American Bar Association
Joint Committee on Employee Benefits

Question and Answer Session
U.S. Department of Labor

May 11, 1994

ERISA Section 3(1)

Facts: An employer has approximately 300 total employees. In addition, the employer has two employee benefit plans. One plan is an executive bonus plan in which 13 or 14 of the most highly paid employees are provided with life insurance. The premiums for this insurance are paid by the company, but the employees own the policy. In addition, the employees pay income tax on the amount of the premium. The second plan provides disability coverage to approximately 20 employees. In this case as well, the company pays the premium. In both cases, the only plan documents are the policies themselves.

1. Are the above plans "employee welfare benefit plans" within the meaning of ERISA?

DOL Answer:

Yes. These plans are maintained by the employer. Life insurance and disability insurance plans maintained by an employer are employee welfare benefit plans within the meaning of ERISA section 3(1).

2. Are these plans subject to ERISA reporting requirements, particularly Summary Plan Descriptions?

DOL Answer:

There is not enough information to determine whether the plans are exempt from the reporting and disclosure rules of ERISA. Top hat welfare plans are totally exempt under Regulation section 2520.104-24. The life insurance plan is likely to be a top hat welfare plan since it covers the highest paid 13 or 14 employees of the employer. There is not enough information on the disability plan to determine whether the 20 covered employees constitute a select group of management or highly compensated employees.

If one or both of the plans are not top hat welfare plans, Regulation section
2520.104-20 exempts welfare plans which have fewer than 100 participants and are funded by insurance or are funded out of the general assets of the employer from some of the reporting and disclosure requirements. This exemption does not extend, however, to the requirement that a summary plan description be circulated to the eligible group of employees.

Follow-up question:

Suppose the life insurance plan was structured so that the Company paid the amount of the premium directly to the executive as a bonus and the executive pays the premium to the life insurance company?

Follow-up answer:

The DOL would have to think about it and perhaps know more facts. The answer may depend upon the degree of involvement of the employer in the arrangement and whether the employee can use the money for other purposes than paying for the life insurance.

ERISA Section 3(2)

3. DOL Reg. Section 2510.3-2(f) states that a Code Section 403(b) salary reduction annuity contract shall not be "established or maintained by an employer", and therefore not a pension plan subject to the requirements of Title I of ERISA, if it satisfies the conditions of the regulation, in particular the requirements of subsection (3) which specifies that may be the "sole involvement of the employer". If a Code Section 403(b) salary reduction annuity contract permits hardship withdrawals, and the insurance company issuing the contract is using the deemed hardship withdrawal standards in Treas. Reg. Section 1.401(k)-1(d)(2)(iv), will an employer's certifying to the insurance company that an employee has satisfied the requirements of such standards result in an impermissible involvement by the employer with the result that the annuity contract will be considered to be "established or maintained by an employer" and therefore a pension plan subject to the requirements of Title I of ERISA?

DOL Answer:

The Department of Labor representatives indicated that the question did not state sufficient facts to allow them to provide a definitive answer. They indicated, however, that the key analytical issue in these circumstances is the degree of employer involvement. They distinguished between "ministerial" functions, which are largely
automatic, and functions that would require the employer to engage in an investigation. In the latter case, the Department representatives suggested that the employer's involvement might be so extensive that the safe harbor provided by the regulation would be unavailable. The Department representatives suggested that reliance on employee certifications might be less problematic and would raise fewer issues about whether an employer-sponsored plan has been created.

ERISA Section 3(14)

4. Are individual physicians who treat participants in an employee welfare benefit plan and who are paid directly by the plan "service providers" as defined in ERISA Section 3(14)(B)? If the physicians are employed by an entity providing services to the plan, are they "parties in interest" under ERISA Section 3(14)(H) as employees of a service provider?

DOL Answer:

Where you have a fee for services plan and the plan reimburses the participant for 80% of charges, or if money is assigned to doctor, doctor would not be a service provider to the plan. Beyond that, they have thought a lot about it (and about the related question of the level of involvement that might cause a physician to become a fiduciary), and have no answer.

5. Are the independent contractor-physicians of an HMO or PPO which has an agreement with an employee benefit plan to provide services to the employee benefit plan, but who are not employees of the HMO or PPO "service providers" under ERISA Section 3(14)(B)? 3(14)(H)?

DOL Answer:

See answer for question 4.

Plan asset questions

6. Do options to purchase real estate constitute "investments in real estate" for purposes of the Real Estate Operating Company definition in 29 C.F.R. Section 2510.3-101(e)(1)?

DOL Answer:
The staff does not have a position on this issue and recognizes that there is room for disagreement. The staff noted that even if an option were treated as real estate, to be considered an investment in real estate for purposes of the real estate operating company definition, the option must be real estate that is managed or developed.

7. Is an entity that is deemed to hold plan assets (e.g. a limited partnership) under 29 C.F.R. Section 2510.3-101 considered to be a service provider (as contrasted with a person who exercises control over those assets, who would be a fiduciary and therefore a service provider)?

**DOL Answer:**

The staff did not answer this question. It noted that the general partner of the partnership is a fiduciary, and if the partnership were a fiduciary and liable for the conduct of the general partner, payment for any liability ultimately would come out of plan assets.

8. Does a profits participation interest constitute a "class of equity interests" for purposes of the 25% limit on benefit plan investors under 29 C.F.R. Section 2510.3-101? Does it make any difference if the profits participation interest is convertible into a partnership interest?

**DOL Answer:**

The DOL representatives said that they were not sure they understood the question. They stated that a profits interest would constitute a "class of equity interests" rather than debt. They did not address whether the profits interest would be a separate class of equity interests from the other partnership interests. However, they appeared to acknowledge that the further you get from a traditional equity interest, the less likely it is to be considered an equity interest. Maybe participation in profits but not losses would be more like a commission and not an equity interest.

**ERISA Section 204(h)**

9. ERISA Section 204(h) requires a notice of a plan amendment significantly reducing the rate of future accruals under a pension plan be given "setting forth the plan amendment". Does this mean the amended plan provision must be contained verbatim in the notice, or is an explanation of the effect of the amendment what is intended should be provided?
DOL Answer:

See Question 12.

10. ERISA Section 204(h) requires notice to be given to "each participant in the plan" and to certain other persons. In this case does "participant" include persons who are not affected by the amendment, such as terminated vested participants, persons whose benefits are in pay status, or persons who are otherwise not in the covered class of employees affected by the amendment? If so, what purpose is to be served by giving a notice to persons unaffected by the amendment?

DOL Answer:

See Question 12.

11. Does the elimination of an insured death benefit under a defined benefit pension plan constitute an event requiring notice under ERISA Section 204(h)? Note that ancillary death benefits are not Internal Revenue Code Section 411(d)(6) protected benefits under Treasury Regulation Section 1.411(d)-4, Q&A-1(d)(1).

DOL Answer:

See Question 12.

12. Does elimination of an optional form of distribution (e.g. elimination of a Joint and 75% Annuity in a plan that provides Joint and 100% Survivor Annuities and Joint and 50% Survivor Annuities) require advance notice under ERISA Section 204(h)?

DOL Answer:

Questions 9-12 raised issues concerning notices under §204(h) of ERISA. With respect to all of these questions, the Department of Labor indicated that the issues were under IRS jurisdiction.

ERISA Section 403

13. Can a lender perfect its security interest in employer securities acquired by a leveraged ESOP by obtaining possession without violating the requirement of ERISA Section 403 that all plan assets be held in trust?
DOL Answer:

No statutory exemption applies. If the plan has transferred legal title, there is a problem, and a transfer of the power to get legal title could create a problem. However, if the plan keeps legal title, that helps. They would consider an advisory opinion request based on what is commercially required to perfect a security interest.

14. DOL Advisory Opinion 93-35A states that prepayment of an ESOP loan from the proceeds of a sale of ESOP suspense account shares in a tender offer where the shares were not pledged as collateral for the loan is subject to the general fiduciary rules of ERISA. A Private Letter Ruling on the same transaction, (issued January 28, 1994 but not yet publicly available) states that amounts allocated to participants' accounts as a result of such a sale will be annual additions subject to the maximum limitation on contributions under Internal Revenue Code 415. If the allocation is substantial, so that not all amounts released from the ESOP suspense account can be allocated within the 415 limits, the excess would be allocated to a Code Section 415 suspense account under Treasury Regulation Section 1.415-6(b)(6). If the ESOP terminated while amounts were allocated to the Code Section 415 suspense account, Treasury Regulation Section 1.401(a)-(2)(b) permits the 415 suspense account to revert to the employer.

A. The reversion problem could be avoided if amounts released from the ESOP suspense account in the above situation were treated as fund earnings rather than annual additions. In that case the sale proceeds would be allocated among all participants' accounts, including the accounts of previously terminated participants with account balances. Does the DOL agree that the amount allocated to the participants' accounts must be treated as annual additions rather than trust fund gain?

B. May amounts credited to the Code Section 415 suspense account revert to the employer on termination of the plan without violating ERISA Section 403(d) (which requires assets to be allocated in accordance with ERISA Section 4044 "except as otherwise provided in regulations of the Secretary") or ERISA Section 404(a) (the exclusive benefit rule)? This question applies not only to ESOPs but to any individual account plan which terminates when amounts are allocated to a Code Section 415 suspense account.
DOL Answer:

IRS has jurisdiction over 415 analysis. However, ERISA prohibitions on reversions still apply, so they have a problem with the reversion even if the IRS regulations seem to authorize it.

ERISA Section 404

15. If a plan provides that plan expenses will be paid by the plan unless they are paid directly by the sponsor, and the sponsor has historically paid the expenses directly, is the decision to have the plan begin to pay expenses a fiduciary decision? Is the analysis different if the plan originally provided that the plan sponsor will pay plan expenses and is amended to provide that expenses will be paid by the plan unless paid by the sponsor? Is the decision to make such an amendment a fiduciary decision or a settlor function? Does it matter if the sponsor is also the "named fiduciary"?

DOL Answer:

The decision to start paying expenses from plan assets is a fiduciary decision that must be based on the plan's provisions. An amendment to enable the plan to pay expenses is the exercise of a settlor's discretion. The fact that the employer has paid all expenses in the past does not create an inference that future expenses are, per se, employer expenses.

16. In determining whether a service provider's "bundled" fee (i.e. one that includes disparate services such as investment management and recordkeeping) is a reasonable expense of administering the plan,

A. Is each separate fee subject to a reasonableness standard, or can the convenience of having disparate services provided by a single provider ("one stop shopping") be taken into account?

DOL Answer:

One can look at the entire fee so there is no need to analyze each separate fee in the bundled services.

B. Is the analysis affected if the fees are not separately quoted and the bundled fee is described as an "investment management fee" with the recordkeeping services provided "free"?
DOL Answer:

Again, one need only review the reasonableness of the entire fee.

C. What information should the plan sponsor or fiduciary obtain with regard to the service-provider's fee structure to ensure that the fees are a "reasonable" expense of administering the plan?

DOL Answer:

The Department referred us to PT 91-8, an individual exemption, as containing much of the information that is necessary to gather in response to the question.

17. In determining which investment options to make available under an ERISA Section 404(c) plan, many plan sponsors or fiduciaries find a family of mutual funds to be attractive because of the "one stop shopping" (i.e. fund management and participant recordkeeping services) provided by the mutual fund family. Can the convenience of one stop shopping be taken into account in selecting investment alternatives, or must each fund be independently determined to be the most appropriate of its type (e.g. money market, bond fund, equity fund) for the plan? Does it matter if the plan's fiduciary structure has separate fiduciaries responsible for recordkeeping and investment management?

DOL Answer:

The value of the convenience of "one stop shopping" can be taken into account. This value can be measured in economic terms. There may be a trade-off between administrative costs and the quality of the funds (assuming the funds meet basic prudence standard). The determination of what combination is best must be made by the appropriate plan fiduciary.

18. May a plan be structured so that in all events the requirements of ERISA Section 404(c) are satisfied? In other words, may a plan require as a condition of participation or continued participation in the plan that participants and beneficiaries direct the investment of their accounts as provided in ERISA Section 404(c)?

DOL Answer:

Nothing prohibits a plan from limiting eligibility, at the outset of participation, to employees who have consented to direct the investment of their accounts pursuant to ERISA § 404(c).
19. May a plan provide that a participant who has elected to direct the investment of his account may not thereafter abandon the responsibility for directing the investment of his account as long as the plan otherwise continues to provide the participant with the opportunity to direct the investment of his account in compliance with the regulations under ERISA Section 404(c)?

DOL Answer:

No. A fiduciary must take control if the participant will not. For example, if the fiduciary terminates an investment fund in which a participant has invested part of his account, the fiduciary must direct the reinvestment of the money if the participant fails to do so. Nevertheless, the protections of § 404(c) apply where a participant makes and fails to change a voluntary investment decision.

20. The final ERISA Section 404(c) regulation with respect to employer securities requires that "information relating to the purchase, holding and sale of securities, and the exercise of voting, tender and similar rights with respect to such securities by participants and beneficiaries [be] maintained in accordance with procedures which are designed to safeguard the confidentiality of such information." Although it is the usual practice to have the exercise of voting and tender rights by participants kept confidential from the employer, many plans have some degree of in-house administration that permits an employee of the company to have individual participant information with respect to the purchase, holding and sale of employer securities within the plan. What specific "confidentiality safeguards" must be maintained with respect to the purchase, holding and sale of securities if ERISA Section 404(c) protection is sought for the employer stock fund or is ERISA Section 404(c) unavailable if any person, even a non-officer administrative employee, has access to individual participant account information regarding the purchase, holding and sale of employer securities?

DOL Answer:

The plan procedures to maintain confidentiality with respect to participant activities relating to the purchase, holding and sale of, and exercise of rights regarding, employer securities must be reasonable. Restriction of information on a need-to-know basis could be reasonable. In-house administration of such programs is permissible. An independent fiduciary is not necessary to carry out such activities except in situations which involve a potential for undue employer influence. Situations where the potential for undue employer influence may exist include tender offers, exchange offers and contested board elections.
ERISA Section 405

21. ERISA Section 405 provides for allocation and delegation of fiduciary responsibilities (other than trustee responsibilities). Given the breadth of the definition of "trustee responsibilities" ("any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan"), is it permissible for a board of trustees to allocate or delegate full responsibility for certain fiduciary actions? For example, may a "legal committee" of trustees have full authority to resolve legal disputes between the plan and outside parties? May the trustees delegate full authority to resolve legal disputes to a "legal committee" consisting of non-trustees?

DOL Answer:

If you have a "legal committee" of trustees, that's fine. There's no problem with allocating among the trustees the trustee responsibilities. You can delegate trustee responsibilities to non-trustees, but the trustees remain responsible. The DOL left open the question of whether or not "legal responsibilities" are in fact "trustee responsibilities."

ERISA Section 406

22. Please address the prohibited transaction implications of the following: A plan sponsor maintains an ERISA Section 404(c) plan. In an effort to provide employees with general information about asset allocation, the plan sponsor asks the plan's investment managers to provide educational services to plan participants regarding the allocation of assets in their accounts. Following the educational program, some participants allocate their account assets to specific investment options (funds) maintained by the investment manager or its affiliates. Is it necessary to have educational programs provided by persons unaffiliated with any of the investment alternatives under the plan in order to avoid ERISA Section 406(b) issues?

DOL Answer:

No, it is not necessary to have educational programs provided by persons unaffiliated with any of the plan's investment alternatives, so long as the information provided in the educational programs does not constitute "investment advice" making the person a fiduciary under the applicable regulations. There should ordinarily be no problem in giving information of a general nature not individualized for any employee's specific circumstances. A prohibited transaction could arise, however, if a person were a fiduciary giving "investment advice" and recommended its own products.
23. A "strategic alliance" is an arrangement whereby unrelated persons (e.g. a recordkeeper and an investment manager) collaborate to offer a range of services to plans and/or plan sponsors and plan administrators. If a single fee is paid to the strategic alliance manager, who shares the fee with the other member(s) of the strategic alliance,

A. Has a prohibited transaction occurred?

*DOL Answer:*

*No, assuming that a plan fiduciary independent from the strategic alliance made the decision to retain the strategic alliance.*

B. Does it matter whether the strategic alliance manager is a fiduciary or a non-fiduciary service provider?

*DOL Answer:*

*No.*

C. Is the analysis any different with respect to a "strategic alliance" than with respect to a single fiduciary/service provider with a "bundled" fee?

*DOL Answer:*

*No.*

24. PTE 77-10 allows for the lease of space by a plan to a participating employee organization, participating employer, or participating employer organization, or to another multiemployer plan, which is a party in interest with respect to such plan. Does the exemption cover a lease of office space by a plan to a service provider to a plan, if the lease meets the reasonable compensation requirements of PTE 77-10?

*DOL Answer:*

*PTE 77-10 exempts leases by a plan to parties in interest falling in the specified categories (participating employee organization, participating employer, participating employer association or another multiemployer plan), provided the applicable conditions are met. Since a person who is a party in interest solely by reason of being a service provider would not fall into any of such specified categories, PTE 77-10 would not apply. An individual prohibited transaction exemption could be*
requested in such a case. The mere fact that a person falling within one of the specified categories is also a service provider would not prevent such person from qualifying for the exemption under PTE 77-10. It should be noted that PTE 77-10 just provides relief under ERISA §406(b)(2); PTE 76-1 must be satisfied for relief under ERISA §406(a).

25. Does the existence of discretion by an investment manager mean that even potential conflicts of interest are prohibited transactions, or is the manager to be judged based upon whether he actually acts in conflict with the interests of the plan? For example, the term "structural conflict" is often used to suggest that fiduciary discretion is a prohibited transaction per se if it may result in a benefit to a fiduciary, even if the plan is not harmed. However, others suggest that a "structural conflict" occurs only if a fiduciary acts on behalf of a plan in a situation in which the fiduciary may benefit from the transaction to the detriment of the plan. Which is correct?

*DOL Answer:*

* A *per se* prohibited transaction would occur if a fiduciary acts in a situation where the fiduciary may benefit to the detriment of the plan.*

26. In an interview reported in the January, 1994 issue of the Pension Real Estate Quarterly, Olena Berg responded to a question concerning fiduciary discretion by saying, "Well, I find it hard to think of any real estate arrangement where the manager can't affect the amount or timing of the payments. So, again, I think that this is an area we need to look at." What is the status of this project? When and in what form might future guidance be expected?

*DOL Answer:*

*It's an "open" project. It will be in the form of a class exemption.*

**ERISA Section 407**

27. If a company adopts a "poison pill" plan which makes available to a shareholder certain rights to receive stock upon the happening of a change of control event and if such rights are provided under a tax-qualified profit sharing plan which holds company stock, would the receipt of such rights result in the acquisition and holding of an employer security that does not constitute a qualifying employer security?
DOL Answer:

The DOL ignored the proposed analysis that because no significant economic value appertains to such a subscription right, the receipt of such subscription right does not constitute the receipt of an employer security. They stated that a subscription right would be a security under Section 2(1) of the Securities Act of 1933 and could therefore be an employer security. Unless the employer security is a qualifying employer security, the plan is prohibited from holding it.

28. Would the DOL consider issuing a class exemption for a plan’s receipt and holding of basic stock subscription rights pursuant to a subscription rights plan offered generally to all shareholders? Currently, companies offering such rights must seek a prohibited transaction exemption. (See Time Warner Notice of Prohibited Transaction Exemption).

DOL Answer:

The Department of Labor stated that they would consider a class exemption for the receipt and holding of stock subscription rights, if the exemption could be crafted sufficiently broadly to merit a class approach. They said they would be most inclined to issue a class PTE with respect to participant-directed plans, but also said a class PTE could be issued with respect to plans where a fiduciary would manage and be responsible for the subscription rights.

ERISA Section 514

29. A benefit payment check under an employee welfare benefit plan is returned or otherwise not negotiated by the recipient. Assume the Plan Administrator has made diligent efforts to find the affected participant, without success, and that the benefits will be paid if the participant later surfaces.

A. If the check was issued by a voluntary employee benefit association ("VEBA"), may the VEBA apply the funds to payment of other benefits, or are they subject to state escheat laws?

DOL Answer:

State escheat laws are preempted in this situation. A/O Nos. 78-32 and 79-30 address this question.
B. If the check was issued by an insurance company insuring the benefits, would the funds be subject to state escheat laws?

DOL Answer:

The DOL had no position on this issue. They stated that the DOL did not participate in the case of Aetna Life Insurance Co. v. Borges, 869 F.2d 142 (2d Cir. 1989), which addressed this issue.

C. If the check was issued from the employer’s general assets, would the funds be subject to state escheat laws?

DOL Answer:

The DOL referred to its answer to question A above. They stated that the analysis would not be any different because it still relates to an employee benefit plan.

ERISA Section 609: QMCSOs (Qualified Medical Child Support Orders)

30. When does an alternate recipient under a medical child support order that is not a qualified medical child support order cease to be a participant for purposes of the reporting and disclosure obligations of ERISA?

DOL Answer:

The DOL representatives stated that an alternative recipient under a medical child support order that is not a qualified medical child support order possibly will never cease to be a participant for purposes of the reporting and disclosure obligations of ERISA. The DOL representatives noted that ERISA §609(a)(7)(B) does not specifically require the medical child support order to be qualified.

31. Is a dependent who is subject to the terms of a qualified medical child support order subject to the normal plan rules regarding waiting for an open enrollment period or pre-existing condition limitations?

DOL Answer:

The DOL representatives thought that this question was a very good question and would appreciate assistance in developing an answer. They noted that arguments could be made for either a positive or negative answer and that the language of
ERISA §609 was not helpful. State laws relating to medical child support described in §1908 of the Social Security Act may provide a basis for arguing that normal plan rules regarding waiting for an open enrollment period or pre-existing condition limitation do not apply. The DOL representatives noted that an argument could be made that the pre-existing conditions restriction was specifically addressed in ERISA §609(c) which deals with coverage of adopted children and not so addressed with respect to qualified medical child support orders. The DOL representatives noted that the fact that the pre-existing conditions restriction was a much more significant issue with respect to adopted children may be the reason why ERISA §609(c) includes a specific reference to pre-existing conditions.

32. Does ERISA Section 609(a)(6) apply to the failure to make payments (because the fiduciary improperly determines that the order is not qualified)? The statute only refers to payments made, and in this case, there would be no payments.

DOL Answer:

The DOL representatives thought that ERISA §609(a)(6) probably covered a failure to make payments because the fiduciary improperly determines that the order is not qualified. They suggested that the term payment could be construed to include the range of payments from zero to 100%. They noted that if the fiduciary did not act prudently or otherwise in compliance with part 4 of Title I of ERISA, the fiduciary could be liable.

33. What treatment will be accorded a dependent’s enrollment in a cafeteria plan pursuant to a Qualified Medical Child Support Order (QMCSO)? May the QMCSO be treated as a life event under Internal Revenue Code Section 125, permitting enrollment outside of the annual enrollment period. If the participant/employee does not make a positive election to enroll the dependent, may the QMCSO be deemed an election under Internal Revenue Code Section 125 on behalf of the employee to enroll the dependent and, if the employee has not elected medical coverage for himself or herself, to enroll the employee? If the QMCSO remains in effect beyond the end of the plan year, may a deemed election pursuant to a QMCSO override any future elections of the employee which are not in accordance with the QMCSO?

DOL Answer:

This is a question for the IRS.
Department of Labor Questions and Answers

1. **Questions:** Internal Revenue Code 414(p) provides the rules that govern domestic relations orders. To be considered a qualified domestic relations order ("QDRO"), the order must satisfy the requirements of section 414(p). Exclusive jurisdiction for determining whether a domestic relations order qualifies under IRC section 414(p) belongs to the Department of Labor. ERISA section 206(d)(3); LTR 8338063. Code section 414(p)(2)(D) requires that a domestic relations order must clearly specify each plan to which such order applies. See also ERISA section 206(d)(3)(C)(iv). If the order satisfies the Code and ERISA requirements, it is qualified and the alternate payee will have a right to satisfy the order from the participant’s plan balance or accrued benefit. The Code does not address whether the order fails the plan specificity requirement of Code section 414(p)(2)(D) if the plan to which the QDRO originally applied is subject to a merger and acquisition transaction in which employees become employed by the acquiring company and there is a transfer of plan assets to the acquiror’s plan. Will the order remain qualified if the plan assets are transferred to the acquiror’s plan as part of an acquisition? Must the acquiror’s plan administrator comply with the terms of the QDRO which names the participant’s former employer plan in the order? Should the alternate payee obtain a new QDRO naming the participant’s (and ex-spouse’s) new plan so as to satisfy the specific plan requirement of Code section 414(p)(2)(D)?

**Answer:** In the case where assets are transferred to a successor plan, the successor plan should be bound by the terms of the original QDRO with respect to those assets even if the successor is not mentioned. A new qualified domestic relations order is not necessary. See S. Rpt. No. 98-575 at page 20. Future accruals under the successor plan, as pension accruals earned from an employer unrelated to the employer sponsoring the plan to which the original QDRO was attached, would not be subject to the QDRO without specific naming of the new plan in an amended QDRO.

2. **Question:** Would an in-kind distribution of a collectible from a qualified pension plan to a participant violate the prohibited transaction rules of ERISA section 406, where the collectible would be valued by an independent appraiser, and where the distributions would be allowed by all participants that made such contributions (when such contributions were allowed prior to January 1, 1982)?

**Answer:** An in-kind distribution from a qualified pension plan that held collectibles in trust and acquired such collectibles when such contributions were permissible would not be considered a prohibited transaction violative of section 406 of ERISA since the distribution would not be deemed a sale or exchange of any property between the plan and a party in interest but rather a benefit distribution in accordance with the terms of the plan. However, if the plan terms only permit cash distributions, then such in-kind distribution would be a violation of ERISA.

3. **Question:** May penalties imposed for late filing of Form 5500 be paid from trust assets?

**Answer:** No, penalties for late filing of Form 5500s may not be paid from plan assets nor may the late filer program fees be paid from plan assets, since the penalties are imposed on the plan administrator. (There may be rare facts and circumstances where such a payment from plan assets may be allowed — e.g., the plan administrator is insolvent or no longer in existence.) To the extent that PBGC penalties for late premium payments may be able to be paid from plan assets, this may be due to the differences in the statutory language.

4. **Question:** If the proposed participant contributions plan asset regulations are adopted in their present form, will DOL Technical Release 92-01, with respect to pre-tax participant contributions, remain in effect?

**Answer:** Yes, it will remain in effect and is not proposed to be changed.
5. **Question**: If the proposed participant contributions plan asset regulations are adopted in their present form, will plan sponsors of insured plans be required to remit partial premium payments (i.e., after-tax participant contributions) to insurers within the required deposit time period?

**Answer**: Yes. DOL Technical Release 92-01 will remain in effect and is not prepared to be changed. Moreover, the exemptions in 29 C.F.R. §§2520.104-20 and 2520.104-44 will remain in effect. Nevertheless, the plan sponsor must still comply with the plan assets regulation.

6. **Question**: If the proposed participant contributions plan asset regulations are adopted in their present form, will plan sponsors be required to establish a trust to hold such items as COBRA payments or retiree contributions that are made on an after-tax basis? This question assumes that the employer’s medical plan is self-funded, that participant contributions for active employees are made on a pre-tax basis through the employer’s Section 125 cafeteria plan and that Technical Release 92-01 provides an exemption from the trust requirement.

**Answer**: COBRA and retiree contributions are participant contributions, and the non-enforcement release should be read as potentially impacting them. If the release does not apply, then there is no relief from the trust requirement for COBRA or retiree contributions.

7. **Question**: The FMLA regulations require the employer to notify an employee that leave will be treated as FMLA leave, but only touch on the potential consequences of failure to give the notice. What are the consequences if an employer fails to give that notice to an employee who has taken leave that would have qualified as FMLA leave?

**Answer**: The consequences depend on the circumstances and context in which the issue arises.

The simplest case is when an employee is seeking additional leave that would also qualify under FMLA.

In that case, since the employee received no earlier notice, the earlier leave cannot be counted against the FMLA entitlement, and the employee will be entitled to a full 12 weeks of leave.

More difficult are situations where the issue is entitlement to reinstatement. For example, if an employee took 11 weeks of leave that would have qualified as FMLA-protected leave and upon return was told that her position had been filled, the employee cannot be denied the FMLA’s protection if the employer gave the employee enough information to determine that the leave was FMLA-protected. Therefore, the employee could assert the right to have the 11 weeks treated as FMLA leave and would be entitled to reinstatement.

The really difficult cases will be those where the employee was out for longer than the FMLA-protected period and never received notice that they were using up the FMLA leave. Assume an employee is on leave for a serious injury for 16 weeks and then seeks reinstatement. Assume further that the employer knew of the nature of the leave from the start, and assume that additional leave beyond the first 12 weeks would not constitute a reasonable accommodation under the ADA. The employer might argue that the employee has no right to reinstatement because the leave exceeded 12 weeks. The employee’s counter argument is that no notice was given, so the employee is entitled to the maximum FMLA protection the law would allow, i.e., treat the most recent 12 week period (or the most recent day of leave, for that matter) as FMLA-protected, mandating reinstatement. The DOL’s view is that the employee would be entitled to reinstatement and would count the last 12 weeks at FMLA leave whether or not the employee could have returned to work after the end of the first 12 weeks.

8. **Question**: The DOL has recently filed suit against certain insurers for failure to pass on negotiated health care provider discounts to employer plans purchasing service from the insurer. The DOL has alleged that such failure constitutes a breach of fiduciary duty. Does the DOL believe that it would be a breach of fiduciary duty if a self-insured plan does not pass on
negotiated discounts to plan participants and beneficiaries?

**Answer:** DOL has filed suits against self-insured plans who use insurance companies as administrators under ASO arrangements. The cases do not turn on whether a plan is insured or self-insured, but on plan language explaining co-pays and other payment provisions to participants. Plan language includes the descriptions in both the plan document and the summary plan description. According to the DOL, plan language that allows employers to not pass on discounts must be "brutally clear" — particularly in the summary plan description — to be sufficient.

9. **Question:** Do administrators of ERISA-covered managed care plans have a fiduciary duty to inform participants if the plan penalizes "primary care physicians" (financially or otherwise) for referring participants to specialists covered by the plan?

**Answer:** The DOL declined to answer this question.

10. **Question:** An employer maintains a basic noncontributory group life insurance program for its employees providing coverage of 1 times pay. It also provides a supplemental group life insurance program under which its employees can elect 1 times, 2 times or 3 times pay. Employee contributions for supplemental coverage are set at levels actuarially estimated to cover the full cost of the supplemental coverage. However, the basic and supplemental coverage are combined for experience by the insurer, so that insurer gains on one program may be used to offset insurer losses on the other policy. Because of this combining, the insurer charges lower premium rates under both policies than it would if the two were not combined for experience.

The ERISA plan document, SPD and employer treat both group life insurance programs as constituting a single ERISA plan, and a single Form 5500 covering both programs is filed. The plan document, group policy and summary plan description all set forth the details of the combining for experience feature of the two insurance programs. Does using favorable experience from the supplemental group life insurance program to offset adverse experience under the basic group life insurance program violate Title I of ERISA?

**Answer:** No, as long as the two group life insurance programs are part of one ERISA plan. The fact that the employer treats the two programs as a single plan (including the filing of a single Form 5500) does not mean that they actually constitute a single plan. The DOL would look at all the facts and circumstances. The DOL would require that the SPD and the plan document clearly describe how the separate coverages relate to one another, including the details of the experience blending. The plan and summary plan description must be clear and explicit. If so, the arrangement would not be violative of Title I of ERISA. This situation differs from the case where an employer offers a supplemental group life program and represents to employees that the program is employee-pay-all. It also differs from the case where the basic group life insurance program and the supplemental group life insurance program are established as separate ERISA plans.

11. **Question:** An employer adopts in year X a group term life insurance plan for its employees. The plan is contributory. Employees pay fixed amounts pursuant to a plan schedule, and the employer pays the difference between the employee contributions and the full premium cost of the plan. The plan document, the group insurance policy and the summary plan description all provide that policy dividends will be used to offset cumulative employer payments since inception of the group policy, and that in the event the dividends exceed cumulative employer payments, the excess will be used for the benefit of the participating employees. The insurer determines dividends based on the cumulative experience under the group policy.

In year X + 3, the insurer declares a dividend for year X + 2, the dividend exceeds the employer payments in year X + 2, but does not exceed the cumulative employer contributions since year X. Does the employer's retention of the dividend violate Title I of ERISA?
**Answer:** No. Where employee contributions are fixed and the employer contributes the remainder of the premium cost, the employer is permitted to receive dividends up to the amount of its premium payments, as long as the plan document, the group insurance policy and the summary plan description so provide. This rule can be applied on a cumulative rather than a year-by-year basis, provided the insurer determines the dividends on a cumulative rather than a year-by-year basis. But, again, the DOL would require the dividend arrangement to be described in a clear and explicit manner. The DOL indicated that PTE 80-26 contains an analysis of exempt plan repayments of an employer’s interest free loan which may be useful in this situation. Specifically, PTE 80-26 indicated that the employer cannot recover interest on its cumulative premiums.

12. **Question:** If a plan acquires an employer security that is not a marketable obligation, is the amount of the prohibited transaction excise tax determined with respect to the purchase price paid, the amount of the interest paid, or both?

**Answer:** DOL noted that this is an IRS issue and DOL had not consulted with the IRS about its answer. With that caveat, the DOL stated that, if the plan purchased a non-marketable obligation from a party-in-interest, than the excise tax would be determined on the purchase price paid and the amount of interest paid. However, if a plan purchased a non-marketable obligation from a third party, then the excise tax would be owed only on the amount of interest paid.

13. **Question:** Are state laws governing investment managers preempted?

**Answer:** The question is too broad and vague to answer. Without the specific law or provision, DOL could not answer the question or provide any analysis.

14. **Question:** Can a QDRO require a payment to the alternate payee’s attorney, who is obligated by the QDRO to deposit those amounts in his trust account, and then distribute them pursuant to a prior court order?

**Answer:** No, the payment can only be made to an alternate payee as defined under ERISA, who then is treated as a beneficiary of the plan. The DOL noted that, after payment is made to the alternate payee, the alternate payee, of course, can turn over the money to the attorney. The DOL suggested that it might be proper to make the check payable to the alternate payee and mail it to the attorney if the order so provides.

15. **Question:** ERISA Section 403(d)(1) says that, in the case of a pension plan that is not subject to Title IV but is subject to Title I, the assets of the plan will be allocated in accordance with the provisions of ERISA Section 4044. Does this apply in the case of a defined contribution plan? If so, how?

**Answer:** On its face, section 4044 would also apply to defined contribution plans.

16. **Question:** Some states impose rules regarding the pass-through of voting rights to shareholders. Would those rules be preempted?

**Answer:** The question is too broad and vague to answer. Without the specific law or provision, DOL could not answer the question or provide any analysis.

17. **Question:** Assume that an individual accrued a benefit under a top-hat plan while a highly compensated employee (as that term is used in ERISA), but he later ceases to have such status. Does that mean that he cannot participate in the plan to the extent of his prior accruals and must forfeit those benefits?

**Answer:** The DOL declined to answer this question.

18. **Question:** Where a qualified plan makes a loan to a participant, is it a prohibited transaction for the plan trustee to require that the loan processing fee be deducted directly from the loan proceeds? Is the answer the same if the trustee gives the participant the choice between paying part of the loan proceeds to the trustee as the loan origination fee or paying the fee up front?
**Answer:** The DOL declined to answer this question, other than to say that they are looking at §406(b)(3) issues in another context, which might affect the questions posed.

19. **Question:** Is a state insurance department regulation preempted by ERISA where the regulation requires insurers to offer employees the option to continue group health insurance for 6 months after completion of the COBRA continuation period (so that employees may continue coverage for 24 months on termination of employment)? The regulation requires the option for a six-month continuation “upon completion of any continuation of coverage provided under COBRA.” Under the insurance department regulation, insured employers who are not subject to COBRA are only required to offer a six-month extension.

**Answer:** The state insurance department’s requirement that insurers offer to continue group insurance coverage beyond the continuation period required by COBRA and provide a conversion privilege at the end of the continuation period is preempted by ERISA. ERISA preempts laws which “relate to” employee benefit plans, with the relevant exception of laws which “regulate insurance.” According to the Supreme Court, a law regulates insurance if (1) it has the effect of transferring or spreading a policyholder’s risk; (2) the practice is an integral part of the policy relationship between the insurer and the insured; and (3) the practice is limited to entities within the insurance industry. See Pilot Life v. Dedeaux, 481 U.S. 41, 48-49 (1987). In Duclos v. Dynamics Corp., 12 E.B.C. 2648 (D.R.I. 1990), the court held that a state law requiring employers to continue divorced spouse’s medical benefits pursuant to a divorce decree at no additional premium was preempted by ERISA. Among other reasons, the regulation failed the second part of the Supreme Court’s test because it was not limited to requiring insurance policy provisions. Similarly, in Mimbs v. Commercial Life Insurance Company, 818 F. Supp. 1556 (S.D. Ga. 1993), the District Court held that state laws regarding continuation of coverage and the right to convert to an individual policy are preempted by ERISA.

The state insurance department’s continuation of coverage requirements are inconsistent with those of COBRA because the regulation requires a longer continuation period than COBRA. The regulation specifically requires the state continuation period to be tacked on to the end of the COBRA continuation period. This directly conflicts with COBRA proposed regulations, which provide that state continuation requirements are subsumed in the COBRA continuation period. IRS Proposed Reg. §1.162-26, Q&A 41(a). The state regulation appears to extend beyond the policy relationship between the insurer and the insured when the regulation must specifically mention COBRA to accomplish its ends. The DOL also noted that the case, Howard v. Gleason, 901 F.2d 1154 (2d Cir. 1990), is consistent with this analysis, as well as its Advisory Opinion Letter No. 82-006A.

20. **Question:** With respect to DOL Letter, dated March 21, 1996, to Honorable Eugene A. Ludwig, Comptroller of the Currency, which relates to fiduciary standards in connection with the utilization of derivatives in the management of a portfolio of assets of pension plans subject to ERISA, does the term “pooled fund”, as used in the first full paragraph on page 3 of the letter, include a fund whose underlying assets do not constitute plan assets (such as a mutual fund or a fund as to which equity participation by benefit plan investors is not significant as set forth in 29 C.F.R. § 2510.3-101(a)(2))?

**Answer:** Even if the assets in a pooled fund are not plan assets, a fiduciary would violate §404(a)(1)(B) if it invests in anything which is not prudently managed.

21. **Question:** Plan participants are exerting more and more pressure on plan administrators and their funding vehicles to accept telefax and E-mail transmittals of applications for distributions of benefits which include the REACT spousal waivers? Will the Department consider such “electronic” submissions as satisfying the “signed writing” requirements?

**Answer:** It is not DOL’s responsibility to regulate this area of Title I under the reorganization plan; the
responsibility is assigned to the IRS. Consequently, the DOL will not issue any advice. However, the DOL is interested in the issues presented by electronic communications to plan participants and, although no formal guidance will be forthcoming, a dialogue on these issues with practitioners is encouraged. In examining electronic communications, the DOL would want to know the following: (a) Why is the proposed electronic delivery of required information satisfactory under existing regulations? (b) Are participants who are targeted to receive the electronic communication capable of receiving and using electronic information — e.g., do the participants have access and training on computers and will a hard copy of information be available at no cost to participants? (c) What assurance is there of actual receipt by participants which would distinguish electronic delivery from posting in an area frequented by employees? (d) What are the demographics of the company’s employees — i.e., extremely computer literate employees of a computer technology company or assembly employees of a manufacturing company? In order to arrange discussions on these issues, please call Mr. Canary at (202) 219-8515.