AMERICAN BAR ASSOCIATION
JOINT COMMITTEE ON
EMPLOYEE BENEFITS

U.S. DEPARTMENT OF LABOR
QUESTIONS AND ANSWERS
MAY 17, 1995
1. **ERISA Section 3(1)**

**Question:** If a nonprofit entity maintains a medical or life insurance plan exclusively for volunteers, is the plan subject to ERISA and Form 5500 filing requirements?

**Proposed Response:** Because volunteers are not employees, they are not eligible for ERISA protections, just as they aren't covered by wage and hour laws. Therefore, a plan that covers only volunteers isn't an ERISA plan and need not file Form 5500 or comply with the COBRA provisions of ERISA.

**DOL Response:** The DOL did not give a “yes or no” answer. They said to look at *Nationwide v. Darden*, a 1992 Supreme Court case concerning whether an insurance agent was an independent contractor or an employee. There the Supreme Court adopted a common law test for determining who qualifies as an employee under ERISA. The Court said to look at agency law criteria regarding master-servant relationships. The DOL said that the same principles apply here. They also indicated that the nonprofit entity’s provision of the medical or life insurance benefits would be an important factor in determining whether these volunteers would be employees under ERISA. They said that if the volunteers were employees, then the plan would be covered by ERISA.

2. **ERISA Section 3(2) - Tax Sheltered Annuity - Treatment as a Title I Pension Plan**

**Question:** DOL Reg. Section 2510.3-2(f) states that a Code Section 403(b) salary reduction annuity contract is not to 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. The regulation specifically permits summarizing or otherwise compiling the information with respect to proposed funding media or products, or the annuity contractors whose services are provided, in order to facilitate employee review and analysis. Because many tax exempt institutions use the same 403(b) providers for their 403(b) institution-funded retirement plan, and most employees view their 403(b) salary reduction annuity contracts as an element of their overall retirement benefits from the institution, which benefits include the institution’s funded 403(b) retirement plan, the institutions would like to provide a single summary plan description which describes not only the institution’s funded 403(b) retirement plan but also describes the available 403(b) salary reduction annuity contracts. If an institution prepares a summary plan description that describes its funded 403(b) retirement plan and, with
respect to the available 403(b) salary reduction annuity contracts, contains all of the information required for a summary plan description, that is, more than merely summarizing the available funding media or annuity contractors, will the providing of such information result in the 403(b) salary reduction annuity contracts being considered to be "established or maintained by an employer", and therefore pension plans subject to the requirements of Title I of ERISA?

Proposed Response: No. While the regulation does not specifically deal with providing the type of information which would be provided in a summary plan description, as long as the institution is only summarizing the information provided by an annuity contractor as to the terms and provisions of that contractor's annuities, or is stating what is permitted under Code Section 403(b) and other Code Sections, and the institution has not influenced the design or the provisions of the contractor’s annuities, in providing such information in a summary plan description along with information about the institution’s 403(b) funded retirement plan, the institution is not sufficiently involved in the design, operation and/or administration of the 403(b) salary reduction annuity contracts to result in the contracts being considered “established or maintained” by the institution.

DOL Response: In order to satisfy the SPD regulation at DOL Reg. Section 2520.102-3, an SPD must do more than the "summarizing" permitted under the tax-sheltered annuity exception to treatment as a Title I pension plan at DOL Reg. Section 2510.3-2(f). Yet, if the employer goes beyond such "summarizing", there is a risk of tripping Title I exposure with respect to the annuities. However, it is theoretically possible to include the minimal information about the annuities (not in an ERISA plan) in the same document with the SPD of the ERISA plan, so long as such information is in a separate section and it is made clear that the ERISA rights and protections (the claims procedure, for example) do not apply to the non-ERISA portion.

3. ERISA Sections 3(3) and 4(a) ERISA Coverage

Question: In light of the Supreme Court's decision in Fort Halifax Packing Co. v. Coyne and its progeny, has the Department modified its position regarding the ERISA coverage of any severance benefits arrangements (even those providing single payments)? If not, are such plans being assessed penalties for failure to file 5500s?

Proposed Response: A severance benefits plan established by an employer is covered by ERISA regardless of the complexity (or lack thereof) of its administrative scheme and regardless of whether the benefit(s) are paid in a single sum, in a few installments, or in monthly payments up to 24 months.

DOL Response: The Supreme Court's decision in Fort Halifax Packing Co. v. Coyne should be read narrowly in the context of its facts: a state statute providing for a lump sum severance benefit. So, any employer-established severance program is at a minimum a welfare plan, if not a pension plan, and is subject to ERISA's reporting requirements, in accordance with the "standard analysis."
4. **ERISA Sections 3(21) and 402(a)(1) - Fiduciary as a matter of law**

**Question**: The recent case of *Kayes v. Pacific Lumber Co.*, No. 93-16271 and No. 93-16575 (9th Cir. April 10, 1995) held that where the employer (a third-tier subsidiary) was designated by the plan as "the Plan Fiduciary", the following were, as a matter of law, plan fiduciaries:

- the principal owner of the parent corporation (an individual) and
- the president and CEO of the third tier subsidiary (also an individual), as well as
- the third-tier corporate subsidiary.

Is an individual officer personally liable as an ERISA fiduciary as a matter of law where the corporate entity is named as a plan fiduciary or is the "named fiduciary" and the individual, in his capacity as an officer, acts solely on behalf of the corporate entity? Must the individual act as a fiduciary, as described in ERISA Section 3(21), before he is subject to personal liability? Does the DOL consider the case cited above correct on this issue?

**Proposed Response**: DOL regulations, 29 CFR Section 2509.75-8 (1993), indicate in D-3 and D-4 that the determination as to whether an individual is a fiduciary is a functional approach; i.e., did the individual perform any of the functions described in the statute? Accordingly, the DOL does not agree with the *Kayes* position in this regard. Rather, the agency believes the Third Circuit set forth the correct analysis in *Confer v. Custom Engineering Co.*, 952 F.2d 34, 37 (3d Cir. 1991), where it held that:

"when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of that corporation are not fiduciaries within the meaning of section 3(21)(A)(iii), unless it can be shown that these officers have individual discretionary roles as to plan administration."

**DOL Response**: The DOL uses a functional approach, looking at the functions and responsibilities of the individual.

5. **ERISA Section 4(b)**

**Question**: Can a church welfare plan waive its ERISA exemption under IRC section 410(d)?

**Proposed Response**: Yes. Nothing in the law prohibits a church employer from electing to come under the rules of ERISA, including preemption.

**DOL Response**: Section 410(d) only applies to pension benefit plans and does not apply to welfare benefit plans.

6. **ERISA Section 101**

**Question**: What details, if any, can be released regarding the anticipated new amnesty program for 5500 filings? For example, will employers who voluntarily file delinquent 5500 Forms prior to the effective date of this new program be permitted to obtain any more beneficial treatment
which may be extended under the new amnesty program? For nonfilers, how many years’ forms should be filed? Will back filed 5500 forms be subject to any increased scrutiny?

Proposed Response: It is anticipated that the forthcoming amnesty program will closely follow the DOL’s previous amnesty program effective March 23, 1992. It was understood that the DOL’s practice under this prior program, was to extend the more favorable penalty provisions of the program to non-filers who voluntarily came forward prior to March 1992, and to require a maximum of 3 prior years’ 5500 forms, even if the employer was delinquent for more than 3 plan years. Further, the prior amnesty program indicated that the DOL would not subject such back filings of 5500 forms to any unusual departmental audit checks.

DOL Response: The DOL did not answer this question, other than to suggest looking at their recently published guidance on the new amnesty program.

7. ERISA Section 101-104 - Electronic Communications

Question: May a plan furnish summary plan descriptions (SPDs), summaries of material modifications (SMMs), and summary annual reports (SARs) to participants by electronic means like “E-Mail?”

Proposed Answer: ERISA requires “publication” of SPDs, SMMs, and SARs. Regulations issued under ERISA speak of “furnishing copies” of the SPDs, SMMs, and SARs. Neither the statute nor the regulations specify the copies be furnished “in writing” or “on paper.” Electronic communications are as accurate, understandable, and authentic as paper communications and have numerous advantages, including making delivery more timely, economical, efficient and verifiable. Electronic communications are widely accepted in numerous contexts, including invoicing, purchase orders, and correspondence. An electronically transmitted SPD, SMM, or SAR can be printed on paper by the recipient at any time if so desired. The fact that an SPD, SMM, or SAR is furnished by electronic means such as E-Mail does not, in and of itself, fail to meet any disclosure requirements.

DOL Response: This question generated an extended response from the DOL officials present. Initially they referred to DOL Reg. §2520.104b-1, which requires the plan administrator to "use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries." That regulation also requires that materials required to be furnished must be "sent by a method or methods of delivery likely to result in full distribution."

The DOL officials indicated that electronic delivery of summary plan descriptions, summaries of material modifications and summary annual reports "seems doable" under current law and regulations, but there are many problems to be worked out. They also indicated that this was a matter under current review by the Labor Department. They referred to their 1993 request for comments on this issue and indicated that they had received almost none. (They indicated that they would still welcome comments from the ABA on this issue).
One of the problem examples cited by the DOL officials was the "printer problem." They noted, for example, that retirees presumably would not have printers and so would not be covered by electronic distribution, and that any other individual, even if they had a printer but did not know how to use it, might not have received adequate delivery. They want the participant or beneficiary to have ready access to a "hard copy" of the document being distributed electronically.

Other problems that they believe need to be worked out include people who don't have a computer, changes to documents, privacy concerns and maybe others they haven't thought of yet.

It was also stated that some coordination is occurring on this issue with the Internal Revenue Service but that it is not part of a major coordination effort. Instead it occurs on an as-needed basis.

They also indicated that they were preparing a legislative package which would clarify that electronic communication would be permissible. It was emphasized that electronic delivery is definitely not permissible in all circumstances and that the standard applied must assure adequate delivery.

In response to a question, the Labor Department indicated that it may already have the authority to allow electronic delivery by regulation and that the reason for including it in the legislative package was not necessarily lack of authority.

8. **ERISA Section 101 et seq.**

**Question:** Does a plan that provides benefits in the form of a joint and survivor annuity have a duty to disclose the amount of benefits payable to a participant to the participant's estranged spouse (who is contemplating a divorce)? Assume that the employee does not want that information disclosed.

**Proposed Response:** No. Until the participant dies (with benefits payable in the form of a joint and survivor annuity), there is no guarantee that the current spouse will be entitled to a benefit under the plan. Anyway, if the estranged spouse wants the information, it could be obtained in the divorce proceeding.

**DOL Response:** Under Section 404 of ERISA a fiduciary has a duty to act solely in the interest of participants and beneficiaries. To the extent the spouse is a beneficiary, the DOL believes it is appropriate to share information. The issue whether there is a mandate to share information with a beneficiary will be given consideration under the QDRO guidance to be issued by the DOL.

9. **ERISA Sections 201, 301 and 401 - Top Hat Plan Exemption**

**Question:** How is “select group of management or highly compensated employees” defined for purposes of the exemptions in Title I of ERISA for top hat plans? The exemption for top hat plans from most of ERISA’s Title I requirements is available only if the top hat plan is both
unfunded and maintained by an employer "primarily... for a select group of management or highly compensated employees." With the reduction in the includable compensation limit under IRC Section 401(a)(17), nonqualified top hat plans are becoming a more prevalent way for employers to restore qualified benefits to the select group of employees who are affected by the compensation limit. In what appears to be the Department's most recent pronouncement on how the "select group" should be defined, the Department indicates that this group includes only those employees who do not require ERISA protection. Thus, only employees who by virtue of their position or compensation level have the ability to affect or substantially influence the design and operation of their compensation plans and who have the ability to evaluate the risks under a deferred compensation plan are included in the "select group" because they do not need the substantive rights and protections provided under Title I of ERISA (See DOL Advisory Opinion Letter 90-14A, May 8, 1990). A problem arises in that if a top hat plan may cover only the most senior level executives, many high level management and highly compensated employees who could otherwise benefit from top hat plan participation because of the lowered 401(a)(17) compensation limit would have to be excluded from participation in order for the plan to avail itself of the top hat plan exemptions under ERISA.

Proposed Response: A suggested approach that the DOL may wish to use in reevaluating its position on how a "select group" should be defined is to focus on the definition of "officer" under the insider trading rules of Section 16(b) of the Securities Exchange Act of 1934. This definition, which appears at 17 C.F.R. Section 240.16a-1(f), focuses more on which employees truly perform "management" duties, i.e., whether they perform substantial policy making functions as opposed to whether those functions include direct influence over their compensation plans. As suggested above, continuing to limit the definition of "select group" to only those employees who may substantially influence the design and operation of their compensation plans may result in the exclusion of many equally high level "management" employees who have policy making authority, but who have no direct authority over executive compensation.

DOL Response: The DOL reaffirmed that the Opinion Letter 90-14A states the agency's best and most current thinking on the scope of the top-hat plan exemption. Beyond that, the DOL is reluctant to adopt any specific standard, such as that set forth in the ABA question. The agency restated its view that it cannot announce an objective standard that will work well for large as well as small employers, and that in lieu of specific rules, they would prefer to permit litigation to proceed on the issue through the courts.

10. **ERISA Sections 202-204**

**Question:** Can a retirement plan simply list all of the various permissible service crediting equivalencies under Section 2530.200b-3, or must the plan state exactly which one is to be used?

**Proposed Response:** Paragraph (c)(1) states "Any equivalency used by a plan must be set forth in the document under which the plan is maintained." However, this is satisfied if the plan simply listed all of the equivalencies. Because all of the equivalencies are of equal value, there is no requirement that the plan specify exactly which one applies.
DOL Response: Under Reorganization Plan No. 4, the service provisions are the responsibility of the Department of The Treasury. As a result, the Department of Labor declined to answer this question.

11. **ERISA Section 403 - Trust Requirements for Participant Contributions**

**Question:** Are self-funded health plans operated in conjunction with Code Section 125 cafeteria plans subject to trust requirements, or at least the non-enforcement position stated in ERISA Technical Release 92-1 with regard to all after-tax participant contributions, including those by retirees, employees on unpaid leave of absence, and COBRA qualified beneficiaries?

**Proposed Response:** Participant contributions to self-funded health plans represent reimbursement for costs already incurred, and should not be characterized as plan assets subject to the trust requirements. At a minimum, the DOL should apply its non-enforcement position to all contributions to a health plan that is operated in conjunction with a cafeteria plan since there is no greater potential to misuse the after-tax contributions than the pre-tax contributions.

**DOL Response:** The DOL staff noted that participant contributions to self-funded health plans are always plan assets. The DOL staff stated that its nonenforcement position regarding trust requirements set forth in ERISA Technical Release 92-1 applied to cafeteria plans and insured plans. There was discussion whether after-tax contributions could be considered as part of cafeteria plans. The DOL staff wanted to interpret Technical Release 92-1 narrowly but at least one DOL staff member thought COBRA premiums should not alter DOL’s nonenforcement position. The DOL staff noted that Technical Release 92-1 does not protect against lawsuits by parties other than the DOL.

12. **ERISA Section 403 - Trust Requirements for Participant Contributions**

**Question:** Are employee contributions that are turned over to an insurance company acting solely as a third party administrator of a self-funded health plan exempt from the trust requirement under ERISA Section 403(b)?

**Proposed Response:** The statute does not specify that the plan must be insured in order for exemption to apply. Furthermore, the contributions are used to pay benefits under the self-insured plan before the time in which Regulation Section 2510.3-102 would otherwise require them to be placed in trust. Requiring the contributions to pass through a trust would merely increase administrative expenses to plan participants without providing any additional safety or accountability.

**DOL Response:** The DOL staff noted that ERISA §403(b)(2) provides an exception from the trust requirements to any assets of an insurance company qualified to do business in a state or any assets of a plan which are held by such an insurance company. The DOL staff said that such exception does not depend on whether the insurance company is acting as an insurer or third-party administrator. The DOL staff noted that in most situations where the insurer is acting as
the third party administrator the assets should be held by the insurance company in a separate account to avoid violations of ERISA §406(a)(1)(D).

13. **ERISA Section 404**

**Question:** Is the establishment of a funding policy a fiduciary or settlor function?

**Proposed Response:** Section 2509.75-5, Q&A FR-4 indicates that the trustees of a plan are to establish the funding policy. But this example may involve a multiemployer plan, where there is no employer to act as settlor. However, Section 402(b)(1) indicates that the funding policy is dynamic, which would indicate that the fiduciaries of the plan should be involved in developing and modifying it.

**DOL Response:** The DOL agreed with the proposed response -- establishing a funding policy is a fiduciary function.

14. **ERISA Section 404 - Voting of Stock Under Employee Stock Ownership Plan When Employee Does Not Give Voting Directions**

**Question:** Under what circumstances may or must the plan's fiduciary vote employer stock when a participant who has the right to direct voting with respect to the stock does not give such direction?

Assume in all cases that the plan is an employee stock ownership plan as defined in Internal Revenue Code Section 4975(e)(7). The employer has only one class of stock, common stock. All shareholders have the same rights with respect to the stock.

First, assume that the employer stock is a registration-type class of securities. The ESOP provides that participants and beneficiaries are entitled to direct the voting of the employer stock allocated to their accounts. The ESOP provides generally that the plan assets shall be managed by the plan's trustee.

Assume that the plan document does not expressly provide what must happen if the participant does not direct the trustee how to vote the shares allocated to his account. (Implicit in this question is the question of whether the absence of such a plan provision would somehow violate ERISA. Please answer this question, also.)

1. With respect to a vote for election of the employer's directors, the employee does not give any voting direction (for example, he does not return a "voting direction form"). Must the trustee, as fiduciary, vote or consider voting the shares? If not "must," may the trustee vote the shares?

2. With respect to a vote for election of the employer's directors, the employee expressly tells the trustee, in writing, not to vote the shares allocated to his account. Must the
trustee, as fiduciary, vote or consider voting the shares? If not "must," may the trustee vote the shares?

3. Same question as 1, except that the vote is for a merger of the employer in which the shareholders will receive cash in consideration for their shares.

4. Same question as 2, except that the vote is for a merger of the employer in which the shareholders will receive cash in consideration for their shares.

Assume that the plan document *expressly provides* that the trustee *may not* vote shares allocated to participants' accounts with respect to which it receives no voting direction. Are the answers to 1 through 4 above different? If so, what are the answers? (Implicit in this question is the question of whether such a plan provision would somehow violate ERISA. Please answer this question, also.)

Assume that the plan document *expressly provides* that the trustee *must* vote shares allocated to participants' accounts with respect to which it receives no voting direction. Are the answer to 1 through 4 above different? If so, what are the answers? (Implicit in this question is the question of whether such a plan provision would somehow violate ERISA. Please answer this question, also.)

Second, assume that the employer stock is not a registration-type class of securities, but that the ESOP document nevertheless provides that participants and beneficiaries are entitled to direct the voting (on all matters on which shareholders are entitled to vote) of the employer stock allocated to their accounts.

Answer all of the fifteen questions above with respect to this fact pattern.

**Proposed Response:** Registration-type class of securities, plan says participants and beneficiaries are entitled to direct vote of allocated shares, plan silent on trustee's voting obligation if participant fails to direct voting (the absence of such a provision would not violate ERISA):

1. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

2. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

3. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

4. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.
Registration-type class of securities, plan says participants and beneficiaries are entitled to direct vote of allocated shares, plan expressly states that the trustee may not vote stock for which the participant fails to direct voting (such a provision would not violate ERISA):

1. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

2. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

3. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

4. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

Registration-type class of securities, plan says participants and beneficiaries are entitled to direct vote of allocated shares, plan expressly provides that the trustee must vote stock for which the participant fails to direct voting (such a provision would be inconsistent with IRC Section 409(e)(2), to the extent that it were deemed to require the trustee to ignore express directions of the participant not to vote and such an interpretation would be contrary to the common law of ERISA):

1. The trustee must vote allocated stock for which he receives no voting direction, as required by the plan. In the absence of any indication from the participant regarding his voting wishes, the trustee must follow the plan.

2. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction, regardless of what the plan provides.

3. The trustee must vote allocated stock for which he receives no voting direction, as required by the plan. In the absence of any indication from the participant regarding his voting wishes, the trustee must follow the plan.

4. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction, regardless of what the plan provides.

Not a registration-type class of securities, plan says participants and beneficiaries are entitled to direct vote of allocated shares on all matters subject to shareholder vote, plan silent on trustee's voting obligation if participant fails to direct voting (the absence of such a provision would not violate ERISA):
1. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

2. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

3. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

4. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

Not a registration-type class of securities, plan says participants and beneficiaries are entitled to direct vote of allocated shares on all matters subject to shareholder vote, plan expressly states that the trustee may not vote stock for which the participant fails to direct voting (such a provision would not violate ERISA):

1. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

2. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

3. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

4. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction.

Not a registration-type class of securities, plan says participants and beneficiaries are entitled to direct vote of allocated shares on all matters subject to shareholder vote, plan expressly provides that the trustee must vote stock for which the participant fails to direct voting (such a provision would be inconsistent with the purpose of IRC Section 409(e), which favors participant voting direction, to the extent that it were deemed to require the trustee to ignore express directions of the participant not to vote and such an interpretation would be contrary to the common law of ERISA):

1. The trustee must vote allocated stock for which he receives no voting direction, as required by the plan. In the absence of any indication from the participant regarding his voting wishes, the trustee must follow the plan.

2. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction, regardless of what the plan provides.
3. The trustee must vote allocated stock for which he receives no voting direction, as required by the plan. In the absence of any indication from the participant regarding his voting wishes, the trustee must follow the plan.

4. Since a decision not to vote stock is a permitted "shareholder" or "investor" decision, the trustee may not vote allocated stock for which he receives no voting direction, regardless of what the plan provides.

**DOL Response:** The DOL did not specifically address the multiple questions within number 14. Instead, they addressed generally the voting of allocated shares.

In the *Polaroid* case, most recently, they expressed the opinion that participants can be considered named fiduciaries. Per ERISA Section 403(a)(1), the trustee can follow the directions of such named fiduciaries after determining that the directions are prudent, that the participants were not coerced and that the participants received adequate information. Their position is the same whether the stock is registered or unregistered.

If the trustee gets no direction from a participant, then the trustee must vote the participant's shares. If a participant sends in a direction not to vote, the DOL would treat it as a direction. However, silence is not a direction.

They are aware of IRC Section 409(e), but do not see an inconsistency with their position under ERISA Section 403(a). Section 409(e) says that participants must be entitled to direct the plan as to how shares are to be voted, but nothing more.

To support their position, they pointed to a case named *Central Trust Co. v. American Avents Corp.* They described the case as one where participants didn't want their shares tendered, but the court said that the trustees should exercise fiduciary judgment and that it would be a proper exercise thereof to tender the shares.

They also said that trustees cannot pick one prudent course of action over another, where the participants have directed the latter course. The participant choice has to be imprudent for the trustees to overrule it.

15. **ERISA Section 404(a)(a)(D)**

**Question:** *Metropolitan Life Insurance Co. v. Wheaton*, 18 EBC 2661 (7th Cir. 1994), held that a QDRO could apply to a welfare plan. It did not appear that the welfare plan in that case precluded the assignment or alienation of benefits. Could an order from a domestic relations court override an express provision in a welfare benefits plan that benefits cannot be assigned or alienated?

**Proposed Response:** No. A state court order that is inconsistent with the terms of the plan can be enforced only to the extent it is a QDRO (otherwise it is preempted). A QDRO is not preempted, but a court order relating to a welfare plan cannot be a QDRO.
DOL Response: The DOL responded that the reasoning of the Wheaton case is novel and they have difficulty accepting it as correct. The agency said it is not inclined to apply the QDRO rules to welfare plans, especially in light of ERISA section 609 (the QMCSO rules). However, the DOL has not yet taken a position on an issue found in the ABA question -- whether an order (from a domestic relations court or otherwise) applicable to a welfare plan is preempted by ERISA if it is not a QMCSO. That issue may be taken up in the QDRO project.

16. **ERISA Section 404(c)**

**Question:** A 401(a) plan may impose reasonable restrictions upon participants on the frequency with which investment instructions may be given and accepted. However, to qualify under 404(c), a participant must have at least one opportunity within every three-month period to give investment instructions for each core investment in accordance with DOL regulations. It is permissible that a fiduciary standardize the three-month election period for all participants. Does offering investment option changes on the first day of each calendar quarter (such as January 1, April 1, July 1 and October 1) fall within acceptable standards?

**Proposed Response:** Although standardized procedures permit investment instructions to be given no less frequently than calendar quarterly, under these facts there is a three-month period during which control is exercisable even though the opportunity exists only on the first day of each calendar quarter. Under no circumstances would a change not be offered less frequently than quarterly. It is not necessary that the participant select the day per quarter but that it can be standardized so that all participants may elect on a specific day per quarter.

**DOL Response:** The DOL agreed with the proposed response, provided that the election periods also met the volatility rule under the 404(c) regulations.

17. **ERISA Section 404(c)**

**Question:** What are the implications for Section 404(c) protection for plan investment fiduciaries of the following advice given by a large financial institution? (In other words, would following this advice cause problems with the fiduciaries relying on 404(c) protection?)

I recently attended an employer's 401(k) plan committee meeting at which the representatives of a large financial institution's 401(k) turnkey program gave the following advice to the committee. The committee chairman asked how to handle the substitution of one investment option for another in the employer's participant directed 401(k) plan.

The plan now offers ABC Mutual Fund Growth Fund and wishes to substitute for that fund a similar XYZ Mutual Fund Growth Fund. How should the participants currently directing investments in the ABC Growth Fund be handled? Should their accounts be switched automatically to XYZ Growth Fund, or should the participants be asked to make a new election? If they should be given the option to make a new election, what should we do if they refuse to make an election?
The representatives of the financial institution stated that the participants should not automatically be switched from the ABC Growth Fund to the XYZ Growth Fund. Rather, "they should be asked to make a new investment election for the portions of their accounts formerly invested in the ABC Growth Fund. Not only that, if they do not wish to make a new election, their arms should be twisted, they should be forced to make a new election."

(Incidentally, neither the plan nor the committee's rules governing participant investment direction purport to require participants to make investment elections, but historically the plan has been administered in a manner which would lead most participants to believe they have no choice.)

**Proposed Response:** The protection afforded to plan fiduciaries by ERISA Section 404(c) and the regulations thereunder does not apply in the case of plans that require participants to direct the investment of their accounts. ERISA Section 404(c) and DOL Reg. Section 2550.404c-1(a)(1) use the words "permits a participant or beneficiary to exercise control over assets in his account..." (Emphasis added.) Moreover, [ERISA] Conf. Rep. 93-1280, p. 305, refers to "individual account plans where the participant is permitted to, and in fact does, exercise independent control over the assets in his individual account..." (Emphasis added.)

In addition, "forcing" or "arm twisting" participants to make investment decisions would violate the independent control requirement of DOL Reg. Section 2550.404c-1(c)(2).

ERISA is a remedial statute. Its purpose is to protect retirement benefits. The fiduciary responsibility portions of ERISA, which require a responsible fiduciary to manage retirement plan assets prudently on behalf of participants, are an important part of the protections of ERISA. The purposes of ERISA would not be served if employers were allowed to shift plan investment responsibilities to unwilling participants.

A plan's fiduciaries will not be afforded the protections of ERISA Section 404(c) unless it is made clear to the plan's participants that although they are permitted to direct the investment of their accounts, they are not required to do so, and that the plan's investment fiduciary will prudently invest the accounts of participants who do not choose to direct investments. This should be made clear to the participants in the explanatory material required by DOL Reg. Section 2550.404(c)-1(b)(2)(i)(B)(1)(i) and by including on any investment election form provided to participants an option to not direct investments.

**DOL Response:** In response to the facts as presented in the question, the DOL response was to affirm that the participants must be given prior notice of the change and must make an affirmative election to stay in the new fund for 404(c) protection to continue. Obviously, there should be no coercion with respect to the participant election process.

When the fact situation was altered to describe an investment option under the plan that was described as a "generic growth fund" (as opposed to the prepared question which presumed a designated mutual fund as the option), with the authority in the plan sponsor to select the particular investment manager of the generic fund from time to time (either an individually
managed fund by an investment manager or a designated mutual fund), the DOL indicated that under those circumstances if a subsequent change in the selected manager was made by the sponsor, prior notice had to be given to the participants, but the notice could be structured to provide an adequate notice period for the participant to elect out of the fund by the effective start date of the new manager and if no response was received by that date, the participant would remain in the fund. Whether or not the participant elected, 404(c) protection would continue. The concept expressed was that even though the participants were in a generically described fund option, they would have been receiving information about the fund's activity and performance based on the previously selected manager and any change in the selected manager should prompt an opportunity on behalf of a participant to withdraw from the fund before such a change is effective.

18. **ERISA Section 406**

**Question:** In the instance in which pre-tax deferrals are used to purchase shares of closely-held company stock not listed on an exchange, are there prohibited transaction issues where parties-in-interest, disqualified persons are participating? In a non-ESOP situation, must securities be valued at the time of transaction if parties-in-interest have pre-tax deferrals and matching contributions used to purchase employer securities on a regular basis throughout the plan year?

**Proposed Response:** Securities laws notwithstanding, the rules surrounding valuation of employer securities in eligible individual account plans is not clear outside the employee stock ownership plan arena. Reg. Section 54.4975-11(c)(5) provides that in the case of an ESOP transaction between a plan and a disqualified person value must be determined at the date of the transaction. For all other purposes, value must be determined as of the most recent appraisal under the plan. Rev. Rul. 69-494, however, provides certain requisites particularly that the cost of employer securities must not exceed fair market value at time of purchase. While the valuation issue may have been modified for ESOPs, the general rule for qualified plans (EIAPs) requires valuation at the time of the transaction. This position is fully supported in IRS Announcement 92-182, III. A.2.

**DOL Response:** Under section 408(c) of ERISA a transaction involving the sale of employer securities with a party in interest will be exempt if at the time of sale the price is determined to be adequate consideration. The issue whether there must be a valuation at the time of the sale is a question of fact involving whether a valuation at some other date can represent a determination of adequate consideration at the time of the sale.

19. **ERISA Section 406(a)(1)(A)**

**Question:** According to the provisions of Interpretive Bulletin 94-3, is it a prohibited transaction under Section 406(a)(1)(A) of ERISA (and Section 4975(c)(1)(A) of the Code) for an employer to make a matching contribution under a 401(k) profit sharing plan by contributing employer stock if the plan includes a discretionary matching formula? Does the answer change if the matching contribution is made under a nondiscretionary formula defined in the plan?
**Proposed Response:** So long as all requirements regarding a qualified plan's ability to acquire or hold qualifying employer securities are satisfied, an employer may make matching contributions to the plan under either a discretionary or a fixed formula by way of contributing employer stock without giving rise to a prohibited transaction under Section 406(a)(1)(A) of ERISA (or Section 4975(c)(1)(A) of the Code).

**DOL Response:** The DOL agreed with the proposed response.

20. **ERISA Section 407(d)(9):**

**Question:** ERISA Section 407(d)(9) states that the defined benefit plan and the defined contribution plan composing a floor/offset plan arrangement shall be treated as one plan for purposes of Section 407. This implies that the assets of the defined benefit plan can be taken into account for purposes of the 10% limitation upon investments in employer stock of Section 407(a). However, Section 407(d)(3)(C) says that an eligible individual account plan cannot constitute an eligible individual account plan if the benefits under that plan are taken into account in determining the benefits under a defined benefit plan. If Section 407(d)(3)(C) is governing, doesn't that make Section 407(d)(9) superfluous? If not, what is its import?

**Proposed Response:** Section 407(d)(9) is superfluous.

**DOL Response:** The DOL has not yet taken a position on this question, so they would not answer it.

21. **ERISA Section 502(i)**

**Question:** Does the prohibited transaction tax cease to accrue after the plan has been terminated?

**Proposed Response:** Yes, otherwise the prohibited transaction could not be corrected following plan termination.

**DOL Response:** The response give by DOL officials to this question was that the prohibited transaction tax under section 502(i) continues to accrue, notwithstanding the termination of the plan. In response to a question about how correction might be performed after all plan assets have been distributed, they indicated that some type of creative approach to correction presumably could be developed, depending upon the facts of the case.

22. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

**Question:** A group health plan participant whose child is covered by the plan under a QMCSO, is terminated from employment. The participant does not elect COBRA continuation coverage for himself or this child. Is the child considered a qualified beneficiary and thus entitled to continuation of coverage under the COBRA rules? If so, who is responsible for the premiums?
Proposed Response: Since under ERISA Section 609(a)(7)(A) an alternate recipient under a QMCSO is considered a beneficiary under the plan, except for reporting and disclosure purposes, it appears that this child would be a qualified beneficiary under section 607(3)(A)(ii) and thus would be entitled to continuation of coverage under COBRA. If the child makes a separate selection, then arguably the child or custodial parent is responsible for the premium, on the basis that the QMCSO is no longer in effect due to the participant's termination. It is possible that the QMCSO would require the employer to provide coverage beyond the participant's employment, however, such a request would arguably be beyond the scope of section 609(a)(4), because it provides for a benefit otherwise not provided under the plan.

DOL Response: This issue should properly be addressed to the Internal Revenue Service. The DOL cannot give an appropriate response regarding COBRA.

23. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

Question: A group health plan participant whose child is covered by the plan under a QMCSO, is terminated from employment. The participant elects COBRA continuation coverage for this child and pays the premiums. Some months later the parent discontinues payment of the premiums. What is the employer's obligation, under a QMCSO?

Proposed Response: Since under ERISA Section 609(a)(7)(A) an alternate recipient under a QMCSO is considered a beneficiary under the plan, except for reporting and disclosure purposes, it appears that this child would be a qualified beneficiary under section 607(3)(A)(ii) and thus would be entitled to continuation of coverage under COBRA. If the child makes a separate selection, then arguably the child or custodial parent is responsible for the premium, on the basis that the QMCSO is no longer in effect due to the participant's termination. It is possible that the QMCSO would require the employer to provide coverage beyond the participant's employment, however, such a request would arguably be beyond the scope of section 609(a)(4), because it provides for a benefit otherwise not provided under the plan.

DOL Response: The administrator's position should be that the child is a beneficiary under the plan under Section 609(a)(7)(A) and it could be argued that the plan administrator has an obligation to provide information regarding the plan. Part 4 of Title I could be read to require that the administrator take reasonable steps to get premiums paid by the obligor.

The proposed answer raises an additional issue of who pays. The DOL's position is that if no premium is paid, the administrator would have to notify the custodial parent of the failure.

The DOL notes that there have not been many requests for guidance under Section 609. For the foreseeable future, the way guidance will come is by advisory opinion rather than by regulation.

24. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

Question: Can the QMCSO provide for coverage different from that of the employee-participant? Consider the following situation: The plan participant divorces, his wife and
dependent children subsequently receive continuation of coverage under COBRA. The participant remarries and during open enrollment elects a different coverage with lower premiums for his "new" family. The employer receives a QMCSO covering the children from the previous marriage, now receiving COBRA benefits. Upon qualification of the order, should the alternate recipients receive benefits under the participant's new coverage (which could be less than their current COBRA coverage), or should the participant continue their COBRA coverage until its expiration and then convert these children to his coverage? How specific does the order itself need to be?

**Proposed Response:** It seems logical and consistent with ERISA Section 609, to expect that the QMCSO would require the alternate recipients to be enrolled in the participant's plan. I would submit that unless the order clearly described the type of coverage and the name of the plan to which the order applies, that it would be deficient, without further modification. It remains unclear to me, however, what the intent of the new law is. It is certainly possible, however complicated, that an order could direct payment of premiums under the COBRA coverage with a later change to the participant's coverage.

**DOL Response:** If a plan provides for the type of coverage the participant is eligible for but currently doesn't have (is not enrolled in), the court order could direct the participant to change coverage. In another circumstance, the court could order that the participant not change to different coverage. Also, see Section 609(a)(4).

Follow-up Question: What about step children?

DOL Response: Unless there has been an adoption, it is not a QMCSO and therefore no obligation is established because the child is not the child of the step-parent unless an adoption takes place.

Follow-up Question: What if the order doesn't direct the participant to provide coverage?

DOL Response: The DOL's position would be that you look at the order. The order can do it. If not, the custodial parent is out of luck. It can be addressed by order, and it is not a QMCSO unless it adequately describes coverage.

25. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

**Question:** What is the department's position when the QMCSO covers a child who lives outside of the participant's HMO service area? Will the participant be required to change his coverage to accommodate the order?

**Proposed Response:** While ERISA is silent on this particular question, the Social Security Act amendments ("Amendments") in Section 1369g-1(a)(1)(C) prohibit an insurer from denying health care coverage to a child under a QMCSO on the basis that the child lives outside of the insurer's services area. Some orders have contained the following language: "Nothing in this Order shall be construed to require a health maintenance organization to provide coverage to
children who reside outside the geographic area." (Employer still may be obligated to provide alternative coverage.) It is likely, however, in light of the Amendments, that the nature of the orders will change, as states amend their own laws to comply with Section 1369g-1. It should be noted that under ERISA Section 609(a)(4), a QMCSO cannot require a plan to provide for benefits to an alternate recipient not otherwise provided for by the plan, "except to the extent necessary to meet the requirements of a law relating to medical child support described in Section 1908 of the Social Security Act".

With this in mind, it seems likely that the employer will be obligated to enroll the alternate recipient in an alternative coverage to the extent one exists, such as an indemnity plan or another HMO, PPO arrangement covering the child's residence. It is also possible that although the child resides outside of the HMO service area, if it is feasible for the child to seek care in the nearest HMO facility, such HMO may be obligated to extend coverage to the child. At any rate, it is possible that the participant may have to change his own coverage to accommodate the order.

**DOL Response:** This proposed answer contains a misstatement of our understanding of Section 1908 of the Social Security Act. The DOL has no authority over Section 1908 and recommends that further inquiry be made to HCFA. HCFA has received many inquiries regarding Section 1908.

The second paragraph of the proposed answer is not far off from our thinking. It clearly identifies the possibility that there may be an obligation to enroll the child in an HMO, PPO or other plan, to the extent one exists, if the order clearly identifies the HMO, PPO or other plan. The DOL has received no requests for guidance regarding the description of the facts arising under this scenario.

26. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

**Question:** What is the employer's obligation should it receive a QMCSO which covers a child with a preexisting condition, where the participant's plan precludes dependents with pre-existing conditions from coverage for a period of time?

**Proposed Response:** ERISA Section 609(a)(4) does not require a plan to provide a type or form of benefit to an alternate recipient under a QMCSO that is not otherwise provided by the plan. The SSA amendments do not include preexisting condition as one of the reasons for which coverage may not be denied. However, the answer is unclear, because of ERISA section 609(c)(2), which prohibits a group health plan from restricting coverage of any adopted dependent child based on any preexisting condition. I would guess that under a QMCSO, an employer will do well to exercise caution when dealing with its preexisting condition provisions.

**DOL Response:** The preexisting condition question is one of the thorniest we have run across and are not going to answer it now. We feel that it is inappropriate to answer this issue in a hypothetical, but would rather welcome a request for an advisory opinion letter regarding specific facts and circumstances.
27. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

**Question:** How does the department view the employer's obligation during the period of time that such employer processes a medical child support order for qualification? Should the alternate recipients be extended coverage during this period?

**Proposed Response:** While technically I would propose that coverage does not apply until the order is deemed to be a QMCSO, I would be concerned about a blanket policy practicing such an approach. It would appear safer, until further clarification is received, to enroll the children retroactive to the date the order was received, upon qualification of the order.

**DOL Response:** Different kinds of factual situations can arise, some where coverage would be unlikely, e.g., where the court purports to provide coverage on a retroactive basis. However, where the order is signed on May 10 requiring coverage as of June 1, but the administrator makes a determination on July 15 that it is qualified, so that it is to the administrator's advantage to delay, coverage should be effective prior to July 15. There is no legislative history on this issue. A better case can be made to extend coverage pursuant to the order as of a certain date. If it can be shown that there is a delay, the plan participant has an equitable right under ERISA Sec. 502(a)(3) if a fiduciary fouled up the administration of the plan and it is a breach. The question remains whether any delay in putting the participant in the plan is reasonable. If an order is issued and the delay makes sense, then we would not see that as a breach of fiduciary duty.

28. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

**Question:** In ERISA Section 609(a)(7)(B), the alternate recipient under any medical child support order is to be treated as a participant for reporting and disclosure purposes under ERISA. Does this mean that during the qualification process the alternate recipient should still receive all the required documents and reports? What if the order is not deemed "qualified" by the plan administrator?

**Proposed Response:** If treated literally, then the order would not need to be qualified to trigger the employer's obligation to send the child or representative all required communication. This may not be unreasonable during the period the order is being processed for qualification, however, I fail to see why an employer should remain obligated where an order is not qualified and no modified order is received. (Assume notice of the deficiency has been given to the alternate recipient and representative and the deficiency is significant).

**DOL Response:** It is not unreasonable for the plan participant to receive all the documents and reports of the plan. Section 609(a)(7)(B) talks about the court order and situations where it is not qualified. Until the time the order is determined not to be qualified, the alternate recipient is to be treated as an alternate plan participant. The purpose of this provision is to give access to information and to records in order to correctly identify the plan and create an order that is qualified.
29. **ERISA Section 609 - Qualified Medical Child Support Orders ("QMCSO")**

**Question:** When does DOL intend to issue regulations on the QMCSO?

**DOL Response:** There is nothing regarding QMCSOs on their regulatory agenda. In the current environment, it is not likely that regulations will be issued within the next year. The DOL would be receptive to requests for advisory opinions as a vehicle for private guidance.

30. **FMLA**

**Question:** Does the need for in-vitro fertilization constitute a "Serious Health Condition" under the FMLA? Assume that the woman has no health problems, other than infertility.

**Proposed Response:** No. The different ways in which a person is considered to have a "Serious Health Condition" under Section 825.114(a)(2) all involve "incapacity," and the infertility is not an incapacity.

**DOL Response:** The Wage and Hour Division's Division of Policy and Analysis, which did not have a representative at the meeting, has jurisdiction in this area. Their telephone number is (202) 219-8412.

31. **Warn Act**

**Question:** Assume that a transaction only involves the sale of assets, and that the sale agreement obligates the seller to terminate the employment of all of the employees prior to the closing. Is the seller or the buyer obligated to give the WARN notice?

**Proposed Response:** The seller. Section 639.4(c) states that the seller is responsible if the termination of employment occurs before the date of the closing. The preamble to the regulations (54 F.R. 16042) states "If a plan closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice." Thus, if the termination of employment occurs before the effective time of the sale, the seller must give the notice. If the termination occurs after the effective time of the sale, the buyer must give the notice.

**DOL Response:** This Act is under the jurisdiction of the Office of Worker Retraining and Adjustment Programs. This question should be addressed to that office (telephone number: 202-219-5577).