U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

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89-05
Sec. 401

Mr. Michael P. Sjogren
Mr. Lawrence J. Shulman
Seward & Kissel
Wall Street Plaza
New York, New York 10005

Re: Identification Number F-3630G

Dear Messrs. Sjogren and Shulman:

This responds to your letters requesting clarification of a provision in the “plan assets” regulation (29 CFR 2510.3-101, 51 FR 41262, November 13, 1986) issued by the Department of Labor (the Department) under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, your letters concern the times at which equity participation in an entity by benefit plan investors must be determined for purposes of the “significant participation test” contained in the regulation.

The plan assets regulation establishes rules for determining when the underlying assets of an entity in which a plan invests will be considered to include plan assets. The significant participation test is a “safe harbor” provision which provides that the assets of an entity will be considered to include plan assets only if equity participation in the entity by “benefit plan investors” is “significant”. Regulation section 2510.3-101(f)(1) states, in pertinent part, that:

> [e]quity participation in an entity by benefit plan investors is “significant” on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors….

You described a situation in which benefit plan investors initially own less than 25 percent of a class of the outstanding equity interests in a partnership. After the partnership’s formation, some of the initial investors that are not benefit plan investors redeem their investments in the partnership. As a result of the redemptions, benefit plan investors then own more than 25 percent of such class of partnership interests. Following these redemptions, an initial investor, other than a benefit plan investor, transfers his or her interest in the partnership to a member of the investor’s family. Such intra-family transfers may also include transfers by devise or inheritance.

In effect you seek clarification whether any of the above described transactions subsequent to the formation of the partnership would constitute an “acquisition” of an equity interest within the meaning of regulation section 2510.3-101(f)(1) that would trigger a determination of significant equity participation by benefit plan investors. You suggest that none of the above-described transfers of interest should be considered to be an acquisition because they do not represent new investment in the partnership.

The plan assets regulation does not specifically define what constitutes an “acquisition” for purposes of the significant participation test. However, the preamble to the final regulation suggests that the Department did not intend to circumscribe the scope of such term. For instance, in addressing the recommendations of certain commentators with respect to a limit on the timing of the test, the Department stated that it had decided that determinations of significant participation should not occur “less frequently than the proposal required, i.e., after each new investment, “and referred to such testing as “continual.”[1] The Department further noted that there will be few practical problems of compliance with the significant participation test because it will be applied generally to investments in privately–offered entities in view of the regulation’s broad exception for publicly-offered securities.[2] The Department also expressed the view that the significant participation test must be formulated so as to preclude manipulation aimed at avoiding a determination that a plan’s investment in an entity is significant.[3]

We are of the opinion, therefore, that the term “acquisition” is to be construed broadly in connection with transactions involving the transfer of equity interests for purposes of the significant participation test. Thus, in the Department’s view, the redemption of a partner’s equity investment in a partnership would constitute an acquisition triggering a determination of significant plan participation since such redemption would result in an increase in the interests of the remaining partners. It is also the Department’s view that the above-described intra-family transfers of equity interests in a partnership would trigger application of the significant participation test.[4]

This is an advisory opinion under ERISA Procedure 76-1. It is subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

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[1] 51 FR 41262,41270.

[2] Ibid.

[3] Ibid., 41269.

[4] We wish to point out that the degree of equity participation in an entity by benefit plan investors would not change solely because an investor, other than a benefit plan investor, transfers his or her equity interest in the partnership to a family member.

Sincerely,

Robert J. Doyle
Acting Director of Regulations and Interpretations