1. **Prohibited Transaction Question:** Is it a prohibited transaction under ERISA for a service provider to make “charitable” contributions to its non-profit client? Several potential clients have advised us that they will not switch service providers because of this practice by our competitors.

**Initial Proposed Answer:** Yes, this would be a prohibited transaction because the plan sponsor is transferring and using plan assets for its own benefit, knowing that service fees paid to the provider will be returned to the plan sponsor in the form of a charitable contribution (a form of quid pro quo), which may in turn offset the plan sponsor’s other operations expenses. The plan participants do not benefit from this type of arrangement, and the plan sponsor may well not be selecting its service provider based upon the sole interest of what is best for the plan participant.

**DOL Answer:** A service provider that provides services to an employee benefit plan of a non-profit charity would not violate ERISA merely by making a tax-deductible contribution to the non-profit entity. If, however, a plan fiduciary conditions a decision to hire a plan service provider on the service provider agreeing to make tax-deductible contributions to the non-profit entity, the fiduciary’s retention of the service provider would violate section 406(a)(1)(D) and 406(b) of ERISA. Similarly, section 406(b) would be violated if the plan fiduciary accepted a contribution offered by a service provider as an inducement to being retained by the plan. Whether the contribution was made in consideration of the hiring decision is a factual question upon which the Department will not opine. It also should be noted that the receipt or agreement to receive or the solicitation of money or a thing of value by a plan fiduciary with intent to be influenced with respect to any of his or her actions, decisions, or other duties relating to a plan or the payment, offer, or promise to pay money or provide a thing of value by any person, whether direct or indirect, with the intent of influencing an action or decision relating to a plan may constitute a crime under Title 18 U.S.C. 1954.
2. **Unreasonable Fees Question:** Is Company A’s qualified domestic relations order (QDRO) fee schedule set forth below unreasonable with respect to the services to which they relate?

The company charges the following administrative fee for the review and processing of QDROs:

- Approximately $300 for the review of orders generated via the company’s QDRO website with no modifications;
- Approximately $1,200 for the review of orders not generated via the company’s QDRO website;
- Approximately $1,200 for the review of orders generated via the company’s QDRO website but subsequently altered;
- Approximately $1,800 for the review of an order that names more than one defined contribution Plan.

**Initial Proposed Answer:** Yes, Company A’s administrative fees are unreasonable for those QDROs that are not generated from the company’s QDRO website or that vary in any respect from the QDROs generated by the company’s QDRO website.

Department of Labor Field Assistance Bulletin 2003-3 addressed the question of the reasonableness of QDRO administrative fees. The Department of Labor held that “ERISA does not preclude the allocation of reasonable administrative expenses attendant to QDRO or QMCSO determinations to the account of the participant or beneficiary seeking the determination.” There are not any facts or conclusions in Bulletin 2003-3 setting forth specific fee amounts that might or might not be reasonable.

Company A’s fixed administrative fees, by their very nature, have a chilling effect on the right of individuals to seek their own counsel to draft a QDRO to protect their interests.

If a plan participant or alternate payee follows the QDRO generated by the company’s QDRO website, the administrative fee is approximately $300 even if that QDRO does not protect fully the interests of the plan participant or alternate payee. To save additional expenses after an expensive divorce, plan participants and alternate payees are forced to use the company’s form QDRO; and may be left with a QDRO that leaves them vulnerable to a loss of benefits.

If a QDRO is drafted by counsel that is fully administrable on its face, but includes provisions to protect a plan participant or alternate payee that vary from
the company’s form QDRO, the company will assess a fee of approximately $1,200.

The approximately $1,200.00 administrative fee violates the very concept upon which ERISA was enacted; i.e., to provide protection to plan participants (and now alternate payees under the Retirement Equity Act of 1984).

Plan participants and alternate payees have the right to their own counsel under ERISA to draft a QDRO to protect their interests in those situations where the company’s form QDRO, by itself, falls short of that goal. That right to counsel should not allow the company to automatically assess a much higher administrative fee for a QDRO that departs from the company’s form QDRO.

We note, in general, that the approximately $1,200 administrative fee is more than most QDRO lawyers charge to prepare QDROs in the first place and to process them through the court system. And the review is an administrative process that should not take a lawyer, but rather a trained staff reviewer. And even if their costs for this reviewer was as much as $100/hour, certainly it does not take 12 hours of their staff time to review and implement a simple defined contribution plan QDRO. It might take an hour or two in most cases.

Company A is entitled to cover their costs and a small component for overhead and even small profit. But a fee of approximately $1,200 is very excessive for parties who have no other choice, and thus is unreasonable.

DOL Answer: EBSA staff does not believe this to be the appropriate forum in which to answer this question.

3. Service Provider Required Disclosures Question: The new service provider disclosure rules require employers to proactively address failures by service providers to provide information. There are still many employers who have not fully comprehended their responsibilities and consequently have failed to seek that information or take other required actions, such as notifying the Labor Department of the failure or firing the provider. These employers may now for the first time be receiving competent advice as to what their obligations are. The Labor Department has indicated that for the first year under the new rules, it will take a lenient enforcement posture. Does the mean that the employer should not report what may be technically a prohibited transaction on Form 5500 or file a Form 5330 to pay excise taxes?

Initial Proposed Answer: In the case of a good faith failure to demand from service providers the required disclosures or take other actions as required by the new rule, the reporting of the failure as a prohibited transaction or the payment of excise taxes will not be required for disclosures required in the first
year under the rule, provided that the employer seeks the information and initiates other appropriate actions by, or on or about, the due date for filing the annual information return for the year.

**DOL Answer:** The final regulation at 29 CFR § 2550.408b-2(c)(1)(vii) allows for timely correction of an error or omission in required disclosures when a covered service provider is acting in good faith and with reasonable diligence. Such corrections must be made not later than 30 days from the date that the service provider knows of the error or omission. If the conditions of the regulation are satisfied, the error or omission would not result in a prohibited transaction.

The regulation at 29 CFR § 2550.408b-2(c)(1)(ix) includes a class exemption for plan fiduciaries for situations where a responsible plan fiduciary discovers an error or other deficiency in disclosures. While the class exemption in the regulations provides relief for the innocent fiduciary for its part in the prohibited transaction, it does not provide relief for the prohibited transaction committed by the service provider who did not comply with the statutory exemption under ERISA section 408(b)(2). Thus, in such cases, there would still be a prohibited transaction to report on the Form 5500.

In Field Assistance Bulletin 2012-02R, the Department stated that, for enforcement purposes, the Department will take into account whether covered service providers and plan administrators have acted in good faith based on a reasonable interpretation of the new regulations. The Department stated that if covered service providers and plan administrators have acted in good faith based on a reasonable interpretation of the new regulations, enforcement actions generally would be unnecessary if the covered service provider or plan administrator, as applicable, also establishes a plan for complying with the requirements of this Bulletin in future disclosures. The FAB did not relieve plan administrators from the obligation to report prohibited transactions on the Form 5500.

**4. Healthcare Reform Question:** PHS Act Section 2715(d)(4), as added by the Affordable Care Act, generally requires a group health plan or health insurance issuer to provide notice of any material modification, other than in connection with a renewal or reissuance of coverage, which would change the information otherwise reflected in the most recently provided summary of benefits and coverage (SBC), no later than 60 days prior to the date on which such modification will become effective. The preamble to the final rule states that the 60-day advance notice requirement is applicable to both benefit enhancements and reductions. Will the DOL, or other Departments enforcing the Affordable Care Act, seek penalties against a multiemployer plan, and/or its Board of Trustees, that fails to provide 60-day advance notice of a benefit enhancement which constitutes a material modification?
**Initial Proposed Answer:** No. The Trustees, as fiduciaries, must discharge their duties with respect to their respective plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. ERISA §404. Delaying a benefit enhancement approved by a Board, solely for the purpose of providing a 60-day advance notice, appears counter to the fiduciary requirement to act in the best interest of participants. There is no benefit to the participant to delay implementation of a benefit improvement.

**DOL Answer:** The JCEB and the DOL had a discussion about health reform issues and implementation generally.

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5. **Standing Question:** ERISA Section 502(a)(2) allows individual participants to seek private enforcement of the fiduciary standards of ERISA Section 404 as well as empowering the Department to do so. Yet some courts (e.g., the Fourth Circuit in *David v. Alphin*, 704 F. 3d 327 (4th Cir. 2012)) have concluded that this statutory grant of standing is not enough to support an individual action against fiduciaries of a currently overfunded defined benefit plan. Relying upon an interpretation of the requirements for Article III standing, such courts find that individual plaintiffs only have an interest in their fixed annuity expectation. They reason that as long as the plan is overfunded the participant’s claims based upon future retirement insecurity are too speculative to support constitutional standing requirements.

The DOL filed an amicus brief opposing the position taken by the fourth Circuit and there are conflicting decisions in other Circuits.

The Fourth Circuit did suggest in *David* that the Department retains its institutional statutory standing under ERISA Section 502(a)(2) and in dicta implies that, unlike an individual participant, the Department would have constitutional standing to assert the very same fiduciary breach claims that individual plaintiffs are barred from bringing.

In light of these developments, does the DOL stand by its views expressed in the amicus brief it filed in *David*? In either event, will the DOL seek to close the enforcement gap in circuits that follow the *David* interpretation of individual standing by bringing enforcement cases against fiduciaries breaching their duties to overfunded plans?

**Initial Proposed Answer:** Given the dramatic variability of funding levels over time that may result from lump sum leakage in low interest environments, investment performance fluctuations and future changes in mortality and plan earnings assumptions and other factors, the Department stands by the views expressed in its *David* amicus brief and will look for opportunities to lend amicus
support to similar individual actions in circuits that have not yet taken a position on this Article III standing issue. Moreover, the Department will consider bringing more fiduciary breach actions directly in circuits that follow the *David* line of reasoning in order to protect the future retirement security of participants in plans that are currently overfunded.

**DOL Answer:** Staff notes that the Department stands by the views expressed in its amicus brief filed in *David v. Alphin*.

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6. **Fiduciary Duty Question:** A defined benefit plan grants its plan administrator/named fiduciary the authority, if he, she or it deems appropriate, to provide the remaining annuity payments that retirees are entitled to receive from the plan by purchasing and distributing individual paid up annuity contracts selected by the plan administrator/named fiduciary. The plan is not undergoing or expected in the foreseeable future to undergo a plan termination. The annuities distributed satisfy the requirement that they are irrevocable commitments of the carriers issuing the contracts.

What fiduciary duties apply to the decisions of the plan administrator/named fiduciary?

**Initial Proposed Answer:** Both the decision to purchase and distribute annuities and the selection of the annuity carrier and contract terms are fiduciary acts. Those decisions must be made prudently and must be in the best interests of plan participants. ERISA Section 502(a)(9) permits former participants to sue to enforce this prudence duty even though they otherwise would no longer be treated as having statutory standing under Section 502(a)(1)(B).

Interpretive Bulletin 95-1, 29 C.F.R. §2509.95-1, issued in the aftermath of retiree losses due to the collapse of Executive Life, operates as a no-enforcement safe harbor regarding purchases of annuities that are irrevocable commitments as long as the distributed contracts satisfy a strict “safest available annuity” test that includes a number of procedural prudence requirements.

**DOL Answer:** EBSA staff believes that this question is best addressed through the advisory opinion process where the Department can examine and address the specific facts of the particular question.

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7. **Fiduciary Duty Question:** Assuming the same facts as in the preceding question, except the plan document is amended by the settlor to require purchase and distribution of annuity contracts rather than leaving that to the discretion of the plan fiduciary. What fiduciary duties apply?
**Initial Proposed Answer:** The selection of the carrier remains subject to all the same fiduciary duties and breach of those duties remains subject to the same remedies described in the preceding answer. However, on these revised facts, the decision to purchase and distribute annuities at all would ordinarily not be viewed as a fiduciary act, but a result of exercise of the settlor’s reserved authority to amend the plan. The only caveat is that depending upon the unique facts and circumstances, a plan design change may be treated as a fiduciary rather than a settlor act.

**DOL Answer:** EBSA staff believes that this question is best addressed through the advisory opinion process where the Department can examine and address the specific facts of the particular question.