

ERISA ALERT: IRS Says Wall Street Cannot "Buy" Your Company's Pension Plan --- at Least for Now

By

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Recently hedge funds, private equity funds, investment banks and insurance companies ("Institutional Investors") have been seeking approval from the IRS, the Department of Labor and the PBGC to "buy" frozen pension plans (ones where participants are no longer earning new benefits). Such an opportunity could arise pursuant to a corporate transaction, such as where Company A buys the stock or assets of Company B but does not wish to assume B's frozen pension plan. Opportunities to buy plans also could arise in a corporate bankruptcy. One such transaction was completed in the U.K. in 2007 but there is no evidence that any have been attempted in the U.S. Institutional Investors seek to manage the plans and their assets for profit, since they represent such a lucrative potential source of new investment. Private pension assets in the U.S. are approximately \$2.3 trillion, of which approximately \$500 billion is held in frozen plans. These include the assets held in frozen plans by IBM, Hewlett-Packard, Verizon and Alcoa.

Advocates of this concept point to the benefits that plan participants would receive by having their benefits managed by a professional asset manager and to the fact that a well-capitalized Institutional Investor could help shield an underfunded pension plan and its participants from having to rely on the limited guarantees of benefits offered by the PBGC should the plan not have enough assets to pay benefits.

Critics point to the fact that an entity that has never had an employment relationship with plan participants has never been allowed to sponsor, much less purchase, a pension plan and that, because of this, they are less likely to be "employee friendly." They also argue that an Institutional Investor might take greater risks in investing pension assets than is traditionally considered prudent and that reporting of the underlying assets of many such Institutional Investors is considered by many to be too opaque.

On August 6, 2008, the IRS issued Revenue Ruling 2008-45, clarifying that pension plan buyouts by companies that are unrelated to the employer are impermissible under ERISA and the Code because such arrangements would violate the requirement that pension plans be operated for the "exclusive benefit" of plan participants and beneficiaries.

This, however, may not be the end of the matter. Accompanying the ruling, the Administration set forth a framework of principles that should guide the development of legislation that could permit such transactions, "in circumstances where the transaction is in the best interest of plan participants, their beneficiaries, employers, and the pension insurance system." The legislative framework was developed by Treasury, the Labor Department, the Commerce Department, and the PBGC, so in the view of the government, if Institutional Investors are going to be permitted to buy private pension plans, Congress will have to take the lead.