

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank;

(ii) The instructions specify (A) the security to be purchased or sold, (B) a price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, *et seq.*), a price which is determined in accordance with Rule 22c-1 under the Investment Company Act of 1940 (17 CFR 270.22c-1), (C) a time span during which such security may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or the management or disposition of plan assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition, of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

(e) *Affiliate and control.* (1) For purposes of paragraphs (c) and (d) of this section, an "affiliate" of a person shall include:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person;

(ii) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and

(iii) Any corporation or partnership of which such person is an officer, director or partner.

(2) For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

[40 FR 50843, Oct. 31, 1975]

#### § 2510.3-37 Multiemployer plan.

(a) *General.* Section 3(37) of the Act contains in paragraphs (a)(i)-(iv) a number of criteria which an employee benefit plan must meet in order to be a multiemployer plan under the Act. Section 3(37) also provides that the Secretary may prescribe by regulation other requirements in addition to those contained in paragraphs (a)(i)-(iv). The purpose of this regulation is to establish such requirements.

(b) *Plans in existence before the effective date.* (1) A plan in existence before September 2, 1974, will be considered a multiemployer plan if it satisfies the requirements of section 3(37)(A)(i)-(iv) of the Act.

(2) For purposes of this section, a plan is considered to be in existence if:

(i)(A) The plan was reduced to writing and adopted by the participating employers and the employee organization (including, in the case of a corporate employer, formal approval by an

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employer's board of directors or shareholders, if required), even though no amounts had been contributed under the plan, and

(B) The plan has not been terminated; or

(ii)(A) There was a legally enforceable agreement to establish such a plan signed by the employers and the employee organization, and

(B) The contributions to be made to the plan were set forth in the agreement.

(iii) If a plan was in existence within the meaning of paragraph (b)(2)(i) or (ii) of this section, any other plan with which such existing plan is merged or consolidated shall also be considered to be in existence.

(c) *Plans not in existence before the effective date.* In addition to the provisions of section 3(37)(A)(i)-(iv) of the Act, a multiemployer plan established on or after September 2, 1974, must meet the requirement that it was established for a substantial business purpose. A substantial business purpose includes the interest of a labor organization in securing an employee benefit plan for its members. The following factors are relevant in determining whether a substantial business purpose existed for the establishment of a plan; any single factor may be sufficient to constitute a substantial business purpose:

(1) The extent to which the plan is maintained by a substantial number of unaffiliated contributing employers and covers a substantial portion of the trade, craft or industry in terms of employees or a substantial number of the employees in the trade, craft or industry in a locality or geographic area;

(2) The extent to which the plan provides benefits more closely related to years of service within the trade, craft or industry rather than with an employer, reflecting the fact that an employee's relationship with an employer maintaining the plan is generally short-term although service in the trade, craft or industry is generally long-term;

(3) The extent to which collective bargaining takes place on matters other than employee benefit plans between the employee organization and

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the employers maintaining the plan; and

(4) The extent to which the administrative burden and expense of providing benefits through single employer plans would be greater than through a multi-employer plan.

[40 FR 52008, Nov. 7, 1975]

### § 2510.3-101 Definition of "plan assets"—plan investments.

(a) *In general.* (1) This section describes what constitute assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and parts 1 and 4 of subtitle B, of title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs (b) through (f) of this section define certain terms that are used in the application of the general rule. Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments. Paragraph (i) describes the assets that a plan acquires when it purchases certain guaranteed mortgage certificates. Paragraph (j) of this section contains examples illustrating the operation of this section. The effective date of this section is set forth in paragraph (k) of this section.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that—

(i) The entity is an operating company, or