



Tuesday
November 25, 1997

Part IX

Department of Labor

**Pension and Welfare Benefits
Administration**

**29 CFR Part 2510
Amendment to the Definition of Plan
Assets; Participant Contributions; Final
Rule**

DEPARTMENT OF LABOR

Pension and Welfare Benefits
Administration

29 CFR Part 2510

RIN 1210-AA59

Final Rule Amending the Definition of
Plan Assets; Participant ContributionsAGENCY: Pension and Welfare Benefits
Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule amending the Department of Labor's regulation published in the **Federal Register** on August 7, 1996, that defines when participant contributions to a pension benefit plan become plan assets for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The amendment set forth in this notice harmonizes the Title I rules governing the definition of plan assets with the Internal Revenue Code (Code) rules governing the timing of deposits for Savings Incentive Match Plans for Employees (SIMPLE plans) that involve Individual Retirement Accounts (SIMPLE IRAs) and thereby simplifies compliance by small businesses.

EFFECTIVE DATE: This regulation is effective on November 25, 1997.

FOR FURTHER INFORMATION CONTACT: Rudy Nuissl, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC (202) 219-8671; or William W. Taylor, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC, (202) 219-9141. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On March 27, 1997, the Department of Labor (the Department) published a notice of proposed rulemaking in the **Federal Register** at 62 FR 14760 (the "proposal") to amend a regulation which had been issued on August 7, 1996, at 61 FR 41220 (the "1996 regulation") defining when certain monies that a participant pays to, or has withheld by, an employer for contribution to a plan are "plan assets" for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the related prohibited transaction provisions of the Internal Revenue Code (the Code).¹ The purpose

of the proposed amendment was to harmonize the 1996 regulation with the Code rules governing the timing of deposits for SIMPLE Plans that involve IRAs, in order to simplify compliance for small plans.

The 1996 Regulation

Section 2510.3-102(a) of the 1996 regulation sets forth a general rule which provides that the assets of a plan include amounts that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. With respect to employee pension benefit plans covered by Title I of ERISA, section 2510.3-102(b) of the 1996 regulation further provides that in no event shall the date determined pursuant to section 2510.3-102(a) occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer or in which such amounts would otherwise have been payable to the participant in cash.

Except as provided in ERISA § 403(b), plan assets are required to be held in trust by one or more trustees.² ERISA § 403(a), 29 U.S.C. 1103(a). In addition, ERISA's fiduciary responsibility provisions apply to the management of plan assets. Among other things, these provisions make clear that the assets of a plan may not inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan. ERISA §§ 403-404, 29 U.S.C. 1103-1104. These provisions also prohibit a broad array of transactions involving plan assets. ERISA §§ 403-408, 29 U.S.C. 1106-1108. Employers who fail to transmit promptly participant contributions, and plan fiduciaries who fail to collect those amounts in a timely

of clarity, the remainder of the preamble refers only to Title I of ERISA. However, these references apply to the corresponding provisions of section 4975 of the Code as well.

² ERISA § 403(b) contains a number of exceptions to the trust requirement for certain types of assets, including assets which consist of insurance contracts, and for certain types of plans. In addition, the Secretary has issued a technical release, T.R. 92-01, which provides that, with respect to certain welfare plans (e.g. cafeteria plans), the Department will not assert a violation of the trust or certain other reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations involving such plans solely because of a failure to hold participant contributions in trust. 57 FR 23272 (June 2, 1992), 58 FR 45359 (Aug. 27, 1993).

manner, will violate the requirement that plan assets be held in trust; in addition, such employers and fiduciaries may be engaging in prohibited transactions.

The Proposal

On August 20, 1996, the Small Business Job Protection Act of 1996 (the Act, Pub. L. 104-188) was signed into law. Section 1421 of the Act amended section 408(p) of the Code to provide that certain employers may establish SIMPLE plans. Under amended section 408(p) of the Code, an eligible employer may establish an employee pension benefit plan by making contributions to each eligible employee's SIMPLE IRA. Section 408(p)(5)(A)(i) of the Code provides that an employer must make salary reduction elective contributions to each eligible employee's SIMPLE IRA not later than the close of the 30-day period following the last day of the month with respect to which the contributions are to be made.³ However, section 1421 of the Act did not amend Title I of ERISA, as it did the Code, with respect to when such participant contributions become assets of the plan.

In order to harmonize the Title I rules governing the definition of plan assets with section 408(p) of the Code, as amended by the Act, the Department proposed to amend 29 CFR 2510.3-102 to provide that salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs become plan assets as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the 30th day following the month in which such amounts would otherwise have been payable to the participant in cash.

The Department explained in the preamble to the proposed rule that, while the amendment would preserve the general rule set forth in section 2510.3-102(a) of the 1996 regulation governing when participant contributions to employee pension benefit plans become plan assets, it would amend 29 CFR 2510.3-102(b) of the 1996 regulation by specifying that, for purposes of Title I of ERISA, the maximum period during which salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs may be treated as other than plan

³ The Department has taken the position that contributions to an employee benefit plan made at the election of the participant, whether made pursuant to a salary reduction agreement or otherwise, constitute amounts paid to or withheld by an employer (i.e., participant contributions) within the scope of § 2510.3-102, without regard to the treatment of such contributions under the Internal Revenue Code. See 53 FR 29660 (Aug. 8, 1988).

¹ The Secretary of Labor has authority to issue regulations relating to most of section 4975 of the Internal Revenue Code pursuant to section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 165, 43 FR 47713, October 17, 1978. For the sake

assets is the same number of days as the period within which the employer is required to deposit withheld contributions under a SIMPLE plan that involves SIMPLE IRAs under section 408(p) of the Code, as amended by the Act. The Department further explained in the preamble to the proposed rule that, for all other pension plans covered under Title I of ERISA, including SIMPLE 401(k) plans that meet the requirements of section 401(k)(11) of the Code, the maximum period would remain 15 business days following the month in which participant contributions were received by the employer (for amounts that participants or beneficiaries pay to the employer) or would otherwise have been payable to the participants in cash (for amounts that the employer withholds from the participant's wages).

Discussion of the Comments and Final Rule

The Department received only one comment letter in response to the March 27, 1997, notice of proposed rulemaking. The commenter expressed concern with regard to the statement in the preamble to the proposal at 59 FR 14760 that "employers who fail to transmit promptly participant contributions, and plan fiduciaries who fail to collect those amounts in a timely manner, will violate the requirement that plan assets be held in trust; in addition, such employers and fiduciaries may be engaging in prohibited transactions." Specifically, the commenter contended that this language is too broad and that financial institutions that are fiduciaries (by virtue of being investment advisers or otherwise) but have no control over when participant contributions are sent to them should not be subject to liability in connection with failures by employers to transmit participant contributions in a timely manner. The Department does not agree that the referenced preamble language should be modified or withdrawn. As noted at 61 FR 41226 in the preamble to the 1996 regulation, while it is the view of the Department that the plan sponsor (usually the employer) is primarily responsible for assuring that participant contributions are transmitted to the trustee in a timely manner, section 405(a)(3) of ERISA would impose a fiduciary duty on plan trustees in certain circumstances. See, for example, the guidance of ERISA's co-fiduciary liability provisions set forth in 29 CFR 2509.75-5. Similar considerations would be relevant with respect to plan fiduciaries who are not necessarily trustees and who do not have control

over when participant contributions are sent to them but who are involved in the process of investing such contributions.

For the reasons set forth herein, the Department is by this notice adopting the amendment as proposed.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires each Federal agency to perform an initial regulatory flexibility analysis (IRFA) for all proposed rules unless the head of the agency certifies that the rule will not, if promulgated, have a significant impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions. The Department published an IRFA with regard to the proposed amendment in the March 27, 1997, notice of proposed rulemaking, in accordance with the requirements of 5 U.S.C. 603. In the IRFA, the Department explained the basis for its belief that the proposed rule would not have a significant economic effect on a substantial number of small entities. Because the final rule amending the 1996 regulation is identical to the proposal and because no comments were received from the public in response to the IRFA included in the March 27, 1997, notice of proposed rulemaking, the Department has made a final determination that this final rule will not have a significant effect on a substantial number of small entities.

Executive Order 12866

This regulatory action is not a "significant rule" within the meaning of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) because it is not likely to result in: (1) An annual effect on the economy of \$100 million or more, or an adverse effect on a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) the creation of a serious inconsistency or interference with an action taken or planned by another agency; (3) a material alteration in the budgetary impacts of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raising of novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Paperwork Reduction Act

This final rule contains no information collection requirements which are subject to review and approval by the Office of Management

and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3500 *et seq.*).

Unfunded Mandates Reform Act

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 1531-1538, as well as Executive Order 12875, this final rule does not contain any federal mandate that may result in increased expenditures in either federal, State, local and tribal governments in the aggregate, or impose an annual burden exceeding \$100 million on the private sector.

Congressional Review

The Department has determined that this final rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Statutory Authority

This final rule is adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93-406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332 and under Secretary of Labor's Order No. 1-87, 52 FR 13139 (Apr. 21, 1987).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

Final Rule

For the reasons set out in the preamble, 29 CFR part 2510 is amended as forth below:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority for part 2510 continues to read as follows:

Authority: Secs. 3(2), 111(c), 505, Pub. L. 93-406, 88 Stat. 852, 894 (29 U.S.C. 1002(2), 1031, 1135) Secretary of Labor's Order No. 27-74, 1-86, 1-87, and Labor-Management Services Administration Order No. 2-9.

Section 2510.3-101 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332, and sec. 11018(d) of Pub. L. 99-272, 100 Stat. 82.

Section 2510.3-102 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332.

2. Paragraph (b) of § 2510.3-102, as published in the **Federal Register** on August 7, 1996 at 61 FR 41233, is revised to read as follows:

§ 2510.3-102 Definition of "plan assets"—participant contributions.

* * * * *

(b) *Maximum time period for pension benefit plans.* (1) Except as provided in

paragraph (b)(2), of this section, with respect to an employee pension benefit plan as defined in section 3(2) of ERISA, in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

(2) With respect to a SIMPLE plan that involves SIMPLE IRAs (*i.e.*, Simple Retirement Accounts, as described in section 408(p) of the Internal Revenue Code), in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 30th calendar day following the month in which the participant contribution amounts would otherwise have been payable to the participant in cash.

* * * * *

Signed at Washington, DC, this 20th day of November 1997.

Olena Berg,

Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor.

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