Department anticipates that such an approach would generally involve permitting employers that meet specified eligibility criteria to join the state multiple employer plan. The plan documents would provide that the plan is subject to Title I of ERISA and is intended to comply with Internal Revenue Code tax qualification requirements. The plan would have a separate trust holding contributions made by the participating employers, the employer's employees, or both. The state, or a designated governmental agency or instrumentality, would be the plan sponsor under ERISA section 3(16)(B) and the named fiduciary and plan administrator responsible (either directly or through one or more contract agents, which could be private-sector providers) for administering the plan, selecting service providers, communicating with employees, paying benefits, and providing other plan services. A state could take advantage of economies of scale to lower administrative and other costs.

As a state-sponsored multiple employer plan (''state MEP''), this type of

[5] The retirement plan will be overseen by the Massachusetts State Treasurer's Office. Mass. Gen. Laws ch.29, § 64E (2012). In June 2014, the Massachusetts Treasurer's Office announced that the IRS had issued a favorable ruling on the proposal, but noted that additional approval from the IRS is still needed (*see www.massnonprofitnet.org/blog/nonprofitretirement/*). *See also* GAO's Report 2015 Report–15–566, RETIREMENT SECURITY—Federal Action Could Help State Efforts to Expand Private Sector Coverage, which included the following statement at footnote 93 regarding the Massachusetts program: ''The Massachusetts official told us that each participating employer would be considered to have created its own plan, characterizing the state's effort as development of a volume submitter 401(k) plan, which is a type of employee benefit plan that is typically pre-approved by the Internal Revenue Service.'' (GAO report is available at *www.gao.gov/assets/680/672419.pdf*).

[6] *See* IRS Online Publication, *Types of Pre-Approved Retirement Plans* at *www.irs.gov/Retirement-Plans/Types-of-Pre-Approved-Retirement-Plans*.

[7] Governor's Task Force to Ensure Retirement Security for All Marylanders, *1,000,000 of Our Neighbors at Risk: Improving Retirement Security for Marylanders* (February 2015) (available at *www.dllr.state.md.us/retsecurity/*).

arrangement could also reduce overall administrative costs for participating employers in large part because the Department would consider this arrangement as a single ERISA plan. Consequently, only a single Form 5500 Annual Return/Report would be filed for the whole arrangement. In order to participate in the plan, employers simply would be required to execute a participation agreement. Under a state MEP, each employer that chose to participate would not be considered to have established its own ERISA plan, and the state could design its defined contribution MEP so that the participating employers could have limited fiduciary responsibilities (the duty to prudently select the arrangement and to monitor its operation would continue to apply). The continuing involvement by participating employers in the ongoing operation and administration of a 401(k)-type individual account MEP, however, generally could be limited to enrolling employees in the state plan and forwarding voluntary employee and employer contributions to the plan. When an employer joins a carefully structured MEP, the employer is not the ''sponsor'' of the plan under ERISA, and also would not act as a plan administrator or named fiduciary. Those fiduciary roles, and attendant fiduciary responsibilities, would be assigned to other parties responsible for administration and management of the state MEP.[8] Adoption of a defined benefit plan structure would involve additional funding and other employer obligations.[9]

For a person (other than an employee organization) to sponsor an employee benefit plan under Title I of ERISA, such person must either act directly as the employer of the covered employees or ''indirectly in the interest of an employer'' in relation to a plan.[10] ERISA sections 3(2), 3(5). A person will be considered to act ''indirectly in the interest of an employer, in relation to a plan,'' if such person is tied to the contributing employers or their employees by genuine economic or representational interests unrelated to the provision of benefits.[11] In the Department's view, a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that the state should be considered to act indirectly in the

[8] A state developing a state sponsored MEP could submit an advisory opinion request to the Department under ERISA Procedure 76–1 to confirm that the MEP at least in form has assigned those fiduciary functions to persons other than the participating employers. ERISA Procedure 76–1 is available at *www.dol.gov/ebsa/regs/aos/ao__requests.html*.

[9] State laws authorizing defined benefit plans for private sector employers (as prototypes or as multiple employer plans) might create plans covered by Title IV of ERISA and subject to the jurisdiction of the Pension Benefit Guaranty Corporation (PBGC). Subject to some exceptions, the PBGC protects the retirement incomes of workers in private-sector defined benefit pension plans. A defined benefit plan provides a specified monthly benefit at retirement, often based on a combination of salary and years of service. PBGC was created by ERISA to encourage the continuation and maintenance of private-sector defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum. More information is available on the PBGC's Web site at *www.pbgc.gov*.

[10] Different rules may apply under the Internal Revenue Code for purposes of determining the plan sponsor of a tax-qualified retirement plan.

[11] *See, e.g.*, Advisory Opinion 2012–04A. *See also MDPhysicians & Associates, Inc.* v. *State Bd. Ins.*, 957 F.2d 178,185 (5th Cir.), *cert. denied*, 506 U.S. 861 (1992) (''the entity that maintains the plan and the individuals that benefit from the plan [must be] tied by a common economic or representation interest, unrelated to the provision of benefits.'' (quoting *Wisconsin Educ. Assoc. Ins. Trust* v. *Iowa State Bd.*, 804 F.2d 1059, 1063 (8th Cir. 1986)).

interest of the participating employers.[12] Having this unique nexus distinguishes the state MEP from other business enterprises that underwrite benefits or provide administrative services to several unrelated employers.[13]

(c) *ERISA Preemption.* The Department is aware that a concern for states adopting an ERISA plan approach is whether or not those state laws will be held preempted. ERISA preemption analysis begins with the ''presumption that Congress does not intend to supplant state law.'' *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). The question turns on Congress's intent ''to avoid a multiplicity of regulation in order to permit nationally uniform administration of employee benefit plans.'' *Id.* at 654, 657. *See also Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987) (goal of ERISA preemption is to ''ensure . . . that the administrative practices of a benefit plan will be governed by only a single set of regulations.'').

Section 514 of ERISA provides that Title I ''shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan'' covered by the statute. The U.S. Supreme Court has held that ''[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'' *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983) (footnote omitted); *see, e.g., Travelers*, 514 U.S. at 656. A law has a ''reference to'' ERISA plans if the law ''acts immediately and exclusively upon ERISA plans'' or ''the existence of ERISA plans is essential to the law's operation.'' *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A.*, 519 U.S. 316, 325–326 (1997). In determining whether a state law has a ''connection with ERISA plans,'' the U.S. Supreme Court ''look[s] both to 'the objectives of the ERISA statute as a guide to the scope of the state laws that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans,'' to ''determine whether [the] state law has the forbidden connection'' with ERISA plans. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001) (quoting *Dillingham*, 519 U.S. at 325). In various decisions, the Court has concluded that ERISA preempts state laws that: (1) Mandate employee benefit structures or their administration; (2) provide alternative enforcement mechanisms; or (3) bind employers or plan fiduciaries to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.[14]

In the Department's view, state laws of the sort outlined above interact with ERISA in such a way that section 514 preemption principles and purposes would not appear to come into play in the way they have in past preemption cases. Although the approaches described above involve ERISA plans, they do not appear to undermine ERISA's exclusive regulation of ERISA-covered plans. The approaches do not mandate employee benefit structures or their administration, provide alternative regulatory or enforcement mechanisms, bind employers or plan fiduciaries to particular choices, or preclude uniform administrative practice in any way that would regulate ERISA plans.

[12] The Department has also recognized other circumstances when a person sponsoring a plan is acting as an ''employer'' indirectly rather than as an entity that underwrites benefits or provides administrative services. *See* Advisory Opinion 89–06A (Department would consider a member of a controlled group which establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of section 3(5) of ERISA); Advisory Opinion 95–29A (employee leasing company may act either directly or indirectly in the interest of an employer in establishing and maintaining employee benefit plan).

[13] *See* Advisory Opinion 2012–04A (holding that a group of employers can collectively act as the ''employer'' in sponsoring a multiple employer plan only if the employers group was formed for purposes other than the provision of benefits, the employers have a basic level of commonality (such as the participating employers all being in the same industry), and the employers participating in the plan in fact act as the ''employer'' by controlling the plan).

[14] *Travelers*, 514 U.S. at 658 (1995); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990); *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 14 (1987).

Moreover, the approaches appear to contemplate a state acting as a participant in a market rather than as a regulator. The U.S. Supreme Court has found that, when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute state regulation. *Compare Building and Construction Trades Council* v. *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993); *Wisconsin Department of Industry, Labor and Human Relations* v. *Gould*, 475 U.S. 282 (1986); *see also American Trucking Associations, Inc.* v. *City of Los Angeles*, 133 S. Ct. 2096, 2102 (2013) (Section 14501(c)(1) of the Federal Aviation Administration Authorization Act, which preempts a state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. 14501(c)(1), "draws a rough line between a government's exercise of regulatory authority and its own contract-based participation in a market"); *Associated General Contractors of America* v. *Metropolitan Water District of Southern California*, 159 F.3d 1178, 1182–84 (9th Cir. 1998) (recognizing a similar distinction between state regulation and state market participation). By merely offering employers particular ERISA-covered plan options [15] (or non-ERISA plan options), these approaches (whether used separately or together as part of a multi-faceted state initiative) do not dictate how an employer's plan is designed or operated or make offering a plan more costly for employers or employees. Nor do they make it impossible for employers operating across state lines to offer uniform benefits to their employees.[16] Rather than impair federal regulation of employee benefit plans, the state laws would leave the plans wholly subject to ERISA's regulatory requirements and protections.

Of course, a state must implement these approaches without establishing standards inconsistent with ERISA or providing its own regulatory or judicial remedies for conduct governed exclusively by ERISA. ERISA's system of rules and remedies would apply to these arrangements. A contractor retained by a state using the marketplace approach would be subject to the same ERISA standards and remedies that apply to any company offering the same services to employers. Similarly, a prototype plan or multiple employer plan program that a state offers to employers would have to comply with the same ERISA requirements and would have to be subject to the same remedies as any private party offering such products and services.[17]

Even if the state laws enacted to establish programs of the sort described above "reference" employee benefit plans in a literal sense, they should not be seen as laws that "relate to" ERISA plans in the sense ERISA section 514(a) uses that statutory term because they are completely voluntary from the employer's perspective, the state program would be entirely subject to ERISA, and state law would not impose any outside regulatory requirements beyond ERISA. They do not require employers to establish ERISA-covered plans, forbid any type of plan or restrict employers' choices with respect to benefit structures or their administration. These laws would merely offer a program that employers could accept

[15] In the Department's view, a state law that required employers to participate in a state prototype plan or state sponsored multiple employer plan unless they affirmatively opted out would effectively compel the employer to decide whether to sponsor an ERISA plan in a way that would be preempted by ERISA.

[16] The Court in *Travelers* approved a New York statute that gave employers a strong incentive to provide health care benefits through Blue Cross and Blue Shield as opposed to other providers. The Court noted that the law did not "mandate" employee benefit plans or their administration, or produce such acute economic effects, either directly or indirectly, by intent or otherwise "as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Travelers*, 514 U.S. at 668. *See also De Buono* v. *NYSA–ILA Medical and Clinical Services Fund*, 520 U.S. 806, 816 (1997).

[17] State laws relating to sovereign immunity for state governments and their employees would have to be evaluated carefully to ensure they do not conflict with ERISA's remedial provisions.

or reject. *See Dillingham*, 519 U.S. at 325–28.

In addition, none of the state approaches described above resemble the state laws that the Court held preempted in its pre-*Travelers* ''reference to'' cases. Those laws targeted ERISA plans as a class with affirmative requirements or special exemptions. *See, e.g., District of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125, 128, 129–133 (1992) (workers' compensation law that required employee benefits ''set by reference to [ERISA] plans'') (citation omitted); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 135–136, 140 (1990) (common law claim for wrongful discharge to prevent attainment of ERISA benefits); *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 828 & n.2, 829–830 (1988) (exemption from garnishment statute for ERISA plans). In the case of the state actions outlined above, any restriction on private economic activity arises, not from state regulatory actions, but from the application of ERISA requirements to the plans, service providers, and investment products, that the state, as any other private sector participant in the market, selects in deciding what it is willing to offer.

Finally, it is worth noting that even if the state laws implementing these approaches ''relate to'' ERISA plans in some sense of that term, it is only because they create or authorize arrangements that are fully governed by ERISA's requirements. By embracing ERISA in this way, the state would not on that basis be running afoul of section 514(a) because ERISA fully applies to the arrangement and there is nothing in the state law for ERISA to ''supersede.'' In this regard, section 514(a) of ERISA, in relevant part, provides that Title I of ERISA ''shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . .'' To the extent that the state makes plan design decisions in fashioning its prototype plan or state sponsored plan, or otherwise adopts rules necessary to run the plan, those actions would be the same as any other prototype plan provider or employer sponsor of any ERISA-covered plan, and the arrangement would be fully and equally subject to ERISA.

This conclusion is supported by the Department's position regarding state governmental participation in ERISA plans in another context. Pursuant to section 4(b)(1) of ERISA, the provisions of Title I of ERISA do not apply to a plan that a state government establishes for its own employees, which ERISA section 3(32) defines as a ''governmental plan.'' The Department has long held the view, however, that if a plan covering governmental employees fails to qualify as a governmental plan, it would still be subject to Title I of ERISA.[18] In these circumstances, the failure to qualify as a governmental plan does not prohibit a governmental employer from providing benefits through, and making contributions to, an ERISA-covered employee benefit plan.[19] Thus, the effect of ERISA is not to prohibit the state from offering benefits, but rather to make those benefits subject to ERISA. Here too, ERISA does not supersede state law to the extent it merely creates an arrangement that is fully governed by ERISA.

[80 FR 71937, Nov. 18, 2015]

§ 2509.2016–01 Interpretive Bulletin relating to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.

This interpretive bulletin sets forth the Department of Labor's (the Department) interpretation of sections 402, 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA) as those sections apply to voting of proxies on securities held in employee benefit plan investment portfolios and the maintenance of and compliance with statements of investment policy, including proxy voting policy. In addition, this interpretive bulletin provides guidance on the appropriateness under ERISA of active engagement with corporate management by plan fiduciaries.

(1) PROXY VOTING

The fiduciary act of managing plan assets that are shares of corporate

[18] *See, e.g.*, Advisory Opinion 2004–04A.

[19] *See* Information Letter to Michael T. Scaraggi and James M. Steinberg from John J. Canary (April 12, 2004).

stock includes the voting of proxies appurtenant to those shares of stock. As a result, the responsibility for voting proxies lies exclusively with the plan trustee except to the extent that either (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), or (2) the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2). Where the authority to manage plan assets has been delegated to an investment manager pursuant to section 403(a)(2), no person other than the investment manager has authority to vote proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies. In this regard, a named fiduciary, in delegating investment management authority to an investment manager, could reserve to itself the right to direct a trustee with respect to the voting of all proxies or reserve to itself the right to direct a trustee as to the voting of only those proxies relating to specified assets or issues.

If the plan document or investment management agreement provides that the investment manager is not required to vote proxies, but does not expressly preclude the investment manager from voting proxies, the investment manager would have exclusive responsibility for voting proxies. Moreover, an investment manager would not be relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. If, however, the plan document or the investment management contract expressly precludes the investment manager from voting proxies, the responsibility for voting proxies would lie exclusively with the trustee. The trustee, however, consistent with the requirements of ERISA section 403(a)(1), may be subject to the directions of a named fiduciary if the plan so provides.

The fiduciary duties described at ERISA section 404(a)(1)(A) and(B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. These duties also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The named fiduciary must carry out this responsibility solely in the interest of the participants and beneficiaries and without regard to its relationship to the plan sponsor.

It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. Thus, the investment manager or other responsible fiduciary would be required to maintain accurate records as to proxy voting. Moreover, if the named fiduciary is to be able to carry out its responsibilities under ERISA section 404(a) in determining whether the investment manager is fulfilling its fiduciary obligations in investing plans assets in a manner that justifies the continuation of the management appointment, the proxy voting records must enable the named fiduciary to review not only the investment manager's voting procedure with respect to plan-owned stock, but also to review the actions taken in individual proxy voting situations.

The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan's investment. This principle applies broadly. However, the Department recognizes that in some special cases voting proxies may involve out of the ordinary costs or unusual requirements, for example in the case of voting proxies on shares of certain foreign corporations. Thus, in such cases, a fiduciary should consider whether the plan's vote, either by itself or together with the votes of other shareholders, is expected to have an effect on the value of

the plan's investment that warrants the additional cost of voting. Moreover, a fiduciary, in deciding whether to purchase shares for which this may be the case, should consider whether the difficulty and expense in voting the shares is reflected in their market price.

(2) STATEMENTS OF INVESTMENT POLICY

The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Since the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy. For purposes of this document, the term ''statement of investment policy'' means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions as well as policies concerning economically targeted investments or incorporating environmental, social or governance (ESG) factors in investment policy statements or integrating ESG-related tools, metrics and analyses to evaluate an investment's risk or return or choose among equivalent investments. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time or as to voting specific plan proxies.

In plans where investment management responsibility is delegated to one or more investment managers appointed by the named fiduciary pursuant to ERISA section 402(c)(3), the named fiduciary responsible for appointment of investment managers has the authority to condition the appointment on acceptance of a statement of investment policy. Thus, such a named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy which sets forth guidelines concerning investments and investment courses of action which the investment manager is authorized or is not authorized to make. Such investment policy may include a policy or guidelines on the voting of proxies on shares of stock for which the investment manager is responsible. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), an investment manager who has authority to make investment decisions, including proxy voting decisions, would never be relieved of its fiduciary responsibility if it followed directions as to specific investment decisions from the named fiduciary or any other person.

Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the ''documents and instruments governing the plan'' within the meaning of ERISA section 404(a)(1)(D). An investment manager to whom such investment policy applies would be required to comply with such policy, pursuant to ERISA section 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA. Therefore, if, for example, compliance with the guidelines in a given instance would be imprudent, then the investment manager's failure to follow the guidelines would not violate ERISA section 404(a)(1)(D). Moreover, ERISA section 404(a)(1)(D) does not shield the investment manager from liability for imprudent actions taken in compliance with a statement of investment policy.

The plan document or trust agreement may expressly provide a statement of investment policy to guide the trustee or may authorize a named fiduciary to issue a statement of investment policy applicable to a trustee. Where a plan trustee is subject to an investment policy, the trustee's duty to comply with such investment policy would also be analyzed under ERISA

section 404(a)(1)(D). Thus, the trustee would be required to comply with the statement of investment policy unless, for example, it would be imprudent to do so in a given instance.

Maintenance of a statement of investment policy by a named fiduciary does not relieve the named fiduciary of its obligations under ERISA section 404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to management of the plan assets. Moreover, compliance with ERISA section 404(a)(1)(B) would require maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager. In addition, in the view of the Department, a named fiduciary's determination of the terms of a statement of investment policy is an exercise of fiduciary responsibility and, as such, statements may need to take into account factors such as the plan's funding policy and its liquidity needs as well as issues of prudence, diversification and other fiduciary requirements of ERISA.

An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. Compliance with ERISA section 404(a)(1)(D) would require the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)) and, if necessary and to the extent permitted by applicable law, vote the relevant proxies to reflect such policies in proportion to each plan's interest in the pooled investment vehicle. If, however, the investment manager determines that compliance with conflicting voting policies would violate ERISA section 404(a)(1)(D) in a particular instance, for example, by being imprudent or not solely in the interest of plan participants, the investment manager would be required to ignore the voting policy that would violate ERISA section 404(a)(1)(D) in that instance. Such an investment manager may, however, require participating investors to accept the investment manager's own investment policy statement, including any statement of proxy voting policy, before they are allowed to invest. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA section 404(a)(1)(D).

(3) SHAREHOLDER ENGAGEMENT

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments, where a plan may not be able to easily dispose of such an investment, or where the same shareholder engagement issue is likely to exist in the case of available alternative investments. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as governance structures and practices, particularly those involving board composition, executive compensation, transparency and accountability in corporate decision-making, responsiveness to shareholders, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and

capitalization, the nature of long-term business plans including plans on climate change preparedness and sustainability, governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations, the corporation's workforce practices (*e.g.*, investment in training to develop its work force, diversity, equal employment opportunity), policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.

[81 FR 95882, Dec. 29, 2016]