

**Questions and Proposed Answers for the Department of Labor Staff for the
2009 Joint Committee of Employee Benefits Technical Session
Held on May 7, 2009**

The following questions and answers are based on informal discussions between private sector representatives of the Joint Committee on Employee Benefits (JCEB) and Department of Labor (DoL) staff. The questions were submitted by ABA members, and the responses were given at a meeting of JCEB and government representatives. The responses reflect only unofficial, nonbinding staff views as of the time of the discussion, and do not necessarily represent the official position of the DoL. Further, this report on the discussions was prepared by JCEB representatives, based on their notes and recollections of the meeting.

Question 1: May the sponsor of a defined benefit plan charge a participant and a potential alternative payee for the reasonable cost of assessing and processing a QDRO outside of the plan?

Proposed

Answer 1: Yes. While the DOL has not specifically addressed this issue, when it initially denied plans any ability to assess the cost directly to the affected individuals in Advisory Opinion 94-32A, the questioner had specifically only inquired as to whether the QDRO expense could be charged against the specific participant's account. In concluding at that time that it could not, the DOL expanded its response to include, not only, charges allocated specifically to a participant's account, but to prohibit as well, charges assessed to the participant and/or alternate payee outside of the plan. Specifically, the DOL's response was:

“Accordingly, it is the view of the Department that imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or administration of a QDRO would constitute an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO.”

However, the DOL has since abandoned this position instead concluding in FAB 2003-3 that ERISA does not preclude allocating such expenses directly to the account of a participant in a defined contribution plan. While this FAB dealt only with defined contribution plans and did not address the ability of even defined contribution plans to permit participants to instead pay such expenses outside of the plan, the fact that the DOL now believes that plans are not precluded by statute from allocating such expenses directly to a participant's account should extend as well to the payment outside of the plan. To reach a different conclusion would mean that a defined contribution plan could not allow participants to pay for the cost outside of the plan and thus save tax deferred dollars.

To take the position that participants can only be charged for expenses inside of their accounts would mean that those participants in a defined contribution plan who would prefer to not have their tax-deferred accounts reduced by such charges would not be allowed the option. Moreover, given that there is no substantive distinction, it would also mean that the current relatively wide-spread practice of defined contribution plans allowing participants who request a loan to pay that fee outside of the plan would be prohibited. As such, plans that allocate expenses directly to an affected participant, in the case of those expenses which are not precluded by statute from being allocated directly, may do so either inside the plan or outside of the plan and may do so without regard to the type of plan involved.

However, plans must be cautioned that alternate payees do have a statutory right to have a QDRO enforced. If defined benefit plans are to charge a fee outside of the plan directly to the participant and alternate payee and, in the absence of direct payment, the plan proposes to deduct the fee from the benefit(s) to be paid, the IRS must be consulted as to whether such an arrangement would be deemed an impermissible forfeiture or prohibited reduction of benefit.

In all events, however, the charges should be fully disclosed in the plan's summary plan description.

DOL

Answer 1: Staff declines to respond to this question at this time. Rather, staff will consider including this issue in any QDRO-related proposed regulations or other guidance that may be issued in the future.

Question 2: Whether in a qualified pension plan the Trustee's amendment of an industry related disability pension (IRD) to include earnings limitation for both current retirees and future retirees violates ERISA and affects the Plan's qualified status.

Whether the Plan can be amended to reduce the IRD benefit for the period prior to Normal Retirement Age without establishing an earnings test.

Proposed

Answer 2: In *Robinson v. Sheet Metal Workers National Pension Fund*, 515 F.3d 93 (2d Cir. 2008), *aff'g* 441 F.Supp. 2d 405 (D.Conn. 2006), cert. den'd, ___ S.Ct. ___, 2008 WL 2794626 (2008), the Sheet Metal Workers National Pension Fund (Plan) included an industry related disability pension benefit which paid benefits to participants who are "totally and permanently unable to return to employment in the Sheet Metal Industry" but are able to pursue gainful employment elsewhere. The IRD benefit was available

to employees who had not attained their normal retirement age but had otherwise earned sufficient pension and service credits.

Eligibility for the IRD benefit was determined by the Plan Trustees in their sole and absolute discretion. The participants were subject to periodic medical examinations and other terms as the Trustees deemed necessary. A participant may lose eligibility for an IRD benefit if he recovers from a disability or he may be entitled to a different type of pension including early retirement or normal retirement. The Trustees have power and authority to interpret and apply the Plan, but no amendment could decrease a participant's accrued benefit.

A Plan amendment renamed the industry related disability pension as an industry related disability benefit and imposed an earnings limitation which was effective for plan years beginning on or after January 1, 2005. The earnings limitation provided that a participant earning \$35,000 or more in any calendar year in any employment whatsoever will no longer be considered disabled and his benefits shall terminate. This new earnings limitation was applied not only to participants who qualify for the IRD benefit on or after the effective date of the amendment but also to those participants who commenced IDR benefit payments prior to the effective date of the amendment.

The Court determined the IRD was a welfare benefit and not a pension benefit. The anti-cutback rule does not apply pursuant to the analysis in the District Court opinion. The District Court reasoned that the IRD benefit was a welfare benefit because it was triggered by a disability and terminates when the beneficiary is no longer disabled. The benefit, therefore, was not subject to ERISA's anti-cutback rule. *Robinson, supra*, 441 F.Supp.2d 405, 418.

The Second Circuit also agreed with the District Court's opinion that the IRD benefit was an ancillary benefit and not an accrued benefit which also exempted the IRD benefit from the ERISA anti-cutback rule. The District Court pointed out that an accrued benefit is an actuarial equivalent to a normal retirement benefit and that the regulations state that "accrued benefit" refers only to "pension or retirement benefits." 26 CFR §1.411(a)-7(a)(1)(ii). Unlike an early retirement pension, the IRD benefit is not triggered by attaining a particular age or period of service.

The District Court (and the Court of Appeals) determined the IRD benefit was not a "qualified disability benefit" because it was triggered by disability and the Plan expressly provided it was not to exceed the benefit that would be payable to the participant if he had attained normal retirement age on the day he became disabled which was consistent with regulations. The regulations further provided that an ancillary benefit to

which the anti-cutback rule did not apply was a benefit payable under a defined benefit plan in the event of a disability “but only if the total benefit payable in the event of disability does not exceed the maximum qualified disability benefit,” as defined 26 CFR §1.411(d)-3(g)(6). Because the IRD benefit did not exceed the maximum qualified disability benefit, the Court concluded it was an ancillary benefit and was not an accrued benefit.

An issue may be raised about whether the IRD is a QPSA or a QJSA and not a temporary welfare benefit. A review of 26 CFR §1.401(a)-20-Q&A 10(c) resolves this issue. The regulation states that for a disability auxiliary benefit, the annuity starting date is the first day of the first period for which the benefit becomes payable unless the disability benefit is an auxiliary benefit. The payment of any auxiliary disability benefits is disregarded to determine the annuity starting date. The regulations provided an example of a participant at age 65 who is entitled to a vested accrued benefit commencing at age 65 in the form of a joint and survivor annuity. He receives at age 45 a disability benefit which does not reduce his normal retirement benefits. Any disability benefit payments made to him between ages 45 and 65 are, therefore, auxiliary benefits and his annuity starting date does not occur until he reaches normal retirement age. His surviving spouse would be entitled to a QPSA if he died before age 65 and the survivor portion of a QJSA if he died after age 65. The IRD is not a QPSA even though the participant and his beneficiary may be asked for an election prior to age 65 if the disability benefits do not reduce benefits the participant will receive at normal retirement age.

Because the IRD benefit is a welfare benefit, it can be reduced without an earnings test.

The proposed response assumes the Plan is not otherwise contractually obligated to provide the IRD benefit.

DoL

Answer 2: Staff declines to respond to this question because it involves application of provisions of the Internal Revenue Code (Code) over which the Treasury Department has interpretive authority. Staff notes that the proposed response assumes the Plan is not otherwise contractually obligated to provide the IRD benefits, and, therefore, that there is no need to evaluate whether the application of the amendment to particular groups of participants might present ERISA Title I issues due to pre-existing plan provision that restricted the sponsor’s authority to modify or reduce the IRD benefits.

Question 3: For purposes of compliance with the Service Contract Act and the Davis Bacon Act, is an FSA, and HRA or an HSA considered a "bona fide"

benefit that can be funded with fringe dollars, and for which the contractor/employer can take credit for purposes of meeting its obligation to fund employee benefits with the fringe allocation? (This may be three questions).

Proposed

Answer 3: No.

DoL

Answer 3: The Department has not taken a position on this question. Until formal guidance is issued, employers and contractors should look to the regulations associated with these two statutes to determine whether their particular arrangements are bona fide benefits that can be funded with fringe dollars.

While there are some differences in how the two laws analyze fringe benefits, under both statutes two questions must be addressed: whether the arrangement constitutes a fringe benefit plan and whether contributions to the arrangement are creditable.

Under the Service Contract Act (SCA), payments for wages and fringe benefit payments must be handled separately. Thus, an employer may not pay more than the prevailing wage rate and use the overpayment as creditable toward a fringe benefit. See 29 CFR § 4.170. In contrast, under the Davis Bacon Act (DBA), an employer can pay in excess of the prevailing wage and use that excess payment toward a creditable fringe benefit plan. See 29 CFR § 5.25.

Employee contributions will never be treated as creditable. See 29 CFR §4.171(a)(1). Accordingly, to the extent that an FSA, HRA, or HSA is funded solely by employee contributions, such arrangements will not be considered “bona fide” benefits under either statute.

The Department encourages employers to contact the local wage and hour office for assistance with respect to a particular arrangement that does not clearly fit within the SCA or DBA regulations.

Question 4: Plan A is a defined benefit plan that does not allow payments to an alternate payee (AP) under a domestic relations order (DRO) to commence prior to the earliest retirement age (as defined in IRC Section 414(p) and ERISA Section 206(d)). Plan A does not contain a provision for pre-retirement death benefits other than the QPSA for a spouse. AP submits a “separate interest” DRO awarding a portion of participant P’s benefits to AP and does not name AP as the surviving spouse for any portion of participant P’s benefits (including the portion awarded to AP). The DRO also provides that the separate interest is required to be paid to

AP even if P dies prior to the earliest retirement age. Can the plan administrator of Plan A refuse to qualify the DRO because it would require the Plan to pay more than it otherwise would have been required to pay if P and AP had continued to be married, AP had waived the right to surviving spouse benefits, and P died prior to the earliest retirement age? Does it make a difference if Plan A provides for a pre-retirement death benefit for a non-spouse beneficiary?

Proposed

Answer 4:

The plan administrator of Plan A can refuse to qualify the DRO whether or not Plan A provides for a pre-retirement death benefit for non-spouse beneficiaries. It is permissible, but not required, for a plan to permit the separate interest to be paid to AP when P would have reached the earliest retirement age if P dies prior to the earliest retirement age.

The Senate Finance Committee Report under the Retirement Equity Act, on page 80, contains the following paragraph (emphasis added):

“The bill provides that a domestic relations order is not treated as failing the requirement for a qualified domestic relations order merely because the order provides that payments must begin to the alternate payee on or after the date on which the participant attains the earliest retirement age under the plan whether or not the participant actually retires on that date. If the participant dies before that date, the alternate payee is entitled to benefits only if the qualified domestic relation order requires survivor benefits to be paid. In the case of an order providing for the payment of benefits after the earliest retirement age, the payments to the alternate payee at the time are computed as if the participant had retired on the date on which benefit payments commence under the order.”

The separate interest concept is solely for the purpose of allowing an AP to have payments begin at the earliest retirement age (or earlier if the plan permits) and to have the benefit paid over the AP’s lifetime and therefore not be affected by P’s death after the payments to AP begin. To require otherwise would require a plan to pay a benefit greater than it otherwise would be required to pay. The result is different if P dies after the earliest retirement age because that is the earliest time that AP has the right under the Code and ERISA to commence payment and to name a beneficiary if the plan provides for single participant death benefits.

An illustrative example using the above facts is as follows. Assume AP is awarded 75% of P’s benefit as a separate interest and P remarries and dies at 40 when the earliest retirement age is 55. If AP’s separate interest is payable beginning at P’s earliest retirement age even if P dies prior to age

55, the benefit payable from the plan is a 25% death benefit to P's surviving spouse (starting at P's age 55) and a 75% benefit (adjusted for AP's life expectancy starting at P's age 55). The 2 payments together represent more than 100% of P's accrued benefit under the plan. If, instead, AP is named as the surviving spouse as to the 75% share awarded to her, the total benefit paid from the plan (assuming a 50% QPSA) would be 12.5% to P's surviving spouse and 37.5% to AP, which together adds up to the maximum 50% QPSA the plan would otherwise pay and then the alternative calculations available under Treasury Regulation Section 1.401(a)-13(g)(4)(C) could be utilized.

Once P reaches the earliest retirement age, Plan A could end up paying more than it otherwise would if AP commences payments and then P dies but this is solely because of the statutory requirement to allow AP to begin payments at that time. This result would also occur in a plan that allows commencement of payments to AP prior to the earliest retirement age (which is common under defined contribution plans). The requirement to allow commencement of payments at the earliest retirement age should not be interpreted as vesting in AP the right to a benefit even if P dies prior to AP's commencement of the payments. Treasury Regulation Section 1.401(a)-13(g)(4)(iii)(A) states as follows: "(A) A plan is not required to provide additional vesting or benefits because of a QDRO."

This is not to say that a plan cannot permit the separate interest to stay with AP if P dies prior to the earliest retirement age. Rather it should not be required.

For an AP's interest to be protected in the event P dies before the earliest retirement age, the DRO could name the AP as the surviving spouse as to all or a portion of P's benefits.

The fact that a state court issues a domestic relations order characterizing AP's award as a separate interest cannot change the benefits payable under the plan where the plan chooses not to allow it. The only circumstances where a plan is required to pay more because of a DRO is when AP begins payments at or after the earliest retirement age and before P commences payments, or if the AP former spouse is designated as the current spouse for purposes of the QPSA and QJSA, both of which are statutorily imposed protections. Other than those two protections, interpretation of the QDRO provisions of the Code and ERISA should not result in the requirement for a plan to provide greater benefits than it would pay otherwise.

It follows that the model DROs and DRO provisions issued by the DOL and IRS should provide an alternative for designating the AP as the surviving spouse for the QPSA as to AP's share (which can be in addition

to a QPSA based on P's remaining share if any) and for forfeiting AP's separate interest if P dies prior to the earliest retirement age in a DRO where AP is not designated as the surviving spouse for AP's share in connection with a plan that chooses not to permit payment to AP prior to the earliest retirement age and not to recognize the separate interest prior to the earliest retirement age. The PBGC has chosen to allow the separate interest to be protected at all times, but could consider making a change in the future if it chooses to adopt this approach.

DoL

Answer 4: Staff declines to answer this question at this time because it raises issues that would require coordination with the IRS and PBGC. However, staff would be willing to consider providing further guidance in response to a specific request and after appropriate coordination with those agencies. Staff understands the submitter of this question has been in touch informally with all three agencies.

Question 5: If a plan is abandoned and no QTA is listed with the DOL what is the process for winding up? Can the custodian bank holding the funds contract with a service provider to locate participants and distribute or rollover? No one is volunteering to become a QTA.

Proposed

Answer 5: If no one is listed as a QTA and no one is volunteering, a custodian, holding funds for the abandoned plan, could contract with a service provider experienced in locating participants. This would allow the service provider to instruct the custodian as to the sum of each payout and its source (e.g. rollover to xyz IRA). The service provider could act quickly and charge only reasonable charges for such a service. Then, any participants not found could be placed in an IRA established with the custodian bank. This all would allow plan participants to be located and overhead to be kept at a minimum.

DoL

Answer 5: The Department recognized the ERISA fiduciary and procedural issues that arise when plans have been abandoned by their sponsors, and in response to requests for guidance, issued the abandoned plan regulation in 29 CFR Section 2578.1 and an associated safe harbor for distributions from abandoned plans. Staff notes that there are substantial ERISA and Code issues in hiring service providers for abandoned plans and in terminating and in distributing assets from such plans. The Department has not specifically approved any process other than the referenced regulations for dealing with abandoned plans. However, staff points to 29 CFR Section 2550.404a-3(a)(3), which specifically recognizes that the safe harbor regulatory provisions are not the exclusive means by which a

fiduciary might satisfy his or her responsibilities under ERISA with regard to distributions from abandoned plans.

Question 6: What does a Plan do with uncashed checks (in both an Active Plan and a Terminated Plan)? Terminations cannot be completed if a check is outstanding.

Proposed

Answer 6: Consistent with Section 404(a) of ERISA, a fiduciary must act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. (See Search Methods from Field Assistance Bulletin 2004-02).

In an ERISA-protected Active Plan, a participant with an outstanding or uncashed check could be located and if found, funds would be reissued to the participant. Search and outreach would be performed. If the participant is found or comes forward, the record keeper could re-issue a check. Escheatment is not an option for these funds, according to DoL guidance which concluded that, if a state unclaimed property statute were applied to require an ongoing plan to pay to the state amounts held by the plan on behalf of terminated employees, the application of that statute would be preempted by Section 514(a) of ERISA. Advisory Opinion 94-41A (Dec. 7, 1994).

DoL

Answer 6: In the context of a terminated defined contribution plan, the Department has issued a regulatory safe harbor for distributions in 29 CFR Section 2550.404a-3. To qualify for safe harbor protection, a fiduciary must provide notice, including a distribution election to participants. If a notice is returned as undeliverable, a fiduciary must then take steps, consistent with its duty under ERISA Section 404(a)(1), to locate the participant to whom the notice was addressed before making a distribution. If a fiduciary is unsuccessful in locating the participant so that the notice can be furnished, such participant is deemed to have been furnished the notice and to have failed to make an election. A fiduciary may then proceed to make a distribution to an IRA meeting the conditions of the safe harbor. In circumstances where a fiduciary could not or chose not to distribute to an IRA, the Department has also provided guidance in FAB 2004-02 on distributions from terminated defined contribution plans to bank accounts and escheatment to state unclaimed property funds; such distributions are not covered by the regulatory safe harbor. Staff notes that these methods of distribution are designed to permit a plan fiduciary to wind up the plan's affairs and to avoid the issue of uncashed checks.

In the context of an ongoing defined contribution plan and assuming a plan provision for mandatory cash outs of less than \$1,000, the Department has issued guidance in 29 CFR Section 2550.404a-2(d) to extend the automatic rollover safe harbor to such cash-outs for participants who are unresponsive to a distribution notice. Staff believes this extension should assist plan fiduciaries in avoiding the issue of uncashed checks, and also has been told that many plans were amended to remove cash outs below the \$1,000 amount. For ongoing defined contributions plans and amounts distributed pursuant to a participant election or operation of law which are not cashed, the Department has issued no formal guidance.

Question 7: Can the DOL or PBGC confirm that a Plan loses its ERISA protection once it is terminated?

Proposed

Answer 7: According to the FAB 2004-2, and the principles set forth in Advisory Opinion 94-41A, which dealt with a plan fiduciary's duty to preserve plan assets held in trust for an ongoing plan, a fiduciary is not prevented from voluntarily deciding to escheat missing participants' account balances under a state's unclaimed property statute in order to complete a plan's termination process. A plan fiduciary's transfer of a missing participant's account balance from a terminated defined contribution plan to a state's unclaimed property fund would constitute a plan distribution, which ends both the property owner's status as a plan participant and the property's status as plan assets under ERISA. (Prior Departmental Advisory Opinions addressed distributions from ongoing plans. See, e.g., Advisory Opinion 94-41A (Dec. 7, 1994); Advisory Opinion 79-30A (May 14, 1979); Advisory Opinion 78-32A (Dec. 22, 1978). We note, however, that this memorandum addresses only distributions that complete the termination of defined contribution plans.) Therefore, for terminated plans, escheatment may be an option if escheated in conjunction with state unclaimed property laws and states have searchable data lists.

DoL

Answer 7: FAB 2004-02 provides guidance to plan fiduciaries on distributing an account balance in a terminated defined contribution plan when efforts to secure a participant's distribution election have failed; such participants are commonly referred to as missing participants. This guidance assumes that the terminated plan does not provide an annuity option and that no other appropriate defined contribution plans are maintained within the sponsoring employer's corporate group to which account balances from the terminated plan could be transferred. The FAB discusses several distribution options including rollovers into an IRA, distributions to a federally insured bank account and distributions to a state unclaimed property fund; only distributions into an IRA may qualify for the safe

harbor protection under 29 CFR Section 2550.404a-3 (except for certain distributions of less than \$1,000 from an abandoned plan).

While fiduciaries must always consider distributions to IRAs because rollovers are most likely to preserve the distributed amounts for retirement purposes, fiduciaries who are unable to find IRA providers who are willing to accept the distributions may distribute the account balances of missing participants to state unclaimed property funds in the state of each participant's last known residence or work location. Fiduciaries who decide between distribution into a state unclaimed property fund versus a federally insured bank account, should evaluate any interest accrual and fees associated with a bank account against the availability of the state unclaimed property fund's searchable database that may facilitate a participant's recovery.

The FAB clearly states the Department's position that a plan fiduciary's transfer of a missing participant's account balance from a terminated defined contribution plan to a state's unclaimed property fund is a plan distribution, which ends both the property owner's status as a plan participant and the property's status as plan assets under ERISA. Staff also notes that in context of the automatic rollover safe harbor in 29 CFR Section 2550.404a-2, the preamble states that the rollover distribution to which a participant is entitled into an individual retirement plan ends his or her status as a plan participant, and the distributed assets cease to be plan assets under Title I of ERISA.

Question 8: Re Safe Harbor Assets in a Terminated Plan: Is it safe to rollover to an IRA if notification does not come back as returned mail (and the notification contains all the requirements enumerated in 29 CFR Section 2520.104b-1(b)(1)) and no response is received from the participant as to his or her selection?

Proposed

Answer 8: According to 29 CFR Section 2550.404a-3, if all steps enumerated in Section 2520.104b-1(b)(1) are met, and the participant or beneficiary does not meet time deadlines for the selection of a distribution, a rollover would be appropriate and the fiduciary will have met the requirements of the "safe harbor". However, there is some conflict in this answer with the 2004-2 FAB, which states that missing participants in a terminated plan must follow required steps to locate missing participants.

Perhaps a comparison to COBRA notification would be appropriate to resolve this conflict: *In Truesdale v. Pacific Holding Company/Hay Adams Division*, 778 F.Supp. 77, 14 EBC 2093 (D.D.C. 1991), the court found for the plan administrator on uncorroborated testimony that the notice had been mailed, regular mail, to the last known address of the

participant, despite the undisputed fact that the participant had not received the notice.

See also Jachim v. KUTV, Inc., 783 F. Supp. 1328 (C.D. Utah 1992), which held that the COBRA notice of qualifying event is only required to be “sent” by the plan administrator, and that even if it were conclusively proven that it had not been received, the plan administrator would have fulfilled its obligation by addressing it to the beneficiary's last known address and placing it in its mail bin under its customary procedures.

DoL

Answer 8: The regulatory safe harbor for distributions from a terminated defined contribution plan in 29 CFR Section 2550.404a-3 provides that a fiduciary may make a distribution into an IRA in circumstances where the plan has sent the participant the required notice requesting the participant to make a distribution election but the notice was not returned with a distribution election within 30 days of the furnishing of the notice and was not otherwise returned as undeliverable.

The safe harbor also addresses the situation where a notice is returned as undeliverable. In such circumstances, the fiduciary must, consistent with its duties under ERISA Section 404(a)(1), take steps to locate the participant. If the fiduciary's search is unsuccessful so that the notice cannot be provided, the participant is deemed to have been furnished the notice and to have failed to make an election within 30 days of the furnishing of the notice, and the fiduciary may distribute the amounts pursuant to the safe harbor.

Staff notes that the preamble to this proposed regulatory safe harbor refers fiduciaries to FAB 2004-02 for guidance in fulfilling their duties under ERISA Section 404(a)(1) in taking appropriate steps to search for missing participants.

Question 9: The alternative method of compliance for top-hat plans set forth in 29 CFR Section 2520.104-23 permits an employer who sponsors one or more top-hat plans to satisfy the reporting and disclosure requirements of Part 1 of Title I of ERISA by filing a single statement with the Secretary of Labor that includes the name, address, and employer identification number of the employer, a declaration that the employer maintains one or more top-hat plans, the number of such plans, and the number of employees in each plan. There is no requirement that the employer file an amended statement if there is any change in the information included in the statement, nor is the employer required to specifically identify the plan or plans included in the statement. 29 CFR Section 2520.104-23(b) states: “Only one statement need be filed for each employer maintaining one or more plans described in paragraph (d) of this section.” If an employer

files a top-hat statement under 29 CFR Section 2520.104-23 and subsequently adopts a new top-hat plan, is the employer required to file a second top-hat statement that reflects the adoption of the new-top-hat plan?

Proposed

Answer 9:

No. The top-hat statement is a one-time filing requirement for each employer that maintains one or more top-hat plans. This is clear from the literal language of the regulation that “only one statement need be filed for each employer...”. The purpose of the statement is merely to identify those employers who maintain top-hat plans and not to identify each plan. It would be impractical to require a separate filing for each top-hat plan because of the multiplicity of arrangements that constitute top-hat plans and the frequent changes in such arrangements. Moreover, there is no policy reason to do so because, as the Department has recognized, the class of employees who participate in top hat plans “generally have ready access to information concerning their rights and obligations and do not need the protections afforded them by Part 1 of Title I.” 40 Fed. Reg. 34530 (Aug. 15, 1975).

DoL

Answer 9:

Staff disagrees with the proposed answer. 29 CFR Section 2520.104-23 provides an alternative method of compliance with the reporting and disclosure requirements of part 1 of Title I of ERISA for certain pension plans maintained by an employer for a select group of management or highly compensated employees (“top-hat” plans). The regulation covers plans in existence at the time the registration statement is filed and encompassed within the registration statement’s content.

Thus, if a new top-hat plan is established subsequent to filing a registration statement with the Department for a separate plan, a new registration statement must be filed within 120 days after the new top-hat plan becomes subject to Title I to satisfy the alternative method of compliance. On the other hand, if, rather than establishing a new top hat plan, the original plan is amended, such as to include a separate class of participants, the amended plan would not need to be re-filed. Whether a new arrangement is a separate plan or simply an expansion of an existing plan is determined under all of the facts and circumstances.

Staff also agrees that the registration statement does not need to specifically identify the plan or plans covered by the statement. Rather, it must include the number of plans for which the registration statement is being filed and the number of employees covered by each. A registration statement for a plan does not need to include information pertaining to plans for which a separate registration statement had been filed.

The provision in 29 CFR Section 2520.104-23(b) which states: “Only one statement need be filed for each employer maintaining one or more plans described in paragraph (d) of this section” was intended to serve primarily as a transition rule under which one registration statement could be filed to cover multiple top hat plans that were established prior to the effective date of the regulation. However, it also allows one registration statement to be filed in the case of an employer that establishes multiple top-hat plans at or about the same time.

The administrator of a top-hat plan that has failed to file a timely registration statement may file the registration statement under the Delinquent Filer Voluntary Compliance Program (DFVCP) in lieu of filing any past due annual reports. By properly filing the registration statement and meeting the other applicable DFVCP requirements, the administrator will be considered as having elected compliance with the alternative method of compliance prescribed in 29 CFR Section 2520.104-23 for all subsequent plan years.

Question 10: Can an employer simultaneously contribute to a 403(b) plan under the DoL safe harbor and also maintain an employer-sponsored 403(b) plan subject to ERISA? Does it make a difference whether an employee can participate in both, or whether an employee who participated in one now participates in the other (and does it make a difference whether that participation occurs in the same year or only in different years)? Can a participant in one of the plans still have an account under the other plan?

Proposed

Answer 10: Yes, an employer may contribute to a 403(b) plan under the DoL safe harbor and at the same time maintain an employer-sponsored 403(b) plan subject to ERISA. An employee of that employer may be a participant in both plans at the same time or may participate in one or the other separately. An employee who currently participates in only one of the plans may have an account under the other plan from prior participation in that plan.

DoL

Answer 10: Staff does not believe there is enough information provided in the question to express a view on the application of the DoL’s 403(b) safe harbor regulation. It is unclear whether the 403(b) arrangements described in the question are properly classified as one or two plans for purposes of ERISA. The answer to that question may be influenced by whether the same annuity contracts and custodial accounts are used to fund both plans. As a general matter, however, staff agrees that an employer’s 403(b) arrangement that complies with the DoL 403(b) safe harbor regulation is not subject to Title I of ERISA merely because the employer also maintains an ERISA-covered 403(b) arrangement. Even in the case of two

separate plans, however, connections between the two arrangements, such as a provision in the Title I plan under which employer contributions are only made for employees with accounts in the purported non-Title I plan, could eliminate the availability of the safe harbor regulation to that plan.

Staff expresses no opinion on whether the 403(b) arrangements described in the question comply with section 403(b) of the Internal Revenue Code. The IRS/Treasury has authority to administer and interpret the rules pertaining to tax-sheltered annuities under section 403(b) of the Code.

Question 11: ERISA Section 104(b) permits a plan’s administrator to furnish a restated summary plan description in intervals as long as five years. Between those restatements, an administrator need not revise an SPD if it supplements the SPD with a summary of material modifications. ERISA Section 102(a) arguably requires only that an SMM explain a “material modification in the terms of the plan” or a change in an item of information required by ERISA Section 102(b). If the only change concerning a plan is a change in a Federal law (other than ERISA) and that law does not require any change in any plan provision, must a summary of material modifications explain the change?

Proposed

Answer 11: Despite a focus in the last sentence of ERISA Section 102(a) on an SMM’s relation to a change in the plan’s terms, a better interpretation of the whole of ERISA Section 102(a) would consider its general command that a summary plan description must “be sufficiently accurate and comprehensive to reasonably apprise [the plan’s] participants and beneficiaries of their rights and obligations under the plan.” Although an SMM is a permitted alternative to revising a whole SPD, the combination of the SPD and SMMs must meet this “reasonably apprise” standard. A summary (whether an SPD or an SMM) must explain something beyond the plan’s provisions if an “average plan participant” would need that information to understand his or her rights under the plan.

DoL

Answer 11: Staff believes that whether a change in existing law constitutes a change in the plan that necessitates an updated SMM or SPD is a facts and circumstances matter. To the extent information included or required to be included in the plan’s SPD becomes incorrect, incomplete or obsolete as a result of a federal law change, an updated SPD or SMM would be required. Staff also believes that the term “plan” as used in the SPD content regulation does not mean just the four corners of a written plan document. Accordingly, if there is a federal law that would result in a material modification of a plan’s provisions, an updated SPD or SMM would be required.

Question 12: In collective bargaining, an employer and a labor union negotiate the employer's withdrawal from a multiemployer defined-benefit plan and the creation of a new individual-account plan for only the union-covered employees. This new plan would *not* be a multiemployer plan, but rather a single-employer plan. Both the union and the employer prefer that the plan name a committee of union local members selected by the union as the plan's administrator and named fiduciary. The employer is ready to do this only if the employer is confident that it (and its directors and officers) will have no responsibility to "monitor" the fiduciary or consider whether any fiduciary is competently performing its duties.

The employer is aware of the view that a person who or that has a discretionary power to appoint a fiduciary is, to the extent of that power, a fiduciary – with some responsibility to monitor his, her, or its appointee's performance to the extent needed in evaluating whether to remove the appointee. 2008 Q&A-19 asked about a situation in which settlor acts provided no authority for a plan's creator to remove a fiduciary. The staff responded that those who "appoint" a fiduciary remain responsible, despite plan language to the contrary.

Is this collectively-bargained situation different?

Proposed

Answer 12: In the response to last year's question, the staff were concerned that the plan documents' provisions too neatly "put the rabbit in the hat" to contrive a settlor act when the reality is that the employer alone selected the plan's named fiduciary. If, however, the selection of a fiduciary truly results from good-faith collective bargaining and so truly is a plan-creation act, the employer need not monitor the fiduciary.

DoL

Answer 12: Staff declined to answer this question because they believed there was not enough information to determine whether the employer retained any residual fiduciary responsibility. Staff expresses no opinion on whether the situation described in the question presents issues under other federal labor laws.

Question 13: A business corporation is the named fiduciary and administrator of a retirement plan that the business maintains for its employees. The administrator files a Form 5500 that claims an audit exemption. This claim is false because more than 5% of the plan's assets are not qualifying assets (as defined by the relevant regulation). A lawyer who advises the corporation (but not the plan) knows that this audit-exemption claim is false. She advises her client to file a corrected Form 5500 and to engage an independent qualified public accountant. The plan administrator refuses to do either. The lawyer remonstrates with her client, but it

persists in refusing to do anything about the false Form 5500 or the failure to engage a public accountant. After remonstrating repeatedly with the highest authority that can act for the corporation, the lawyer resigns and does nothing further. The lawyer does not reveal information to any person beyond her former client. (No one used the lawyer's services in deciding whether the plan qualifies for the exemption, in deciding not to engage a public accountant, or in preparing any part of the Form 5500.) Has the lawyer met all professional-conduct duties that apply to her?

Proposed

Answer 13: (1) Assuming that the lawyer was not a named or functional fiduciary who might be responsible concerning a co-fiduciary, ERISA does not regulate the lawyer's conduct. (2) Although Federal statutes grant every Executive-branch agency power to make rules governing practice before the agency, the DoL has not made such rules. (3) After reminding everyone of the ground rules that anything in these Q&A sessions reflects solely the personal views of those involved, the lawyer's conduct seems correct if the relevant state's conduct rules are the same as the ABA Model Rules.

DoL

Answer 13: Staff agrees that assuming that the lawyer was not a named or functional fiduciary, ERISA would not require any further action from the lawyer to address the Form 5500 filing violation. Staff expresses no opinion on whether the lawyer's conduct satisfies obligations under professional ethics requirements or other professional responsibility rules governing lawyers that are outside of the scope of EBSA's jurisdiction.

Question 14: An employer has about 200 employees, and 160 of them are eligible for one of the employer's two retirement plans. Except for a provision on which employees are eligible, the two retirement plans have identical provisions. Further, each plan provides that a participant directs investment among mutual funds of the same network. Each plan uses the same prototype document, and the two adoption agreements are identical except for the eligibility provision. The different eligibility provisions do not relate to different business lines or locations. Further, nothing in the terms of the eligibility provisions suggests any business purpose at all. Rather, all of the documents and other facts seem to suggest that the employer designed the two eligibility provisions so that each plan will have fewer than 100 participants. Under both plans, the employer is the administrator and the only named fiduciary.

Proposed

Answer 14: A fiduciary may not rely on a plan's documents if doing so is inconsistent with ERISA. See ERISA § 404(a)(1)(D). In deciding whether ERISA requires a fiduciary not to rely on a plan's documents, an administrator

must act according to ERISA’s standard of care. ERISA § 404(a)(1)(B). If a person acting “with the care, skill, prudence, and diligence” that ERISA requires would believe that the two plans really are one plan, the administrator must engage an independent qualified public accountant.

DoL

Answer 14: Under Title I of ERISA, employers have substantial discretion in designing the benefit plans they will offer to their employees, including decisions on whether to offer the benefits as a single plan or as separate plans. Whether an employer has established one or more than one ERISA plan depends on the facts and circumstances. In the staff’s view, in the absence of contrary annual reporting rule or requirement and assuming the structure of the arrangements is otherwise lawful (e.g., under the Internal Revenue Code), it would be reasonable for a fiduciary to look to the instruments governing the arrangement or arrangements to determine whether the benefits are being provided under separate plans and to treat the arrangement or arrangements for annual reporting purposes as separate plans to the extent the instruments establish them as separate plans and they are operated consistent with the terms of such instruments.

Question 15: An employer that serves as the administrator and only named fiduciary of its retirement plan intends to select as the auditor of the plan’s financial statements the same CPA firm that is the auditor of the employer’s financial statements. Is such an audit firm independent? Even if it is independent, might it be a fiduciary breach for the plan’s administrator to select this firm?

The concern is that a careful plan audit might uncover the fiduciary’s breach and that such a discovery could call into question whether the audit firm had correctly performed its audit of the employer’s financial statements and its potential loss contingencies. Knowing this, an audit team assigned to the plan might want to protect themselves or co-workers, and might want to help the firm avoid liability or reputation risks. To do so, an auditor might be tempted to design audit procedures that reduce the opportunities for discovering the fiduciary’s breach.

Proposed

Answer 15: Interpretive Bulletin 75-9 describes three circumstances in which an auditor is *not* independent, but ERISA and the DoL’s interpretations do not define when an auditor *is* independent.

As suggested by the Interpretive Bulletin, “[i]n determining whether an accountant or accounting firm is not, in fact, independent with respect to a particular plan, the Department of Labor will [and a plan fiduciary should] give appropriate consideration to all relevant circumstances, including

evidence bearing on all relationships between the accountant or accounting firm and that of the plan sponsor or any affiliate thereof[.]”

If, after considering all relevant circumstances, a plan’s administrator finds that a CPA firm is sufficiently independent, the administrator as an ERISA fiduciary still must consider whether the selection is in the plan’s best interests and otherwise meets all duties of ERISA Section 404(a). If an unconflicted firm with sufficient capability is willing to perform the audit for a similar fee, the fiduciary should consider whether the plan might benefit from an uncompromised audit.

DoL

Answer 15: Staff agrees with the proposed answer. As provided in 29 CFR Section 2509.75-9, an accountant will not necessarily fail to be independent if, at or during the period of the professional engagement with the employee benefit plan, the accountant or the accountant’s firm is retained or engaged on a professional basis by the plan sponsor. The determination of whether an auditor is independent would depend on facts and circumstances, including any relationship between the accountant or accounting firm and the plan sponsor.

ERISA Section 103(a)(3)(A) provides that the plan administrator of a plan subject to ERISA’s annual audit requirement must engage an independent qualified public accountant on behalf of the plan participants. The selection of an independent qualified public accountant by the plan administrator also must be prudent and in the interest of the plan participants and beneficiaries as required by ERISA Section 404.

Question 16: ERISA Section 411(a) states that “[n]o person who has been convicted of” any of an enumeration of crimes “shall serve or be permitted to serve” as a plan fiduciary. ERISA Section 411(b) punishes a person who intentionally violates Section 411.

A small business established a retirement plan, which has fewer than 100 participants and about \$5 million in plan assets. On the plan’s creation, the business corporation named itself as the plan’s named fiduciary and administrator, and named the natural person who was and is the corporation’s only shareholder, only director, and only officer as the plan’s sole trustee. This person had previously been convicted of a crime that invokes ERISA Section 411(a). At the time of the appointments, the businessperson was unaware of ERISA Section 411. Likewise, none of the plan’s investment or service providers had any procedure for checking whether a plan’s fiduciary is eligible to serve.

Years later, the business owner’s personal lawyer notices this mistake. The lawyer advises the fiduciary that, despite ERISA Section 411(a), he

must not abandon the plan and instead should continue to serve until his successor is serving. Along with this, the lawyer advises the fiduciary that selecting a fiduciary is a fiduciary act. Following that idea, the lawyer suggests that the ineligible fiduciary not select his successor, and instead petition a Federal court to appoint the successor fiduciary.

If we assume that all of the ineligible fiduciary's acts before the lawyer informed him about the mistake resulted from ignorance (and not from any intent to serve despite a disability), may the ineligible fiduciary petition for the appointment of his successor and continue to serve as the plan's fiduciary until his successor is serving?

Proposed

Answer 16: Yes. In addition to criminal punishment for an intentional violation, other remedies concerning a violation of ERISA Section 411 are equitable and generally based on fiduciary principles. Despite the command that an ineligible person "shall [not] serve", the plan's need not to be abandoned is more important than the need to prevent fiduciary service by a person who is presumed to be unsuitable for a fiduciary role. Following ERISA Sections 502(a)(3)&(5), a participant, beneficiary, fiduciary, or the DoL may bring a civil action for appropriate relief. A petitioner may ask the Federal court to proceed swiftly in finding a successor fiduciary.

DoL

Answer 16: Staff notes that the fiduciary in the above situation should promptly request that a Federal court appoint a successor fiduciary. Staff is not able to provide advice on what measures the fiduciary should take pending appointment of a successor. However, the staff noted that they would not determine the merit of violating ERISA section 411 versus ERISA section 404.

Question 17: A multiemployer defined-benefit pension plan's trust was set up to have equal numbers of employer-elected trustees and union-elected trustees. The plan and trust documents have provisions that follow not only ERISA but also Taft-Hartley Act Section 302(c)(5) [29 U.S.C. § 186(c)(5)]. Over the past several years, all of the employer-elected trustees resigned and the employers were unable to elect any successor because no one was willing to serve. It has now been three years that the plan has operated with a full slate of union-elected trustees but no employer-elected trustees.

The surviving trustees wonder whether they have a duty to do something about the imbalance.

Proposed

Answer 17: As long as the trustees did nothing to interfere with the employers' ability to elect their trustees, the union-elected trustees need not do anything.

DoL

Answer 17: Staff disagrees with the proposed answer. Under ERISA Section 404(a)(1)(D), the union trustees have a fiduciary obligation to administer the plan in accordance with the governing plan documents which, according to the facts presented, require an equal number of union-elected and employer-elected trustees. In addition, although the question does not specify what method is used to select the employer trustees, it appears from the facts provided that the participating employers are responsible under the plan and trust for appointing the employer trustees. Therefore, the responsible employers would have fiduciary status in connection with their actions (including failures to act). The union trustees with knowledge of the employer's failure could also have co-fiduciary responsibilities to take reasonable steps under the circumstances to remedy a known co-fiduciary breach. What steps would be reasonable would depend on the facts and circumstances. Staff also noted that this would violate the Taft-Hartley Act.

Question 18: An individual-account retirement plan's directed trustee received notice of a class action that alleges several defendants' deceit concerning publicly-traded shares of a NYSE-listed issuer. The plan held these shares during the class period. The trustee sends the notice to the plan's administrator with a request for directions. The plan's administrator directs the trustee to opt out of the class action. The trustee knows that the size of the plan's stake in the shares is such that it is not plausible that the plan administrator would pursue a separate lawsuit. Along with this, the trustee knows that remaining a class plaintiff would cost the plan nothing (because the lead plaintiff's attorneys agreed to pay all expenses and forego fees until the court orders an award). The trustee decides that the combination of a direction for what seems to be an obviously wrong decision with the absence of any explanation supporting the decision requires the trustee at least to inquire whether the administrator did a proper analysis. The trustee learns that the administrator was aware that remaining a plaintiff costs nothing and that the only reason for the direction was the administrator's view that the class action complaint is meritless.

Must the trustee now pursue remedies in a reasonable effort to prevent (or at least call attention to) what seems to be an obvious fiduciary breach?

Proposed

Answer 18: Even if the class action is meritless, that fact is irrelevant to analyzing a fiduciary's duty in the circumstances described by the question. A plan fiduciary must consider only the plan's interests. If the upside is some potential (even if remote) for a recovery (even if small), and the downside is none, a fiduciary must pursue this potential for the plan.

DoL

Answer 18: Staff agrees that the decision for the plan to participate in a class action is subject to ERISA's fiduciary duties of prudence and loyalty. Staff does not agree with the answer to the extent it asserts that a plan fiduciary who prudently determines that a class action is meritless is legally obligated under ERISA to remain a party to the class action merely because there is some speculative possibility that the plan may at some future remote date receive some undetermined small award. Staff also questions the premise of the proposed answer that there would be no costs to the plan as a result of remaining in the class (e.g., communicating with class counsel, review periodic status reports on the progress of the case, or dealing with requests for information). Staff notes that if there is a certainty of recovery and the recovery is higher than the cost, the fiduciary should participate in the class. DoL has provided guidance in the context of the mutual fund settlements that recoveries can be used to pay plan expenses when the cost to allocate the recovery to participants would be greater than the recovery.

Question 19: Ordinarily, an ERISA-governed plan's administrator must administer the plan according to its documents. A divorce litigant submitted to a retirement plan a state court's order. The plan's administrator followed its QDRO procedures, decided that the order is not a QDRO, and sent a clear written notice to both litigants and each attorney informing them of the administrator's decision. The disappointed litigant obtained a summons for the plan and its administrator to appear as named defendants in a court that has personal jurisdiction over both of them. The amount that a competent lawyer would require as a retainer to brief a motion to dismiss is substantially more than all of the divorcing participant's account; paying the retainer would require charges against the accounts of the plan's non-divorcing participants.

May the plan administrator decide to not file an answer, let a default judgment be entered, and pay a distribution to the non-participant even if doing so is obviously contrary to the plan?

Proposed

Answer 19: Although a plan administrator ordinarily has duties to administer the plan according to its written provisions and to resist a contrary court order, these duties are tempered by a fiduciary's duties to incur only reasonable expenses and to use plan assets primarily for the purpose of providing retirement benefits.

With appropriate analysis and a written record of the reasoning for its decision, a plan fiduciary could decide that the harm that a wrongful court order causes to one participant's plan account would be outweighed by the harms that would be done to many participants' plan accounts in bearing expenses that do not benefit them.

DoL

Answer 19: The Department has taken the position that the jurisdiction to challenge the determination made by a fiduciary regarding whether a DRO is qualified within the meaning of ERISA Section 206(d) rests in federal, not state, court and thus any such default judgment would be subject to ERISA preemption. *See* Amicus Brief of DOL in *In re Marriage of Oddino*, 939 P.2d 1266 (Cal. 1997), Jan. 16, 1997. Before ignoring a summons or subpoena from a state court, however, Staff believes the plan fiduciaries should explore other less expensive options to hiring an attorney to file a motion to dismiss, such as sending a letter to the parties or the court with a model domestic relations order that the plan could qualify, offering to assist the parties by explaining the defects in the DRO that resulted in it not being qualified, etc. Absent information on such steps and why they were unsuccessful, staff does not believe it can address the question.

Staff also notes that the proposal to make a distribution to the non-participant without a valid QDRO appears to raise questions regarding qualification and anti-alienation provisions under the jurisdiction of the Treasury/IRS.

Question 20: In 2009, many public companies are using the new SEC “notice and access” procedure to provide proxy materials to their shareholders. Under this procedure, the company sends out a written notice informing shareholders that they can obtain proxy materials (the annual report, proxy statement and proxy form) on a website. The notice must include a pre-addressed, postage-paid reply card for requesting a paper copy of the proxy materials and most companies provide a toll-free number to call for a paper copy of the proxy materials. If a 401(k) plan or ESOP uses this procedure to solicit directions from participants and beneficiaries as to how the proxies should be voted for employer securities in their plan accounts, will the procedure satisfy the requirement under the section 404(c) regulations that materials related to proxy voting be provided to participants and beneficiaries?

Proposed

Answer 20: Yes, this procedure provides participants and beneficiaries with the same materials provided to other shareholders. Moreover, the process satisfies the key requirement of the Department’s electronic delivery safe harbor by providing notice to each participant or beneficiary in a nonelectronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the documents and of the right to request and obtain a paper version of such document. Participants and beneficiaries who do not have internet access or who choose not to use it will be able to obtain print copies without additional costs.

DoL

Answer 20: Paragraph (d)(2)(ii)(E)(4)(vi) of the ERISA Section 404(c) regulation requires, with respect to employer security investment alternatives for which ERISA Section 404(c) protection is desired, that voting, tender and similar rights be passed through to participants and beneficiaries with accounts holding such securities. Paragraph (d)(2)(ii)(E)(4)(v) of the ERISA Section 404(c) regulation requires that such participants and beneficiaries receive all information provided to non-plan shareholders of such securities. Staff is not prepared to provide guidance on whether the proposed procedure would satisfy this requirement. Staff notes that the Department's regulatory agenda includes a project intended to examine possible updates to EBSA's electronic disclosure rule under Title I to reflect events that have occurred since its initial publication, including advances in technology, recently enacted regulations under the Code, and changes to the disclosure requirements under Title I of ERISA pursuant to the Pension Protection Act of 2006.

Question 21: A plan provides that company match contributions may be made in either cash or stock. Assume that payroll is bi-weekly on a Friday and participant contributions are paid to the trustee on the same day. The plan procedures provide that the number of shares to be contributed will be determined based on the closing price on Thursday on a national securities exchange. The record keeper then calculates the number of shares which must be contributed to match the participant contributions and informs the employer, which then directs the stock to be transferred the plan on Friday. Because of the time it takes to calculate and confirm the number of shares, the company stock is received by the plan on Friday after the market has opened. On some days, the price on the exchange at the moment the stock is contributed is higher and on other Fridays, the price will be lower. An independent fiduciary determines whether the Thursday closing price represents adequate consideration for purposes of calculating the match and has the authority to determine that the Thursday closing price should not be used if an unusual event occurs between the Thursday close and the Friday contribution, such as a negative announcement from the company after the Thursday close. Does this method of calculating the amount of stock needed to satisfy the match comply with ERISA, absent some unusual event that occurs between the Thursday close and the Friday contribution?

Proposed

Answer 21: Yes. The match is calculated on the same day that participant contributions are withheld from payroll. The delay between the determination of the price and the transfer of the shares is merely administrative.

DoL

Answer 21: Based solely on the facts presented, staff does not object to the proposed answer. Staff indicated that having the independent party review the decision significantly improved the procedure.

Question 22: The “known events” disclosure standard of the PPA Funding Notice (ERISA Section 101(f)(2)(B)(vi)) uses language that is similar to securities law “known events” disclosure obligations. By regulation, the SEC requires a public company’s annual report to include a management's discussion and analysis section that includes forward looking statements about material “known events.” Does the DoL believe that authoritative interpretations of what constitutes a “known event” for securities law purposes will be relevant to the interpretation of the same language relating to the annual PPA funding notice?

Proposed

Answer 22: Since both the securities law disclosure rule and the ERISA PPA funding notice requirement require “forward looking statements” about material known events, principles of statutory interpretation suggest that securities law interpretations of the term “known events” prior to enactment of PPA will be relevant in interpreting the “known events” requirement of the PPA funding notice.

DoL

Answer 22: Staff does not believe there is enough information in the question for the staff to express a view on the question.