

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



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Mr. Frederick W. Rumack  
Director of Tax and Legal Services  
Buck Consultants  
Two Pennsylvania Plaza  
New York, New York 10121

Dear Mr. Rumack:

This is in response to your August 18 letter requesting guidance concerning the application of the regulations governing loans to participants and beneficiaries under section 408(b)(1) of the Employee Retirement Income Security Act (ERISA). Specifically, you have requested clarification that the Department's regulations at 29 CFR §2550.408b-1,<sup>1</sup> do not require loans to be made available to plan participants and beneficiaries who are not "parties in interest"<sup>2</sup> with respect to the plan.

Section 408(b)(1) provides an exemption from the prohibitions of section 406 of ERISA for "[a]ny loans made by the plan to parties in interest who are participants and beneficiaries of the plan", if the conditions of the exemption are met.<sup>3</sup> Relevant to your inquiry is the condition contained in paragraph (A) of section 408(b)(1), which requires that loans be made "available to all such participants and beneficiaries on a reasonably equivalent basis." Paragraph (a)(1) of §2550.408b-1, which discusses the general application of the exemption under section 408(b)(1), similarly provides, in pertinent part, that:

Section 408(b)(1) ... exempts from the prohibitions of section 406(a), 406(b)(1), and 406(b)(2) loans by a plan to parties in interest who are participants and beneficiaries of the plan, provided that such loans:

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<sup>1</sup> Published in the Federal Register on July 20, 1989 (54 FR 30520)

<sup>2</sup> The term "party in interest" is defined in section 3(14) of ERISA.

<sup>3</sup> We note that under section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of Labor has the authority to promulgate regulations for section 4975(d)(1) of the Internal Revenue Code (the Code), a parallel provision to section 408(b)(1). Therefore, all references herein to section 408(b)(1) of ERISA apply also to section 4975(d)(1) of the Code.

(i) Are available to all such participants and beneficiaries on a reasonably equivalent basis; ...

Although section 408(b)(1)(A) might be construed to require as a condition for the exemption, that participant loan programs be made available to all participants and beneficiaries of a plan regardless of their status as parties in interest, it is the view of the Department that Congress, in framing the statutory exemption, intended the "available on a reasonably equivalent basis" condition to be applied within the context of the exemptive relief provided by section 408(b)(1), i.e., the otherwise prohibited transaction of a loan of plan assets to a party in interest who is either a participant or beneficiary of the plan.

Thus, it is the position of the Department that the condition that loans be made "available to all such participants and beneficiaries on a reasonably equivalent basis", set forth in paragraph (a)(1)(i) and discussed in paragraph (b) of §2550.408b-1, does not require the inclusion in participant loan programs of participants and beneficiaries who are not parties in interest to the plan. Rather, to the extent that any loans are made available to participants and beneficiaries who are parties in interest, loans must be made available to all participants and beneficiaries who are parties in interest on a "reasonably equivalent basis", in accordance with §2550.408b-1(b). Consistent with the principles discussed in the supplementary information accompanying the Federal Register publication of §2550.408b-1, a loan program which excludes all but active employees from participation would not be considered to be providing loans on a reasonably equivalent basis to all participants and beneficiaries who are parties in interest.<sup>4</sup>

We should also note that to the extent that loans are made available to plan participants and beneficiaries regardless of their status as parties in interest, it is the view of the Department that the requirements of section 408(b)(1) and §2550.408b-1 would have to be satisfied with respect to all the participants and beneficiaries of the plan who are permitted to secure loans with their accrued nonforfeitable benefit under a loan program.<sup>5</sup>

This letter constitutes an advisory opinion letter under ERISA Procedure 76-1.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations

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<sup>4</sup> See: 54 FR 30522, July 20, 1989.

<sup>5</sup> See: Section 206(d)(2) of ERISA, Section 401(a)(13)(A) of the Internal Revenue Code and the regulations issued thereunder, 26 CFR §1.401(a)-13(d)(2)(iii).