

## SUBCHAPTER A—GENERAL

### PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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AUTHORITY: 29 U.S.C. 1135 and Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Secs. 2509.75-10 and 2509-75-2 issued under 29 U.S.C. 1052, 1053, 1054.

#### **§ 2509.75-2 Interpretive bulletin relating to prohibited transactions.**

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-2, with respect to whether a party in

interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested.

On November 13, 1986 the Department published a final regulation dealing with the definition of "plan assets". See §2510.3-101 of this title. Under that regulation, the assets of certain entities in which plans invest would include "plan assets" for purposes of the fiduciary responsibility provisions of the Act. Section 2510.3-101 applies only for purposes of identifying plan assets on or after the effective date of that section, however, and §2510.3-101 does not apply to plan investments in certain entities that qualify for the transitional relief provided for in paragraph (k) of that section. The principles discussed in paragraph (a) of this Interpretive Bulletin continue to be applicable for purposes of identifying assets of a plan for periods prior to the effective date of §2510.3-101 and for investments that are subject to the transitional rule in §2510.3-101(k). Paragraphs (b) and (c) of this Interpretive Bulletin, however, relate to matters outside the scope of §2510.3-101, and nothing in that section affects the continuing application of the principles discussed in those parts.

(a) *Principles applicable to plan investments to which §2510.3-101 does not apply.* Generally, investment by a plan in securities (within the meaning of section 3(20) of the Employee Retirement Income Security Act of 1974) of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets" and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.

For example, where a plan acquires a security of a corporation or a limited partnership interest in a partnership, a subsequent lease or sale of property between such corporation or partnership and a party in interest will not be a prohibited transaction solely by reason of the plan's investment in the corporation or partnership.

This general proposition, as applied to corporations and partnerships, is consistent with section 401(b)(1) of the Act, relating to plan investments in investment companies registered under the Investment Company Act of 1940. Under section 401(b)(1), an investment by a plan in securities of such an investment company may be made without causing, solely by reason of such investment,

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any of the assets of the investment company to be considered to be assets of the plan.

(b) [Reserved]

(c) *Applications of the fiduciary responsibility rules.* The preceding paragraphs do not mean that an investment of plan assets in a security of a corporation or partnership may not be a prohibited transaction. For example, section 406(a)(1)(D) prohibits the direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan and section 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan in his own interest or for his own account.

Thus, for example, if there is an arrangement under which a plan invests in, or retains its investment in, an investment company and as part of the arrangement it is expected that the investment company will purchase securities from a party in interest, such arrangement is a prohibited transaction.

Similarly, the purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.

Moreover, notwithstanding the foregoing, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

Similarly, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if such party in interest, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest may, with the aid of the plan but without the aid of any other persons, require the corporation or partnership to engage in such a transaction. However, the preceding sentence does not apply if the parties in interest engaging in the transaction, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest, may, by themselves, require the corporation or partnership to engage in the transaction.

Further, the Department of Labor emphasizes that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in con-

travention of the provisions of section 404(a) of the Act.

[51 FR 41280, Nov. 13, 1986, as amended at 61 FR 33849, July 1, 1996]

### § 2509.75-3 Interpretive bulletin relating to investments by employee benefit plans in securities of registered investment companies.

On March 12, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-3, with regard to its interpretation of section 3(21)(B) of the Employee Retirement Income Security Act of 1974. That section provides that an investment by an employee benefit plan in securities issued by an investment company registered under the Investment Company Act of 1940 shall not by itself cause the investment company, its investment adviser or principal underwriter to be deemed to be a fiduciary or party in interest "except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter."

The Department of Labor interprets this section as an elaboration of the principle set forth in section 401(b)(1) of the Act and ERISA IB 75-2 (issued February 6, 1975) that the assets of an investment company shall not be deemed to be assets of a plan solely by reason of an investment by such plan in the shares of such investment company. Consistent with this principle, the Department of Labor interprets this section to mean that a person who is connected with an investment company, such as the investment company itself, its investment adviser or its principal underwriter, is not to be deemed to be a fiduciary of or party in interest with respect to a plan solely because the plan has invested in the investment company's shares.

This principle applies, for example, to a plan covering employees of an investment adviser to an investment company where the plan invests in the securities of the investment company. In such a case the investment company or its principal underwriter is not to be deemed to be a fiduciary of or party in interest with respect to the plan solely because of such investment.

On the other hand, the exception clause in section 3(21) emphasizes that if an investment company, its investment adviser or its principal underwriter is a fiduciary or party in interest for a reason other than the investment in the securities of the investment company, such a person remains a party in interest or fiduciary. Thus, in the preceding example, since an employer is a party in interest, the investment adviser remains a

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