1. Where life/accident insurance coverage is provided under a credit card that an employer requires employees to use on company business, is the provision of such an incidental benefit an ERISA plan maintained by the employer?

**Proposed Answer** No. The insurance is offered as an incidental benefit by a third party ancillary to the use of the third party's credit card on company business. It should not be considered a benefit provided through a plan maintained by the employer for the purpose of providing participants accident or death benefits.

**DOL Answer:** No. This is a difficult case that is "on the cusp" because its hard to find an exception under the law and the regulations. Possibly relevant factors would be the amount of insurance coverage, the eligible class of employees and whether there was individualized negotiation. See Advisory Opinions 81-77 and 77-69.

2. IRS regulations under Code section 411(d)(6) authorize the sponsor to amend a 401(k) plan to eliminate a participant's right to take a hardship withdrawal. Must the SPD for this plan mention this authority when describing those circumstances that may cause a participant to lose this right?

**Proposed Answer:** No. The SPD need not describe every possible circumstance under which rights may be eliminated. The SPD's statement of the general power to amend the plan will suffice.
**DOL Answer:** A SPD content regulation is pending that requires a plan to describe circumstances in which benefits can be eliminated. The Preamble (at 3(l)) interprets this requirement as encompassing the power to eliminate a benefit. This requirement is expressed in general terms. It does not necessarily specifically refer to one type of benefit elimination, as opposed to a general disclosure of the authority to eliminate benefits.

While a specific disclosure of the precise benefit or feature that is subsequently eliminated may not be necessary, a general statement of power to amend is not enough. The description of this benefit elimination authority must go beyond such a general amendment authority statement. The general amendment authority statement will only be sufficient if it fleshes out that this authority includes the power to eliminate plan benefits or features. Further, a drafter must consider the "proximity of limitation" requirement of existing regulations. If the hardship withdrawal feature is a benefit, then the proximity requirement must be satisfied too. A blanket statement might still suffice if it is in proximity to the description of all the benefits (i.e., the SPD must put limits in the same context as the description of the benefit so a reader will understand that the benefit they have just read about can be taken away).

3. Will the DOL reconsider the amount of the penalty under the Delinquent Filer Voluntary Compliance Program ("DFVC Program") in the case of a Form 5500 filed in connection with a Tax-Deferred Annuity under Section 403(b)? Given that the Form 5500 for such a plan only involves completing six lines of generic information regarding the plan, the penalties seem excessive.

**Proposed Answer:** Yes. The DOL did not focus upon the de minimis reporting requirements for Section 403(b) plans when it adopted the DFVC Program.

**DOL Answer:** The Department has initiated a broad review of the DFVC Program and will review the program's treatment of Tax-Deferred Annuities under Section 403(b). It realizes that the penalties are burdensome for such plans.

4. In the case of a QDRO that states that it applies to a specific plan and to any "successor plan," would that QDRO be binding on a successor plan?

**Proposed Answer:** Yes.

**DOL Answer:** DOL agrees with the proposed answer:

5. A participant separates from her spouse on September 30, 1995 while 40% vested. In 1998, she become fully vested. In 1999, a court issues an order entitling her former spouse to 50% of her account balance on September 30, 1999. Does the former spouse get 50% of the 40% that was vested in 1995 or 50% of the one hundred percent that actually vested?
**Proposed Answer:** The parties should be encouraged to seek clarification from the court. In the absence of clarification, the spouse gets 50% of the 40% that was vested at the time the spouses separated.

**DOL Answer:** In the absence of clarification by the court, the spouse gets 50% of the 100% that was actually vested.

**6. Assume that an ESOP is a shareholder of a C Corporation. The entity is considering switching to S Corporation status. That election requires the unanimous consent of all of the shareholders. Is consenting to this election a fiduciary function?**

**Proposed Answer:** Yes. Any action affecting the value of the assets of the plan is a fiduciary function. Because electing S Corporation status could affect the value of the corporation, and therefore the value of the stock held by the ESOP, voting on this issue is a fiduciary function.

**DOL Answer:** DOL agrees it would be a fiduciary decision.

**7. A defined contribution plan document provides that if a participant cannot be located, the benefit will be paid to an escrow account on his or her behalf. Assuming that is a taxable distribution, would that be a breach of fiduciary responsibility?**

**Proposed Answer:** Yes. By paying the amount to an escrow, the participant is precluded from rolling over those amounts tax-free into an IRA. Also, if the participant is actually located, the amount of the interest and penalties on those amounts could exceed the amount of the distribution.

**DOL Answer:** This is a prudence issue which must be decided on the facts and circumstances. It would appear that holding the assets in trust is the proper course.

**8. How should a plan sponsor handle insurance company shares it receives by virtue of the demutualization of the insurer of its medical, life or other welfare benefits? Does it matter the extent to which employees may have paid a portion of the plan's costs over the years?**

**Proposed Answer:** No special notice or handling of such shares (or the proceeds from their sale) is necessary so long as the shares received and proceeds are accounted for separately on the records of the company, and the proceeds are used within 3 years to pay for then current similar benefits (or insurance premiums). No trust is required, and no special allocation or payment to employees is required.

**DOL Answer:** The DOL stated its assumption that the question concerns distribution of shares or cash to the "owner" of policy. If the employer paid all premiums for an unfunded plan, then the employer generally may keep the distribution. If any employee money was used directly or indirectly to pay premiums, then a portion must go back to employees or the plan. Until this occurs, that portion constitutes "plan assets." The DOL
is studying what to do if plan itself owns the policy and will not answer the question as it applies to those facts. Specifically, the DOL is studying whether the plan's ownership of the policy converts all distributions into "plan assets."

Following this exchange there was a discussion of the methodology for a proration where the employer owns the policy and a portion of the premiums is attributable to employee contributions. The DOL welcomes comments and suggestions and invited a request for guidance. The key issue is that participants come and go but the employer stays forever. There was a division of opinion whether this fact should entitle an employer to more than a pro rata share of the distribution. There was general support for the view that the continuity of the employer and the revolving door flow of participants may justify not tracing former employees and paying them a share versus sharing with current employees only.

9. The IRS has issued several private letter rulings addressing the tax consequences of domestic partner benefits in the multiemployer plan context. According to these private letter rulings, the fair market value of the benefits provided to the domestic partner is imputed income to the participant electing such benefits, and is subject to income tax withholding, FICA and FUTA. The IRS did not address whether a plan was responsible for the employer's share of FICA and FUTA. In private letter ruling PLR 9850011 (December 11, 1998), the IRS again addressed these issues in the context of a request from a multiemployer plan. In this private letter ruling, the IRS stated that a plan is responsible for the employer's share of FICA as well as FUTA and other employer tax responsibilities.

a) How should a fund withhold when there is no cash payment to the participant?

**DOL Answer:** See Advisory Opinion 82-32A.

b) If a fund pays the employer's share of FICA and FUTA with plan assets, would the plan violate ERISA 406(a) and possibly 406(b)?

**Proposed Answer:** Yes. The use of plan assets in this context would constitute the lending of money or the extension of credit to a party in interest. To the extent that the trustees of the plan are also contributing employers, there may be a violation of 406(b).

**DOL Answer:** If the plan pays the employer's share of the tax and if there is a determination that this is the only effective way to proceed, there will be no violation of Sections 406(a) and (b).

c) Can a plan charge an administrative fee to the participant electing domestic partner benefits, which is placed in a separate account for the purpose of paying the FICA and FUTA obligations in accordance with the IRS' thinking on the subject.

**Proposed Answer:** Yes. There are no prohibitions to a fund charging administrative fees for extending benefits to persons who have a tangential connection with the
participant/dependent population of a plan. In fact, the administrative fees permitted under the COBRA regulations suggest that Congress and the IRS understood that certain responsibilities imposed upon plans result in additional administrative expenses which can be passed on to those persons who benefit from the extension of benefits.

**DOL Answer:** The plan cannot pay the employee's portion of the tax from its general assets. However, if the plan so provides, the employee may be required to pay an additional amount for the tax. If the plan is properly designed, the employee can be required to bear the cost. **10. A Section 407 acquisition is not deemed to have occurred because of stock received by reason of a stock dividend or stock split. 2550.407a-2(b). Does this same rule apply to shares received in a recapitalization or reorganization?**

**Proposed Answer:** Yes. As long as all shareholders are treated equally, the plan's receipt of the stock will not be treated as an acquisition for this purpose.

**DOL Answer:** The DOL said the proposed answer seems right. However, they observed that their agreement may depend upon how the shares are received. Without specifying exactly what they had in mind, the DOL said that if the shares are received in a strange or different manner than usual, then they may have a different answer related to the nature of the recapitulation or reorganization. The DOL also stated that it is an implicit assumption of its answer that the stock must be a qualified employer security. In this connection, they questioned whether the old grandfather for holdings above ten percent was even available anymore given the passage of years since ERISA was enacted.

11. Does the exception for the "publicly-traded securities" contained in Section 2510.3-101 include warrants to purchase the stock of a publicly traded company, even though the warrants are not publicly-traded?

**Proposed Answer:** No. Whether or not the underlying stock is publicly-traded is irrelevant; the test is whether the warrants are publicly-traded. If they aren't, then this test is not satisfied. However, it is possible that the publicly-traded company would qualify as an operating company.

**DOL Answer:** The warrant is itself not an equity interest. It is simply the right to obtain an equity interest. Consequently, there is no "look-through" beyond the warrant.

12. Do equity interests in limited liability companies constitute "qualifying employer securities" for purposes of Section 407?

**Proposed Answer:** Yes.

**DOL Answer:** The DOL agrees with the proposed answer if the equity interests are "stock" and if the "equity interests" meet all the other requirements of ERISA Section 407.
13. Not infrequently a defined contribution plan switches to a "daily valuation" environment in which the participants may choose to invest among a fixed number of funds. Such a plan investment environment generally requires that all funds be liquidated and transferred to the new trustee/recordkeeper in cash. Problems sometimes occur when a formerly trustee-invested plan has one or more assets which for a variety of reasons cannot be liquidated immediately (e.g., because they are in a frozen real estate fund or invested in an asset which will take a period of time to sell). Can Class Exemption 80-26 be utilized so that the plan sponsor may make a no-interest loan to the plan for the anticipated fair market value of the illiquid asset, which loan's proceeds can be utilized as a substitute for the illiquid asset (when the asset is ultimately sold, any upside would be distributable to then current plan participants, and any downside borne by the plan sponsor)?

**Proposed Answer:** So long as such a loan is for no more than 10% of the plan assets, Class Exemption 80-26 may be so used.

**DOL Answer:** Class Exemption 80-26 is not available. Making the loan is not the payment of an ordinary operating expense. An individual exemption was granted in P.T.E. 91-21. Also see P.T.E. Exemptions 95-111 and 95-99 as well as Advisory Opinion 99-48A.

14. Assume that a person claims to be the beneficiary of a deceased participant ("Claimant"), but the plan has a subsequent beneficiary designation form that designates a different person as the beneficiary of the participant's account balance under the plan. Is the plan obligated to provide the subsequent beneficiary designation form? Specifically, would that violate any privacy concerns of the participant's estate? This seems particularly important in this case because the participant apparently did not notify the individual who was originally named as the beneficiary that the designation had been revoked and that a new beneficiary designation had been effected.

**Proposed Answer:** No. Although it can be argued that this should be treated as a denied claim for benefits under the claims procedure rules, that ignores the privacy concerns of the participant. See Ad. Opo. 79-82A and 82-21A; Keyes v. Eastman Kodak Company (W.D. KY 1990) 12 EBC 2319.

**DOL Answer:** This is a difficult problem. However, the denial of the former beneficiary's claim triggers overriding considerations. Because of such denial, the new beneficiary form must be disclosed.

15. A 401(k) plan receives conflicting claims for benefits based on whether a beneficiary designation form executed very shortly before the participant's death was properly executed (or it was executed under duress or while the person was not competent). The conflicting beneficiaries agree to split the proceeds equally. Can the plan pay out the benefit in that manner, even though the beneficiary designation specified that all of the benefit was to be paid to one individual?
Proposed Answer: No. The proper approach would be to file an interpleader action.

DOL Answer: Filing an interpleader is the correct approach. The plan cannot pay benefits to a person who is not entitled to the benefit.

16. Will the DOL respond to industry objections to the proposed claims processing regulations by making changes in the proposal? If so, in what areas?

DOL Answer: The DOL stated it was premature to discuss these regulations.

17. Considering the Department's amicus position in *Unum v. Ward*, which called for the Supreme Court to apply an expansive reading of state laws regulating insurance, does the Department intend to pursue regulatory (and continued amicus) efforts to further narrow the scope of preemption?

DOL Answer: The DOL intends to continue filing amicus briefs arguing for the limiting of preemption.

a) Assuming that Congress fails to pass health care reform legislation that includes a provision to permit participants and beneficiaries to sue managed care organizations for wrongful death and other torts, what role will the DOL play in the preemption debate?

DOL Answer: See Answer 17 above.

b) Why does the Department consider non-legislative steps necessary in light of the willingness of courts in the aftermath of *Travelers* and *Dukes* to expand the liability of managed care organizations, particularly with respect to vicarious liability medical malpractice claims and breach of fiduciary duty claims based on provider-incentive compensation arrangements?

DOL Answer: With respect to the liability of managed care organizations, the DOL cited, *Pegram v. Herdrich*.

18. Will the DOL address alleged abuses in HIPPA portability from group to individual, viz., large rate increases, low conversion commissions, and extensive delays in issuance.

DOL Answer: The DOL stated it could not answer this question.

19. What Title I issues does the DOL see in the current public debate on conversions from traditional defined benefit plans to cash balance plans? Does the DOL intend to take any action in this regard?

DOL Answer: The issue under Title I is the adequacy of disclosure to participants under *Varity v. Howe*. The DOL intends to be involved in cash balance conversion issues.

20. In the area of the contingent workforce and employee benefits:
a) What are the major issues the Department sees?

b) Has the DOL taken action with respect to these issues?

c) What future actions does the DOL anticipate in this area?

**DOL Answer:** The DOL stated an assumption that this question is really a question whether the Time-Warner dispute is a portent of things to come. The DOL stated it does not view Time-Warner as contingent worker case. The DOL characterized that dispute as involving a failure to properly administer the plan.

With respect to contingent workers the real issue is whether or not these workers are covered by the plan. In addressing contingent workforce policy issues, the DOL will defer to its Advisory Committee that is looking into the issue.

**21. What role does the DOL intend to play with respect to health-care fraud issues exemplified by Medicare fraud cases. Is DOL considering a nationwide program to investigate health care fraud committed against employee benefit plans (particularly self-funded plans)? What role would DOL require plans to play in the investigation (since the plans are, in actuality, the victims of possible fraudulent billing)?**

**DOL Answer:** The DOL has a number of cases (civil and criminal) involving health-care fraud issues. The DOL sees health care enforcement as a priority for fiscal year 2000.

**22. A question was raised concerning the DOL's policy regarding Freedom of Information Act requests seeking investigative materials.**

**DOL Answer:** The DOL acknowledged that its offices follow a policy that may involve greater access to investigative files than might be expected. Specifically, the DOL will only deem documents it receives in an investigation as subject to the FOIA exceptions that are specifically claimed by the companies submitting those materials as specified in general DOL FOIA regulations (not in any of the ERISA looseleaf services). If the DOL is not notified of such a FOIA exemption claim before they fulfill a FOIA request, they will respond to the FOIA request without affording prior notification to the persons who submitted the materials to the DOL as part of the earlier investigation. This does not mean that they will necessarily give all investigative materials to the person making the FOIA request. But it means that they will not afford the investigated party a chance to object to the FOIA request before the DOL makes its decision regarding the applicability of FOIA.

The DOL said that it would accept notifications of FOIA exemptions even years after an investigation. If it has received such an exemption claim then it will notify the claimant of subsequent FOIA claims before responding to them.