DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2509

RIN 1210–AA70

Interpretive Bulletin 99–1; Payroll Deduction Programs for Individual Retirement Accounts

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Interpretive bulletin.

SUMMARY: In 1975, the Department of Labor (the Department) issued a regulation describing circumstances under which the use of an employer payroll deduction program for forwarding employee monies to an individual retirement account (IRA) will not constitute an employee pension benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Since the issuance of that regulation, the Department has issued several advisory opinions answering common questions arising under the regulation. This interpretive bulletin codifies the views of the Department provided in those advisory opinions and, by restating those views in one, more readily available document, is intended to assist employers in their efforts to provide retirement savings opportunities to employees by means of payroll deduction programs that do not fall within the reach of Title I of ERISA.

DATES: Effective January 1, 1975.

FOR FURTHER INFORMATION CONTACT: John Keene at (202) 219–8521, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Ave., NW, Room N–5669, Washington, DC 20210. This telephone number is not a toll-free number.

SUPPLEMENTARY INFORMATION: In order to provide a concise and ready reference to its interpretations of ERISA, the Department publishes its interpretive bulletins in the Rules and Regulations section of the **Federal Register**. Published in this issue of the **Federal Register** is ERISA Interpretive Bulletin 99–1, which interprets ERISA section 3(2)(A), 29 U.S.C. 1002(2)(A), and the Department's regulation issued thereunder at 29 CFR 2510.3–2(d), and which codifies the advisory opinions previously issued by the Department interpreting these provisions. The Department is publishing this interpretive bulletin in an effort to facilitate the use by employers of payroll withholding as a vehicle for encouraging employee savings through individual retirement accounts.

The Department has a strong interest in promoting retirement savings by employees. The Department recognizes that some employers currently do not provide pension plans for their employees. Although retirement savings vehicles like the SIMPLE and the SEP, which impose little in the way of administrative burdens or costs on employers, are readily available, some employers are reluctant to assume even those costs for a variety of reasons. The Department believes that it is important that employees of such employers be encouraged to save independently for retirement, and it is in the interest of the public that employers be encouraged to provide opportunities for employee retirement savings. One relatively inexpensive method that employers may use to provide employees the opportunity to save for retirement is making available to employees the possibility of regular payroll deductions that are transmitted directly by the employer to individual retirement accounts established by the employees. At present, there are relatively few such programs in operation, and some employers have indicated that they are reluctant to create payroll withholding programs for individual retirement accounts because they are concerned that such programs would be considered pension plans covered by ERISA and therefore subject to the requirements of Title I of ERISA. The Department is concerned that employers may not be aware of or understand the long-established views of the Department with respect to the ability of employers to establish and maintain employer payroll withholding programs without such programs being considered pension plans under ERISA. This guidance summarizes and restates those views in order to provide employers the Department's views in one convenient, easily accessible document.

Background

Section 3(2)(A) of Title I of ERISA provides that ''any plan, fund, or program * * * established or maintained by an employer or by an employee organization, or by both,'' shall be a pension plan ''to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program * * * provides retirement income to employees, or * * * results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.''

Under provisions of the Internal Revenue Code of 1986, as amended (Code),[1] individual taxpayers may establish individual retirement accounts or individual retirement annuities (IRAs) that are tax-favored if operated within the requirements of the Code. With respect to Title I coverage of such IRAs, the Department has published a regulation at 29 CFR 2510.3–2(d), establishing a safe harbor under which an IRA established by employees and funded through payroll deductions will not be considered to be a ''pension plan'' within the meaning of section 3(2) of Title I when the conditions of the regulation are satisfied. The regulation specifies that an IRA will not be considered a ''pension plan'' when there are no contributions made by an employer; employees participate in the IRA on a completely voluntary basis; and the employer's activities with respect to the IRA must be limited solely to permitting, without endorsement, the IRA sponsor to publicize its program to employees; collecting contributions through payroll deductions or dues checkoffs; and remitting those contributions to the IRA sponsor. Finally, the regulation provides that the employer may receive no consideration in any form, other than reasonable compensation for services actually rendered in connection with the payroll deduction or dues checkoff system. If one or more of the conditions of the regulation are not met, the employer may be considered to have established or maintained a pension plan. If an IRA program is a pension plan under Title I of ERISA, it is subject to Parts 1, 4, and 5 of Title I of ERISA, dealing with reporting and disclosure requirements, fiduciary duties, and enforcement rights. Pursuant to ERISA sections 201(6) and 301(a)(7), 29 U.S.C. 1051(6) and 1081 (a) (7), IRAs are exempt from Parts 2 and 3 of Title I, relating to participation, vesting, and funding.[2]

As part of the Conference Report on the Taxpayer Relief Act of 1997, Congress expressed its view that ''employers that choose not to sponsor a retirement plan should be encouraged to set up a payroll deduction system to help employees save for retirement by making payroll deduction contributions to their IRAs.'' H.R. Rep. No. 220, 105th

[1] *See generally* Code sections 408, 408A.

[2] Whether or not an IRA is part of a ''pension plan,'' the prohibited transaction provisions of section 4975 of the Internal Revenue Code are applicable to transactions by the IRA.

Cong., 1st Sess. at 755 (1997). The Department is aware that some employers that would permit payroll deduction contributions to IRAs are reluctant to do so if ERISA would require employers to permit employees an unlimited choice of IRA sponsors for the payroll deduction IRAs in order not to be considered to have established an ERISA plan. Similarly, some employers desire to limit the choice of IRA sponsors to one entity, but are concerned that doing so might make their payroll deduction arrangements ERISA plans. Employers also have raised issues concerning the extent to which they may encourage employee savings for retirement without being viewed as endorsing an arrangement contrary to the limitations in the Department's regulation.

In response to these specific concerns, and as part of the Department's ongoing efforts to encourage retirement savings, the Department is hereby summarizing and restating its views on employer involvement in providing voluntary payroll deduction systems for contributions to IRAs. This bulletin is intended to supplement 29 CFR 2510.3–2(d) by summarizing and restating the interpretive views of the Department, as expressed in advisory opinions since promulgation of the regulation, on various aspects of an employer's involvement in IRA programs.[3] This interpretive bulletin clarifies the circumstances under which an employer may facilitate employees' voluntary contributions to IRAs by providing an IRA payroll deduction program without thereby inadvertently establishing or maintaining an employee benefit pension plan within the scope of section 3(2) of ERISA.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f)(4), the order defines a ''significant regulatory action'' as an action that is likely to result in, among other things, a rule raising novel policy issues arising out of the President's priorities.

Pursuant to the terms of the Executive Order, the Department has determined that this regulation, which encourages employers to provide the opportunity for employees to save for retirement by clarifying the applicability of certain regulatory compliance issues, is consistent with the President's priorities in encouraging retirement savings, and as such is a ''significant regulatory action'' subject to OMB review under Executive Order section 3(f)(4).

According to the Employee Benefits Supplement to the 1993 Current Population Survey, over half of the private wage and salary workforce does not have employment-based retirement coverage. Employment-based retirement coverage arises from three separate components: access to coverage made available through employer sponsorship of plans, eligibility for coverage through satisfaction of age and service requirements, and acceptance of coverage, where employee participation in the employer's plan is voluntary.

Access to coverage is currently shown to differ significantly by employer size. Approximately 82% of private wage and salary workers employed by employers with 100 or more employees have access to coverage. However, only 18% of employers of fewer than 25 employees, and 45% of employers of 25 to 99 employees sponsor retirement plans. As a result, about 30 million employees of small business do not have access to employment-based retirement coverage. Furthermore, only about 12% of these employees choose to close this gap in retirement coverage with an individual retirement account.

Small employers who do not sponsor retirement plans typically offer a few principal reasons for their decision, including the administrative complexity and burden associated with retirement plans, and the risk of commitment to an ongoing expense in the face of the financial uncertainties of the small business environment. Although this interpretive bulletin is not expected to impact access to employer-provided retirement coverage, it may benefit both employers and employees. First, it offers improved access to the Department's views concerning the regulatory requirements for payroll deduction programs for individual retirement accounts. This may ease concerns about the administrative complexity of offering access to individual retirement savings vehicles, which normally requires only a very limited financial commitment on the part of an employer in the form of affording payroll deductions.

The interpretive bulletin may also facilitate individual savings for retirement by those employees whose access to employer-sponsored retirement coverage is most limited, by encouraging employers to make individual retirement saving programs available in a manner convenient to the employees. Although many employees without access to employer-sponsored coverage are currently permitted to make use of an IRA as an alternative method to save for retirement, the Department believes that employees may be more likely to make use of an individual retirement savings vehicle that is offered in an employment setting and features regular withholding, than one which requires making individual arrangements with an IRA sponsor.

Small Business Regulatory Enforcement Fairness Act

The interpretive bulletin being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review.

Paperwork Reduction Act

The interpretive bulletin being issued here 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(3).

List of Subjects in 29 CFR Part 2509

Employee Benefit Plans, Pensions.

For the reasons set forth above, Part 2509 of Title 29 of The Code of Federal Regulations is amended as follows:

Part 2509—Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974

1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Secretary of Labor's Order No. 1–87 (52 FR 13139).

2. Add a new § 2509.99–1 to read as follows:

§ 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)

[3] *See* Advisory Opinions 77–29A (March 16, 1977), 81–80A (Dec. 18, 1981), 82–13A (Feb. 17, 1982), 82–18A (March 22, 1982), 82–27A (June 16, 1982), 82–53A (Oct. 4, 1982), 83–1A (Jan. 13, 1983), 83–2A (Jan. 13, 1983), 83–9A (February 9, 1983), 83–10A (February 9, 1983), 83–25A (May 24, 1983), 90–20A (June 15, 1990).

[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.

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 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.

(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

[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).

[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.

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]

Signed at Washington, DC, this 14th day of June, 1999.

Richard M. McGahey,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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[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.