

ERISA GUIDELINES—SCHEDULE OF DOCUMENTS—Continued

Publication date 1975	Document	Subject	Code and ERISA sections
Sept. 8	40 FR 41654	Department of Labor—Minimum standards for hours of service, years of service, and breaks in service relating to participation, vesting, and accrual of benefits.	401(a)(3)(B), 411(a)(5)(C), and ERISA secs. 202, 203, and 204.
Sept. 17	TIR 1403	Questions and answers relating mainly to defined benefit plans subject to ERISA (addition to TIR 1334).	410, 411, et al.
Sept. 18	40 FR 43034	Notice of proposed rulemaking: Definitions of multi-employer plan and plan administrator.	414(f) and (g).
Sept. 29	T.D. 7377	Temporary regulations: Certain retroactive amendments of employee plans.	401(b).
Oct. 3	T.D. 7379	Temporary regulations: Qualified joint and survivor annuities.	401(a)(11).
	T.D. 7380	Temporary regulations: Minimum participation standards.	410.
Oct. 8	T.D. 7381	Temporary regulations: Commencement of benefits.	401(a)(14).
Oct. 15	T.D. 7382	Temporary regulations: Requirement that benefits under a qualified plan are not decreased on account of certain social security increases.	401(a)(15).
Oct. 16	T.D. 7383	Temporary regulations: Nonbank trustees of pension and profit sharing trusts benefiting owner-employees.	401(d)(1).
	40 FR 48517	Notice of proposed rulemaking: Certain custodial accounts.	401(f).
Oct. 30	TIR 1408	Questions and answers relating to mergers, consolidations, etc.	401(a)(12) and 414(1).
Nov. 3	Rev. Rul. 75-480, 1975-44 IRB.	Updating of Rev. Rul. 71-446 to reflect changes mandated by ERISA.	401(a)(5).
	Rev. Rul. 75-481, 1975-44 IRB.	Guidelines for determining whether contributions or benefits under plan satisfy the limitations of sec. 415 of the code.	401(a)(16) and 415.
	TIR 1411, Rev. Proc. 75-49, 1975-48 IRB.	Vesting and discrimination	401(a)(4) and 411(d)(1).
Nov. 4	TIR 1413	Questions and answers relating to employee stock ownership plans.	401, 4975, and sec. 301(d) of the Tax Reduction Act of 1975.
Nov. 5	T.D. 7387	Temporary regulations on minimum vesting standards.	411.
	T.D. 7388	Controlled groups, businesses under common control, etc.	414(b) and (c).
(¹)	TIR	Nonforfeiture of employee derived accrued benefit upon death.	411(a)(1).
(¹)		Department of Labor—Interpretive bulletin: Definition of seasonal industries.	410(a)(3)(B), 411(a)(5)(C), and ERISA secs. 202(a)(3)(C), 203(b)(2)(C).
Nov. 7	40 FR 52008	Department of Labor—additional requirements applicable to definition of multiemployer plan.	414(f) and ERISA sec. 3(37).
(¹)		Department of Labor—suspension of benefits upon reemployment of retiree.	411(a)(3)(B) and ERISA sec. 203(a)(3)(A).
Dec. 3	TIR 1422	Assignment or alienation of plan benefits	401(a)(13).
Dec. 9	TIR 1424, Rev. Proc. 76-1, 1976-1 IRB.	Vesting and discrimination	401(a)(4) and 411(d)(1).
(¹)	TIR, Rev. Rul.	Appropriate conversion factor	411(c)(2)(B)(ii).

¹To be published forthwith.

[41 FR 3289, Jan. 22, 1976]

§ 2509.78-1 Interpretive bulletin relating to payments by certain employee welfare benefit plans.

The Department of Labor today announced its interpretation of certain provisions of part 4 of title I of the Employee Retirement

Income Security Act of 1974 (ERISA), as those sections apply to a payment by multiple employer vacation plans of a sum of money to which a participant of beneficiary

of the plan is entitled to a party other than the participant or beneficiary.¹

Section 402(b)(4) of ERISA requires every employee benefit plan to specify the basis on which payments are made to and from the plan.

Section 403(c)(1) of ERISA generally requires the assets of an employee benefit plan to be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries² and defraying reasonable expenses of administering the plan. Similarly, section 404(a)(1)(A) requires a plan fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries of the plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1)(D) further requires the fiduciary to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of title I of ERISA.

In addition, section 406(a) of ERISA specifically prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes, *inter alia*, a direct or indirect: furnishing of goods, services or facilities between the plan and a party in interest (section 406(a)(1)(C)); or transfer to, or use by or for the benefit of, a party in interest of any assets of the plan (section 406(a)(1)(D)). Section 406(b)(2) of ERISA prohibits a plan fiduciary from acting in any transaction involving the plan on behalf of a party, or representing a party, whose interests are adverse to the interests of the plan or of its participants or beneficiaries.

In this regard, however, Prohibited Transaction Exemptions 76-1, Part C, (41 FR 12740, March 26, 1976) and 77-10 (42 FR 33918, July 1, 1977) exempt from the prohibitions of section 406(a) and 406(b)(2), respectively, the provision of administrative services by a multiple employer plan if specified conditions are met. These conditions are: (a) the plan receives reasonable compensation for the provision of the services (for purposes of the exemption, "reasonable compensation" need

not include a profit which would ordinarily have been received in an arm's length transaction, but must be sufficient to reimburse the plan for its costs); (b) the arrangement allows any multiple employer plan which is a party to the transaction to terminate the relationship on a reasonably short notice under the circumstances; and (c) the plan complies with certain recordkeeping requirements. It should be noted that plans not subject to Prohibited Transaction Exemptions 76-1 and 77-10—i.e., plans that are not multiple employer plans—cannot rely upon these exemptions.

A payment by a vacation plan of all or any portion of benefits to which a plan participant or beneficiary is entitled to a party other than the participant or beneficiary will comply with the above-mentioned sections of ERISA if the arrangement pursuant to which payments are made does not constitute a prohibited transaction under ERISA and:

(1) The plan documents expressly state that benefits payable under the plan to a participant or beneficiary may, at the direction of the participant or beneficiary, be paid to a third party rather than to the participant or beneficiary;

(2) The participant or beneficiary directs in writing that the plan trustee(s) shall pay a named third party all or a specified portion of the sum of money which would otherwise be paid under the plan to him or her; and

(3) A payment is made to a third party only when or after the money would otherwise be payable to the plan participant or beneficiary.

In the case of a multiple employer plan (as defined in Prohibited Transaction Exemption 76-1, Part C, Section III), if the arrangement to make payments to a third party is a prohibited transaction under ERISA, the arrangement will comply with the above-mentioned sections of ERISA if the conditions of Prohibited Transaction Exemptions 76-1, Part C, and 77-10 and the above three paragraphs are met. In this regard, it is the view of the Department that the mere payment of money to which a participant or beneficiary is entitled, at the direction of the participant or beneficiary, to a third party who is a party in interest would not constitute a transfer of plan assets prohibited under section 406(a)(1)(D). It is also the view of the Department that if a trustee or other fiduciary of a plan, in addition to his duties with respect to the plan, serves in a decisionmaking capacity with another party, the mere fact that the fiduciary effects payments to such party of money to which a participant is entitled at the direction of the participant and in accordance with specific provisions of governing plan documents and instruments, does not amount to a prohibited transaction under section 406(b)(2).

¹Multiple employer vacation plans generally consist of trust funds to which employers are obligated to make contributions pursuant to collective bargaining agreements. Benefits are generally paid at specified intervals (usually annually or semi-annually) and such benefits are neither contingent upon the occurrence of a specified event nor restricted to use for a specified purpose when paid to the participant.

²Section 403 (c) and (d) provide certain exceptions to this requirement, not here relevant.

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It should be noted that the interpretation set forth herein deals solely with the application of the provisions of title I of ERISA to the arrangements described herein. It does not deal with the application of any other statute to such arrangements. Specifically, no opinion is expressed herein as to the application of section 302 of the Labor Management Relations Act, 1947 or the Internal Revenue Code of 1954 (particularly the provisions of section 501(c)(9) of the Code).

[43 FR 58565, Dec. 15, 1978]

§ 2509.94-1 Interpretive bulletin relating to the fiduciary standard under ERISA in considering economically targeted investments.

This Interpretive Bulletin sets forth the Department of Labor's interpretation of sections 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA), as applied to employee benefit plan investments in "economically targeted investments" (ETIs), that is, investments selected for the economic benefits they create apart from their investment return to the employee benefit plan. Sections 403 and 404, in part, require that a fiduciary of a plan act prudently, and to diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. In addition, these sections require that a fiduciary act solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to their participants and beneficiaries. The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.

With regard to investing plan assets, the Department has issued a regulation, at 29 CFR 2550.404a-1, interpreting the prudence requirements of ERISA as they apply to the investment duties of fiduciaries of employee benefit plans. The regulation provides that the prudence requirements of section 404(a)(1)(B) are satisfied if (1) the fiduciary making an investment or engaging in an investment course of action has given appropriate consideration to those facts and circumstances that, given the scope of the fiduciary's investment duties, the fiduciary knows or should know are relevant, and (2) the fiduciary acts accordingly. This includes giving appropriate consideration to the role that the investment or investment course of action plays (in terms of such factors as diversification, liquidity and risk/return characteristics) with respect to that portion of

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the plan's investment portfolio within the scope of the fiduciary's responsibility.

Other facts and circumstances relevant to an investment or investment course of action would, in the view of the Department, include consideration of the expected return on alternative investments with similar risks available to the plan. It follows that, because every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

The fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally. Therefore, if the above requirements are met, the selection of an ETI, or the engaging in an investment course of action intended to result in the selection of ETIs, will not violate section 404(a)(1)(A) and (B) and the exclusive purpose requirements of section 403.

[59 FR 32607, June 23, 1994]

§ 2509.94-2 Interpretive bulletin relating to written statements of investment policy, including proxy voting policy or guidelines.

This interpretive bulletin sets forth the Department of Labor's (the Department) interpretation of sections 402, 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA) as those sections apply to voting of proxies on securities held in employee benefit plan investment portfolios and the maintenance of and compliance with statements of investment policy, including proxy voting policy. In addition, this interpretive bulletin provides guidance on the appropriateness under ERISA of active monitoring of corporate management by plan fiduciaries.

(1) PROXY VOTING

The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock. As a result, the responsibility for voting proxies lies exclusively with the plan trustee except to the extent that either (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA § 403(a)(1); or (2) the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA § 403(a)(2). Where the authority to manage plan assets has been delegated to an investment manager pursuant to § 403(a)(2),