

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration****29 CFR Part 2510**

RIN 1210-AA59

Proposed Rule Amending the Definition of Plan Assets; Participant Contributions**AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.**ACTION:** Proposed rule.

SUMMARY: This document contains a proposed rule that would amend the Department of Labor's final regulation published in the **Federal Register** on August 7, 1996 that defines when participant contributions to a pension benefit plan become plan assets for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposed amendment would harmonize the Title I rules governing the definition of plan assets with the Internal Revenue Code (Code) rules governing the timing of deposits for Savings Incentive Match Plans for Employees (SIMPLE plans) that involve Individual Retirement Accounts (SIMPLE IRAs) and thereby simplify compliance by small businesses.

DATES: Written comments must be submitted on or before May 27, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule to: Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210. Attention: Proposed Participant Contribution Regulation Amendment.

FOR FURTHER INFORMATION CONTACT: Amy J. Scheingold, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, D.C. (202) 219-8671; or William W. Taylor, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC (202) 219-9141. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On August 7, 1996, the Department of Labor (the Department) published a final regulation at 61 FR 41220 defining when certain monies that a participant pays to, or has withheld by, an employer for contribution to a plan are "plan assets" for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the related prohibited

transaction provisions of the Internal Revenue Code (the Code).¹ Section 2510.3-102(a) of the final regulation sets forth a general rule that provides that the assets of a plan include amounts that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. With respect to employee pension benefit plans covered by Title I of ERISA, section 2510.3-102(b) of the final regulation further provides that in no event shall the date determined pursuant to section 2510.3-102(a) occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer or in which such amounts would otherwise have been payable to the participant in cash.

Except as provided in ERISA § 403(b), plan assets are required to be held in trust by one or more trustees.² ERISA § 403(a), 29 U.S.C. 1103(a). In addition, ERISA's fiduciary responsibility provisions apply to the management of plan assets. Among other things, these provisions make clear that the assets of a plan may not inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan. ERISA §§ 403-404, 29 U.S.C. 1103-1104. These provisions also prohibit a broad array of transactions involving plan assets. ERISA §§ 406-408, 29 U.S.C. 1106-1108. Employers who fail to transmit promptly participant contributions, and plan fiduciaries who fail to collect those amounts in a timely manner, will violate the requirement that plan assets be held in trust; in addition, such employers and

¹ The Secretary of Labor has authority to issue regulations relating to most of section 4975 of the Internal Revenue Code pursuant to section 102 of Reorganization Plan No. 4 of 1978. 5 U.S.C. App. 165, 43 FR 47713, October 17, 1978. For the sake of clarity, the remainder of the preamble refers only to Title I of ERISA. However, these references apply to the corresponding provisions of section 4975 of the Code as well.

² ERISA § 403(b) contains a number of exceptions to the trust requirement for certain types of assets, including assets which consist of insurance contracts, and for certain types of plans. In addition, the Secretary has issued a technical release, T.R. 92-01, which provides that, with respect to certain welfare plans (e.g. cafeteria plans), the Department will not assert a violation of the trust or certain other reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations involving such plans solely because of a failure to hold participant contributions in trust. 57 FR 23272 (June 2, 1992), 58 FR 45359 (Aug. 27, 1993).

fiduciaries may be engaging in prohibited transactions.

On August 20, 1996, the Small Business Job Protection Act of 1996 (the Act, Pub. L. 104-188) was signed into law. Section 1421 of the Act amended section 408(p) of the Code to provide that certain employers may establish Savings Incentive Match Plans for Employees (SIMPLE plans). Under amended section 408(p) of the Code, an eligible employer may establish an employee pension benefit plan by making contributions to each eligible employee's SIMPLE Individual Retirement Account (SIMPLE IRA). Section 408(p)(5)(A)(i) of the Code provides that an employer must make salary reduction elective contributions to each eligible employee's SIMPLE IRA not later than the close of the 30-day period following the last day of the month with respect to which the contributions are to be made.³ However, section 1421 of the Act did not amend Title I of ERISA, as it did the Code, with respect to when such participant contributions become assets of the plan.

The Need for the Proposed Amendment

In order to harmonize the Title I rules governing the definition of plan assets with section 408(p) of the Code, as amended by the Act, the Department proposes to amend 29 CFR 2510.3-102 to provide that salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs become plan assets as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the 30th day following the month in which such amounts would otherwise have been payable to the participant in cash.

The Proposed Amendment

The proposed rule contained in this notice would preserve the general rule set forth in section 2510.3-102(a) governing when participant contributions to employee pension benefit plans become plan assets. However, the proposed rule would amend 29 CFR 2510.3-102(b) by specifying that the maximum period during which salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRA may be treated as other than plan assets is the same

³ The Department has taken the position that contributions to an employee benefit plan made at the election of the participant, whether made pursuant to a salary reduction agreement or otherwise, constitute amounts paid to or withheld by an employer (*i.e.* participant contributions) within the scope of § 2510.3-102, without regard to the treatment of such contributions under the Internal Revenue Code. See 53 FR 29660 (Aug. 8, 1988).

number of days as the period within which the employer is required to deposit withheld contributions under a SIMPLE plan that involves SIMPLE IRAs under section 408(p) of the Code, as amended by the Act. For all other pension plans covered under Title I of ERISA, including SIMPLE 401(k) plans that meet the requirements of section 401(k)(11) of the Code, the maximum period would remain 15 business days following the month in which participant contributions were received by the employer (for amounts that participants or beneficiaries pay to the employer) or would otherwise have been payable to the participants in cash (for amounts that the employer withholds from the participant's wages).

Effective Date of the Amendment

The Department is publishing this proposed rule for notice and comment and will promulgate this rule in final form subsequent to such comment period. The Department expects to issue a final rule 30 days following the close of the comment period. The Department has determined to propose that the final rule will be effective immediately upon publication. Moreover, the Department wishes to note that, pending adoption of the final amendment proposed in this notice, the Department will not assert a violation in any enforcement proceeding relating to salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs solely because the earliest date on which participant contributions could reasonably be made to a plan is later than 15 business days following the month in which such amounts would otherwise have been payable to the participant in cash, but not more than 30 calendar days following the month in which such amounts would otherwise have been payable to the participant in cash.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires each Federal agency to perform an initial regulatory flexibility analysis for all proposed rules unless the head of the agency certifies that the rule will not, if promulgated, have a significant impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions. Although the Department believes that the proposed rule will not have a significant economic effect on a substantial number of small entities, the Department has elected to publish the following initial regulatory flexibility analysis in accordance with the requirements of 5 U.S.C. 603.

(1) Why the Action Is Being Considered

The Department is promulgating this regulation in order to harmonize Title I regulations with the Code, as amended by the Act. This is discussed in greater detail in the Supplementary Information section above.

(2) Objectives of, and Legal Basis for, the Proposed Rule

The proposed regulation harmonizes 29 CFR 2510.3-102 with section 408(p)(5)(A)(i) of the Code, as amended by the Act. This is discussed in greater detail in the Supplementary Information section above.

(3) Description and Estimate of Small Entities to Which the Rule Will Apply

The proposed amendment would apply only to those employers that make salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs. These employers may be individuals, businesses or other for-profit institutions, and not-for-profit institutions. However, only employers that have no more than 100 employees who earned \$5000 or more in compensation during the preceding calendar year are eligible to make these contributions under the Code. No small governmental jurisdictions will be affected by this regulation because governmental plans are not covered by Title I of ERISA. It is estimated that 6,000 employers would be affected by this proposed language.⁴

(4) Description of Compliance Requirements and Classes of Small Entities Subject to Requirements

The proposed rule would impose no additional reporting, recordkeeping or other compliance requirements. Rather, by harmonizing a recently issued Title I regulation with the Code, eligible small employers that make salary reduction elective contributions to SIMPLE plans that involve SIMPLE IRAs will have a longer maximum time period to comply with requirement that participant contributions be placed in trust. The proposed rule may affect classes of small entities to the extent that the entities choose to establish such plans and to the extent that the such

contributions cannot be segregated from the entities' general assets earlier than the maximum time period.

(5) Duplicative, Overlapping, or Conflicting Federal Rules

The Department is not aware of any relevant federal rules that duplicate, overlap or conflict with the proposed rule. It is the view of the Department that harmonizing the Title I definition of plans assets with respect to participant contributions with section 408(p) of the Code, thereby establishing a uniform set of rules for salary reduction contributions to SIMPLE plans that involve SIMPLE IRAs, will simplify plan establishment and administration.

(6) Available Alternatives

There are no significant alternatives to the proposed rule which would accomplish the stated objectives of the Act yet have less of an impact on small entities than the proposed rule. One purpose of the Act is to encourage small employers to adopt retirement plans by permitting them to use simplified retirement plans not subject to the complex rules ordinarily applicable to tax-qualified plans.⁵ The proposed rule reflects the accommodation to small entities provided by the Act.

Executive Order 12866

This regulatory action is not a "significant rule" within the meaning of Executive Order 12866 (58 FR 51735, Oct. 4, 1993), because it is not likely to result in: (1) an annual effect on the economy of \$100 million or more, or an adverse and material effect on a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) the creation of a serious inconsistency or interference with an action taken or planned by another agency; (3) a material alteration in the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising of novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Paperwork Reduction Act

The rule proposed in this notice is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain an "information collection request" as defined in 44 U.S.C. 3502(11).

⁴ This figure is based on the revenue estimates for the Act prepared by the Joint Committee on Taxation. These revenue estimates suggest that approximately 300,000 SIMPLE IRAs will be created for individuals who previously did not have an employer-sponsored retirement plan. The small employers eligible to establish such plans have between 1 and 100 employees; on average, the small employers eligible to establish such plan will have 50 employees. The number of SIMPLE IRAs (300,000) divided by the average number of employees (50) equals the estimated 6,000 employers offering this form of retirement account.

⁵ See House Report 104-586 (filed May 20, 1996).

Unfunded Mandates Reform Act

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 1531–1538, as well as Executive Order 12875, this proposed rule does not contain any federal mandate that may result in increased expenditures in either federal, State, local and tribal governments in the aggregate, or impose an annual burden exceeding \$100 million on the private sector.

Statutory Authority

The proposed rule would be adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332 and under Secretary of Labor's Order No. 1–87, 52 FR 13139 (Apr. 21, 1987).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

For the reasons set out in the preamble, 29 CFR part 2510 is proposed to be amended as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority citation for part 2510 continues to read as follows:

Authority: Secs. 3(2), 111(c), 505, Pub. L. 93–406, 88 Stat. 852, 894 (29 U.S.C. 1002(2), 1031, 1135) Secretary of Labor's Order No. 27–74, 1–86, 1–87, and Labor-Management Services Administration Order No. 2–9.

Section 2510.3–101 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979); 3 CFR 1978 Comp. 332, and sec. 11018(d) of Pub. L. 99–272, 100 Stat. 82.

Section 2510.3–102 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979); 3 CFR 1978 Comp. 332.

2. Paragraph (b) of § 2510.3–102, as published in the **Federal Register** on August 7, 1996 at 61 FR 41233, is proposed to be amended to read as follows:

§ 2510.3–102 Definition of “plan assets”—participant contributions.

* * * * *

(b) Maximum time period for pension benefit plans.

(1) Except as provided in paragraph (b)(2) of this section, with respect to an

employee pension benefit plan as defined in section 3(2) of ERISA, in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

(2) With respect to a SIMPLE plan that involves SIMPLE IRAs (*i.e.*, Simple Retirement Accounts, as described in section 408(p) of the Internal Revenue Code), in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 30th calendar day following the month in which the participant contribution amounts would otherwise have been payable to the participant in cash.

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Signed at Washington, DC, this 21st day of March 1997.

Olena Berg,

Assistant Secretary for Pension and Welfare Benefits, Department of Labor.

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