

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration****29 CFR Part 2510**

RIN 1210-AA53

Proposed Regulation Relating to Definition of Plan Assets; Participant Contributions**AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This document contains a proposed regulation revising the definition of when certain monies which a participant pays to, or has withheld by, an employer for contribution to an employee benefit plan are "plan assets" for purposes of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and the related prohibited transaction provisions of the Internal Revenue Code (the Code). This regulation will provide guidance to employers that sponsor contributory plans, including plans complying with section 401(k) of the Internal Revenue Code, as well as fiduciaries, participants, and beneficiaries of such plans.

DATES: Written comments and requests to testify concerning the proposed regulation must be received by February 5, 1996. The Department has scheduled a public hearing on this proposal on January 24, 1995, and, if necessary, on January 25, 1995. The hearing will begin at 10:00 am on both days.

ADDRESSES: Interested persons are invited to submit written comments and requests to testify concerning this proposed regulation to: Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210. Attention: Proposed Participant Contribution Regulation. All submissions will be open to public inspection at the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Ave., N.W., Washington, DC 20210. Written comments may also be sent by the Internet to the following address: hinz@access.digex.net. The hearing on this proposal will be held in Room N-3437A, Constitution Ave., N.W., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Rudy Nuissl, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC

(202) 219-7461; 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: In 1988, the Department of Labor (the Department) published a final 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 ERISA and the related prohibited transaction provisions of the Code.¹ 53 FR 17628 (May 17, 1988). The final regulation provided that the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his or her 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, but in no event to exceed 90 days from the date on which such amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or 90 days from the date on 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 This final rule was based on a record developed with respect to a proposed regulation published in 1979. 44 FR 50363 (August 28, 1979).

Except as provided in ERISA § 403(b), plan assets are required to be held in trust by one or more trustees.³ ERISA

¹ The Secretary of Labor has authority to issue regulations relating to section 4975 of the Internal Revenue Code pursuant to section 102 of Reorganization Plan No. 4 of 1978. 5 U.S.C. App. 165. For the sake 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 The Department has taken the position that elective contributions to an employee benefit plan, 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).

³ 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 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).

§ 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. They also prohibit a broad array of transactions involving plan assets. ERISA §§ 406-408, 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 manner, will violate the requirement that plan assets be held in trust; in addition, such employers and fiduciaries may be engaging in prohibited transactions.

As was noted in the preamble to the final regulation published in 1988, the Department of Justice takes the position that, under 18 U.S.C. 664, the embezzlement, conversion, abstraction, or stealing of "any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or any fund connected therewith" is a criminal offense, and that under such language, criminal prosecution may go forward in situations in which the participant contributions is not a plan asset for purposes of Title I of ERISA. The final regulation defined when participant contributions become "plan assets" only for the purposes of Title I of ERISA and the related prohibited transaction excise tax provisions of the Code. The Department reiterates that this regulation may not be relied upon to bar criminal prosecutions pursuant to 18 U.S.C. 664.

Similarly, the Department wishes to reemphasize its view, expressed in the preamble to the final regulation, that in circumstances in which the employer clearly converts participant contributions to its own use, such amounts are considered "segregated," and thus will be "plan assets".

The Need for a Proposed Regulation

Although the Department believes that, in the vast majority of contributory employee benefit plans, participant contributions are handled with integrity, recent investigations conducted by the Department have revealed numerous violations related to employers' delay in transmitting or failing to transmit to employee benefit plans amounts that a participant or beneficiary pays to an employer, or