QUESTIONS AND ANSWERS WITH THE LABOR DEPARTMENT

Department of Labor Representatives:

Mr. Morton Klevan

Ms. Elizabeth Goodman

Ms. Lisa Hall

Mr. Jim Craig

1. **Question:** May the reasonable costs of participant investment education be deducted from the assets of a §404(c) plan?

**Proposed Response.** Yes. ERISA 403 permits plan assets to be used to defray reasonable administrative expenses. Participant investment education appears to fall within the gambit of administrative expenses as the term is described in the DOL’s Opinion Letter to Kirk Maldonado dated March 2, 1987. This letter generally states that administrative expenses must be consistent with ERISA Sections 403 and 404. These sections provide, in part, that the plan assets must not inure to the benefit of the employer and that a plan fiduciary must act for the exclusive purpose of providing benefits to the plan participants and beneficiaries. In addition, the letter provides examples of expenses which do not qualify as deductible administrative expenses. Expenses incurred in the process of determining whether an employer should sponsor a plan or in instituting a plan may not be deducted. In addition, administrative expenses do not include expenses which an employer could be reasonably expected to bear. The provision of participant investment education is consistent with ERISA Sections 403 and 404 and is not analogous to any of the examples of nondeductible expenses. The sole purpose of participant investment education is to enhance the value of the plan to the participants. The service is not necessary to implement the plan, nor does it benefit the employer in any way other than providing a more successful retirement income vehicle for the employer’s employees. The cost of providing such services is not a reasonable cost for an employer to bear.

In addition, the DOL has released an Interpretive Bulletin (2509.96-1) emphasizing that investment education is an important element of a successful participant-directed individual account plan. In this regard, participant investment education costs are similar to the administrative costs of qualified domestic relations order ("QDROs"), which may be deducted from plan assets, although may not be charged to individual participants seeking QDROs. It is important that QDRO administration and participant investment education be available to participants, regardless of whether a specific participant avails himself or either service at any given time. Therefore, reasonable costs associated with providing participant investment education should be deductible from §404(c) plan assets just as reasonable costs associated with QDRO administration may be deducted.

**DOL Response:** The proposed response is generally correct. There may be reasons, however, why the employer would choose to bear the expense. Also, the education provided may not be strictly related to investment decisions but may be broader to include general education on the employer’s provision of retirement benefits. In such circumstances, the costs or a portion of the costs may not be payable from the assets of the plan.

In determining the method of allocating the costs among accounts, the QDRO analogy is not the correct analysis. If the education is provided to and applicable to all participants, it is probably correct to assume that the costs may be allocated as an expense of the entire plan. It is not clear what method of allocation should be used if the education provided was not applicable or available to all participants.

2. **Question:** Must stop-loss plans comply with HIPPA, or are they regarded as employer, not employee, benefit plans?

**Proposed Response.** Since they reimburse the employer, they are not required to comply.

Periodically since HIPPA was enacted, we read of horrible rating practices (mostly under individual policies), many involving rate increases of 300%, 500%, etc. Nothing was found in the legislative history to indicate whether the Congress anticipated the practice and assumed that the states would regulate it. Was the legislative intent underlying HIPPA to not address the matter on the federal level in the expectation that the states would do so? If so, isn’t this an illustration of devolution gone awry? It is hoped that the agencies recognize the need for a unified, national approach to the matter.

**DOL Response:** The DOL has not provided any formal response to this issue either in the regulations or preambles to the
regulations. Informally, the DOL has taken the position that in the instance of stop-loss insurance purchased by an employer, the traditional ERISA Title I analysis should be applied. Typically this would result in HIPAA not being applicable to the stop-loss insurance, but the DOL noted that such analysis would be the DOL’s analysis, and it could not speak for the other two relevant agencies. The DOL acknowledged that the more difficult question would be a stop-loss insurance policy purchased with plan assets. Before issuing any guidance, the DOL plans to solicit more information as to the impact of HIPAA’s application in those instances.

3. **Question**: Can a life insurance policy be “rolled out” to a partnership composed of the participant and his children under Prohibited Transaction Class Exemption 92-6?

**Proposed Response**: No. The partnership is not a “relative” within the meaning of ERISA Section 3(15) or a member of the family as defined in Code Section 4975(e)(6), even though all of the (other) partners in the partnership are “relatives” or members of the family.

**DOL Response**: The Proposed Response is correct.

4. **Question**: Can a prohibited transaction be corrected by the in-kind distribution of the property to a participant in connection with the termination of the plan, where the participant who receives the property is not the party in interest that sold it to the plan?

**Proposed Response**: Yes. No recission should be required where the property is transferred to a third party in an arms-length transaction. See Treas. Reg § 53-4941(e)-1(c)(3)(ii).

**DOL Response**: The Proposed Response is correct as long as the conditions of the regulation are met.

5. **Question**: Wouldn’t state laws authorizing a judicial accounting of a trust be preempted in the context of a plan subject to ERISA?

**Proposed Response**: Yes. Such statutes would be preempted.

**DOL Response**: The DOL’s position is that the statute would be preempted, with the caveat that preemption may not apply in the instance of a MEWA using a trust not covered by ERISA.

6. **Question**: Do the claims procedure rules apply in the case of an order that is found by the plan not to be a QDRO?

**Proposed Response**: Yes. The court order constitutes a claim for benefits by the alternate payee.

**DOL Response**: The DOL’s position is that the claims procedure would not apply because this would not be a claim for benefits by an alternate payee until it was determined that the order was a QDRO. This is why the DOL had put the burden upon plan fiduciaries to cooperate. In response to a further question as to whether the purported alternate payee would be considered a participant, the DOL responded that the claims procedure regulation provided a few administrative requirements before the claimant could pursue a remedy in court, but that a plan administrator determining whether an order was a QDRO was strictly a legal determination and there was no reason to delay such a claim being presented to a court. Consistent with this position, the DOL stated that the applicable standard of review would not be arbitrary and capricious because the existence of a QDRO was strictly a legal determination, and not in the discretion of the plan administrator.

7. **Question**: Can a Section 401(k) plan hold a “right” to allow any of its participants to purchase employer stock at a fixed price for an entire year?

**Proposed Response**: No. The “right” is an option. Because an option is an employer security, but not a qualifying employer security, holding it in the plan constitutes a prohibited transaction.

**DOL Response**: The Proposed Response is correct. The applicable definition of security is provided by the federal securities laws, and the SEC confirmed that this would be a security. This security would not, however, be a qualifying employer security.

8. **Question**: Can a plan document simply cross-reference to a participant loan disclosure statement as constituting its loan program?
Proposed Response. No.

DOL Response: The Proposed Response is correct. The DOL noted that if there was a proper and sufficient cross-reference and the cross-referenced documents contained the necessary provisions, the structure may be adequate. There is no requirement that everything be contained in the plan, but the general structure to the loan program has to be described in the Summary Plan Description, and the description should be contained in a document available to the employee before the employee requests a loan.

9. Question: Assume that a participant receives a distribution from a plan of $6,000, and rolls it over into a new employer’s plan. The participant then takes out a loan for $3,000. The new employer’s plan is later informed that the amount of the rollover should only have been $5,000. Is the new employer’s plan in jeopardy because the loan exceeded 50 percent of the participant’s (subsequently adjusted) account balance?

Proposed Response. No. You should look at the account balance at the time of the loan; subsequent events are not taken into account.

DOL Response: The Proposed Response is correct, provided that there was no knowledge that the account balance was incorrect.

10. Question: Can a loan program that is part of a tax-qualified retirement plan refuse to make loans to participants over age 75?

Proposed Response. No.

DOL Response: The Proposed Response is correct. In response to whether a loan program could exclude those already in pay status, the DOL noted that if the person was not a party-in-interest, the plan would not have to comply with 408(b)(1).

11. Question: Can a benefit plan reduce the benefits otherwise properly payable under that plan by the amount of overpayments made by another plan maintained by the employer?

Proposed Response. No.

DOL Response: The Proposed Response is correct.

12. Question: Assume that an individual is excluded from participating in a tax-qualified retirement plan by the very terms of the plan. The employee requests that the employer expand the coverage of the plan to cover him. The employer rejects that idea, and fires the employee for raising the issue. Is the employer’s action prohibited by Section 510?

Proposed Response. No. The person is not covered by the plan and is not entitled to become covered by the plan in the future. Thus, Section 510 does not apply. Accordingly, ERISA does not preempt state law, so that the employee can bring a state law cause of action based on these facts.

DOL Response: The Proposed Response is correct.

13. Question: A non-profit corporation has terminated its 403(b) plan and established a 401(k) plan. Currently, it appears that the assets (i.e., the participants’ benefits) may not be rolled over to an IRA or the 401(k) plan because no distributable event has occurred as provided under IRS Code Section 403(b)(11). Therefore, the 403(b) plan remains obligated to make its annual 5500 filings. Are you aware of any guidance that will be forthcoming from the DOL that will permit a terminated 403(b) plan to avoid this obligation?

DOL Response: This is predominantly an issue under the Internal Revenue Code. The DOL does not anticipate issuing any guidance in the foreseeable future.

14. Question: What definitive action does the PWBA plan to take concerning soft dollar and directed brokerage reforms now that the DOL’s ERISA Advisory Council report has recommended action be taken? When? Does the DOL-PWBA plan to make any recommendations to the Securities and Exchange Commission on this topic?

DOL Response: The DOL plans to codify in the near future the Interim Bulletin it has released on this issue.
15. **Question:** Are the voting rights associated with qualifying employer securities in an ESOP “plan assets?” Is the Department reconsidering its position after *Grindstaff v. Green*, 133 F.3d 416 (6th Cir. 1998)?

**DOL Response:** The DOL is not reconsidering its position. The DOL noted that its real argument in *Grindstaff* was misconstrued. The DOL was essentially arguing that the vote itself was a fiduciary act because it could affect the value of the stock. The DOL pointed out that the case was essentially a labor-management dispute with most accusations contained in the complaint concerning settlor functions, and that the decision may have resulted from the broad reading of the complaint required under a motion to dismiss.

16. **Question:** In light of *Grindstaff v. Green*, is the Labor Department reconsidering its position on whether a directed trustee is a fiduciary?

**DOL Response:** The DOL is not reconsidering its position. See the answer to Question 15.

17. **Question:** In what cases has the Department recently filed amicus briefs? In what future cases is the Department considering filing amicus briefs?

**DOL Response:** More than half of the amicus briefs filed have been in the health area, centering largely on the application of state malpractice laws to HMOs and the distinction between malpractice and denial of benefits. The other half of the cases cover many areas. There is still a considerable focus on preemption cases, with an effort to cut back the scope of preemption. In the health area, it is generally safe to assume that the DOL will not support preemption and will support the existence of a state remedy. The DOL refused to comment on the *Aetna* case in Texas, and stated that the Section 510 outsourcing cases would probably not be an area in which the DOL would be heavily involved.

18. **Question:** When do you expect the regulations on health care claims procedures to be issued? What new issues have you had to confront?

**DOL Response:** Although the DOL would not comment on the substance of the proposed regulations, it did state that it hopes to submit proposed regulations within sixty days.

19. **Question:** Please explain the Administration’s position on amending ERISA to permit the application of state law remedies to health care benefit decisions by managed care companies?

**DOL Response:** The Administration has not taken a position, though one may soon be forthcoming. The PWBA’s position is that there must be an effective remedy in many situations in which one is not provided currently under ERISA, although the PWBA has not taken a position as to whether such remedy should be under federal or state law, or the appropriate scope of such remedy.