
the adviser for breach of this fiduciary duty.¹⁶² Shareholders know exactly what they pay to affiliates for services, because all expenses incurred by an investment company, including those paid to affiliates for services, must be reflected on the fee table in the fund's prospectus.¹⁶³ Finally, an affiliated person may perform services for an investment company without violating section 17(d)¹⁶⁴ only if adequate safeguards exist, including approval by the investment company's directors, to prevent overreaching.¹⁶⁵

Because of the large number of persons subject to ERISA's self-dealing prohibitions, **ERISA** contains several exemptions from the prohibited transactions provisions of section 406(a).¹⁶⁶ Further, the Department of Labor has issued a number of class exemptions to permit potentially beneficial principal transactions where it perceives self-dealing opportunities as minimal.¹⁶⁷ For example, a separate account or a bank collective trust fund may engage in otherwise prohibited transactions with a party in interest, or acquire or hold employer securities or real property, provided the assets of the plan invested in that separate account or collective trust fund do not exceed ten percent of the total assets of the separate account or collective trust fund.¹⁶⁸

¹⁶²15 U.S.C. 80a-35(b).

¹⁶³Item 2 of Form N-1A, Investment Company Act Release No. 16244 (Feb. 1, 1988), 53 FR 3192.

¹⁶⁴Discussed *infra* at notes 199-201 and accompanying text.

¹⁶⁵*See, e.g.*, Merrill Lynch Capital Fund, Inc. (pub. avail. Dec. 21, 1990); Washington Square Cash Fund (pub. avail. July 9, 1990); Unified Management Corporation (pub. avail. June 28, 1990); The Flex-fund (pub. avail. Nov. 22, 1985); Federated Securities Corp. (pub. avail. Oct. 21, 1983).

¹⁶⁶*See* 29 U.S.C. § 1108. These statutory exemptions do not relieve fiduciaries from the general standards of prudence and loyalty that govern a fiduciary's obligations with respect to a plan.

¹⁶⁷**Class** exemptions may provide relief from some or all of the section 406(a) prohibited transactions provisions, or some or all of the section 406(b) fiduciary self-dealing restrictions, or both.

¹⁶⁸Amendment to Prohibited Transaction Exemption (PTE) 80-51 Involving Bank Collective Investment Funds, Prohibited Transaction Exemption 91-38, 56 FR 31966, 31969 (1991) [hereinafter PTE 91-38]; Amendment to Prohibited Transaction Exemption (PTE) 78-19 Involving Insurance Company Pooled Separate Accounts, Prohibited Transactions Exemption 90-1/55 FR 2891 (1990) [hereinafter PTE 90-1]. These exemptions do not relieve a fiduciary from liability for self-dealing under section 406(b). Indirect holdings in qualifying employer securities and qualifying employer real property are not counted for purposes of this 10% limitation. PTE 91-38, *supra*, at 31969; PTE 90-1, *supra*, at 2893. Further, the party in interest engaging in the transaction may not be the insurance company or bank, any separate account of that insurance company or collective investment fund of that bank, or any affiliate of either.

All transactions between a separate account or collective trust fund and a person who is a party in interest solely by reason of providing services to the plan (including a plan fiduciary), or having a particular relationship to a service provider, are also exempt.¹⁶⁹ Another exemption conditionally permits any purchase or sale of a security between a plan and a registered broker-dealer, a primary dealer in U.S. government securities, a bank, or any affiliate of such persons, that is not a fiduciary and is a party in interest *solely* by virtue of providing services to the plan.¹⁷⁰

A party in interest of a plan may engage in otherwise prohibited transactions involving plan assets (including a collective trust fund or separate account in which the plan invests) if the assets are managed by a "qualified professional asset manager" ("QPAM").¹⁷¹ A QPAM must be a bank, savings and loan, insurance company, or registered investment adviser and must meet certain equity capital or net worth standards. To qualify as a QPAM with respect to a transaction, the plan's assets, together with the assets of any other plan maintained by the same employer, or an affiliate thereof, or employee organization must not constitute more than twenty percent of the total client assets managed by that QPAM at the time of the transaction. The QPAM also must be independent of the parties in interest involved in any transaction covered by this class exemption.¹⁷²

A plan's sale or purchase of an interest in a collective trust fund or a separate account of an insurance company is also exempt from the prohibited

¹⁶⁹PTE 91-38, *supra* note 168, at 31968; PTE 90-1, *supra* note 168, at 2893. Unlike the previous exemption, a fiduciary would not be liable for self-dealing under this exemption. *See supra* note 169 and accompanying text. However, the party in interest must not be affiliated with the insurance company or bank and must not have any discretion with respect to the plan's investment in the separate account or collective investment fund or the management or disposition of the assets of the separate account or collective investment fund.

¹⁷⁰PTE 75-1, *supra* note 145, at 50847.

¹⁷¹Class Exemption for Plan Asset Transaction Determined by Independent Qualified Professional Asset Managers, Prohibited Transaction Exemption 84-14/49FR 9494 (1984), amended 50 FR 41430 (1985). A QPAM must have investment discretion over the plan assets, but need not have custody. *Id.* at 9506. Transactions involving fiduciary self-dealing or the acquisition of employer securities or real property are not covered by this exemption.

¹⁷²A transaction will not be exempt under this class exemption if the party in interest, or an affiliate thereof, has the power, or within the preceding 12 months has exercised the power, to appoint or remove the QPAM or to negotiate the terms of the management agreement with the QPAM. *Id.* at 9504. Further, the party in interest dealing with the investment fund must not be the QPAM or any person that owns a 5% interest in, or is 5% owned by, the QPAM. *Id.* at 9504, 9506.

transactions provisions under certain **conditions**.¹⁷³ The plan must pay no more than reasonable compensation in connection with the transaction. The purchase or sale must be expressly permitted by the instrument governing the plan or by a fiduciary (other than the bank, trust company, insurance company, or an affiliate thereof) that has authority to manage and control the assets of the plan. The exemption relieves parties in interest from the prohibited transactions provisions of section 406(a) of **ERISA**. The Department of Labor has not stated whether the exemption also relieves fiduciaries from the self-dealing or conflicts of interest prohibitions of Section 406(b), although the Department has stated that a bank that is a fiduciary of a plan would not violate Section 406(b) if the bank invested the assets of the plan in its "common trust fund" where the bank had no discretion with respect to that **investment**.¹⁷⁴ It is not clear whether this exemption might allow a plan to invest in a collective trust fund or separate account with the expectation that the bank or insurance company will then extend a loan to, or engage in other transactions for the benefit of, a party in **interest**.¹⁷⁵ The Department of Labor has said, however, that a plan's purchase of an insurance policy pursuant to an arrangement under which the insurance company will then lend money to a party in interest would be a prohibited transaction:⁷⁶

The Department of Labor also has exempted the purchase or sale of a security between a plan and a fiduciary that is a market-maker for that security, subject to certain conditions, as long as there is at least one other market-maker for the security, and the net price for the transaction is more favorable to the plan than that which the fiduciary, acting in good faith, reasonably believes to be

¹⁷³29 U.S.C. § 1108(b)(8).

¹⁷⁴**Opinion 88-11A**, 1988 ERISA LEXIS 11 (Aug. 17, 1988). See also Proposed Class Exemption for Certain Transactions Involving Bank Collective Investment Funds, 44 FR 44290, 44291 n.3 (1979) (proposing PTE 80-51, predecessor to current PTE 91-38, *supra* note 168).

¹⁷⁵If the loan to a non-fiduciary party in interest is from the collective trust fund or separate account (*i.e.*, the loan is from plan assets), the transaction, while prohibited, would fall within two class exemptions which exempt transactions between a pooled investment vehicle and a party in interest of a plan where the plan's assets constitute no more **than** 10% of the assets of the collective trust fund or separate account. See PTE 91-38, *supra* note 168, at 31966; PTE 90-1, *supra* note 168, at 2891. However, if the bank loans funds that are not plan assets to a non-fiduciary party in interest, it might not be a prohibited transaction, even if the plan has a substantial investment in the bank's collective trust fund. A loan to a **fiduciary** under these circumstances might be self-dealing under section 406(b).

¹⁷⁶**Interpretive Bulletin Relating to Prohibited Transactions**, 29 C.F.R. § 2509.75-2.

available at the time from all other **market-makers**.¹⁷⁷ However, the Department stated that such a transaction might be deemed a prohibited transaction if its purpose was to benefit the fiduciary or an affiliate of such **fiduciary**.¹⁷⁸ Plan assets may be invested in short term debt instruments issued by a party in interest such as bankers' acceptances, commercial paper, repurchase agreements, and certificates of deposit issued by parties in **interest**.¹⁷⁹ A registered broker-dealer that executes securities transactions for a plan and hence is a party in interest, but is not a fiduciary, may extend credit to a plan in connection with the purchase or sale of **securities**.¹⁸⁰ Conversely, a plan may lend its securities to certain parties in interest, provided neither the borrower, nor any affiliate of the borrower, has discretionary authority or control with respect to the investment of plan assets or provides investment advice with respect to those assets. ""

Just as section 17(c) of the Investment Company Act permits an affiliate to sell merchandise or lease real property to an investment company in the ordinary course of business, two **ERISA** class exemptions conditionally permit a party in interest, including any fiduciary, to furnish certain goods to a separate account or collective trust fund, and a separate account or collective trust fund to lease real property to a party in **interest**.¹⁸² The party in interest must not be the insurance company or bank, another separate account or collective trust fund of that company or bank, or an affiliate of the company or bank.

Again similar to section 17(c), ERISA permits a bank or similar financial institution that is a plan fiduciary to provide an "ancillary service" for reasonable

¹⁷⁷PTE 75-1, *supra* note 145, at 50849-50. This class exemption provides relief from both the prohibited transactions provisions of section 406(a) and the fiduciary self-dealing provisions of section 406(b).

¹⁷⁸*Id.* at 50849.

¹⁷⁹Class Exemption Covering Certain Short-Term Investments, Prohibited Transaction Exemption 81-8/46 FR 7511 (1981), *amended* 50 FR 14043 (1985).

¹⁸⁰PTE 75-1, *supu* note 145, at 50850. A registered broker-dealer that is a fiduciary may extend credit to a plan in connection with the purchase or sale of securities under this exemption provided that neither the fiduciary, nor any affiliate of the fiduciary, receives any interest or other consideration in return. *Id.*

""Class Exemption to Permit Certain Loans of Securities by Employee Benefit Plans, Prohibited Transaction Exemption 81-6/46 FR 7527 (1981), *amended* 52 FR 18754 (1987). A plan may lend securities to a party in interest only if the party in interest is a registered broker-dealer, a person exempt from registration as a dealer in exempted government securities, or a bank. *Id.*

¹⁸²PTE 91-38, *supra* note 168, at 31968; PTE 90-1, *supra* note 168, at 2893.

compensation.¹⁸³ The bank must adopt safeguards to ensure that the service is provided consistent with sound banking and financial practices and the best interests of participants and beneficiaries of the plan, and not in an excessive or unreasonable manner.¹⁸⁴

ERISA also contains an exemption known as the "multiple services exemption." A person that is a party in interest by virtue of providing certain services to the plan may also provide office space, legal, accounting, and other services necessary for the establishment or operation of the plan, if the plan pays no more than reasonable compensation.¹⁸⁵ A broker-dealer that executes transactions on behalf of a plan (making it a party in interest),¹⁸⁶ may, for example, provide recordkeeping or other necessary services to that plan for reasonable compensation.¹⁸⁷

2. Purchasing an Affiliate's Assets

The Investment Company Act generally prohibits registered investment companies from acquiring securities issued by or any other interest in the business of a broker, dealer, underwriter, or investment adviser.¹⁸⁸ Rule 12d3-1 provides limited exemptions from this requirement but, recognizing the inherent conflict of interest, generally prohibits a registered investment company from acquiring any security issued by its investment adviser, promoter, or principal

¹⁸³29 U.S.C. § 1108(b)(6).

¹⁸⁴*Id.* Plan assets held by a bank that is a plan fiduciary which are reasonably expected to be needed to satisfy current plan expenses may be placed by the bank in a non-interest-bearing checking account in the bank if the conditions of regulation 408b-6 are met, notwithstanding the requirement of the statutory exemption for investments in bank deposits that the account bear a reasonable rate of interest. 29 C.F.R. § 2550.408b-6(a). See also 29 U.S.C. § 1108(b)(4) (statutory exemption for bank deposits).

¹⁸⁵29 U.S.C. § 1108(b)(2). Arrangements for office space or services must be reasonable. The arrangements are exempt only from the prohibited transactions provisions of section 406(a) of ERISA. No relief is provided from the prohibitions on conflicts of interest and self-dealing by fiduciaries under section 406(b) of ERISA. See 29 C.F.R. § 2550.408b-2(a).

¹⁸⁶See *ERISA and the Investment Management and Brokerage Industries: Five Years Later*, 35 BUS. L. 189,268 (Nov. 1979) [hereinafter *ERISA Five Years Later*].

¹⁸⁷See Howard Pianko & Stephen J. Nelson, *Special Issues Involving Broker-Dealers and Their Employee Benefit Plan Clients*, 23 REAL PROP. PROB. & TR. J. 749, 757 (1988) [hereinafter Pianko & Nelson].

¹⁸⁸See 15 U.S.C. § 80a-12(d)(3). This section provides an exception for corporate issuers all of whose outstanding securities are owned by registered investment companies.

underwriter, or any affiliated person of such investment adviser, promoter, or principal underwriter that is a "securities related business."¹⁸⁹

ERISA generally prohibits the acquisition of employer securities and real property by a plan.¹⁹² Section 407 does permit a plan to acquire employer securities or real property if, after the acquisition, the aggregate fair market value of the employer securities and employer real property does not exceed ten percent of the fair market value of the plan's assets.¹⁹³ Further, in enacting ERISA, Congress noted that certain kinds of defined contribution plans commonly provide for substantial investments in employer securities and real property.¹⁹² Congress therefore included an exception in section 407 to allow the practice to continue with respect to certain kinds of defined contribution plans that explicitly provide for investment of more than ten percent of their assets in employer securities and real property.¹⁹³ Many defined contribution plans, including 401(k) plans, may thus acquire employer securities and real property in an amount exceeding ten percent of the plan's assets. ERISA further accommodates the use of defined contribution plans for the acquisition of employer securities and real property by excepting these acquisitions from a fiduciary's duty under section 404(a) to diversify a plan's investments.¹⁹⁴

ERISA permits a plan to invest its assets in deposits in a bank or similar financial institution that is a plan fiduciary if the deposits bear a reasonable rate of interest and the investment is expressly authorized by a provision of the plan

¹⁸⁹17 C.F.R. § 270.12d3-1(c).

¹⁹⁰29 U.S.C. § 1106(a)(2).

¹⁹¹Further, under section 407, the plan may only acquire "qualifying employer securities" and "qualifying employer real property." 29 U.S.C. § 1107(a)(1).

¹⁹²U.S. CONGRESS CONFERENCE COMMITTEE, EMPLOYEE RETIREMENT SECURITY ACT OF 1974, H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 317 (1974) [hereinafter ERISA CONFERENCE REPORT].

¹⁹³*Id.* A defined contribution plan relying on this exception must be an "eligible individual account plan" and may acquire only "qualifying employer securities" and "qualifying employer real property." *Id.*

¹⁹⁴The Department of Labor has also exempted acquisitions of employer securities and employer real property by a collective trust fund or separate account in which a plan is invested, provided the plan's assets constitute no more than 10% of the assets of the collective trust fund or separate account. PTE 91-38, *supra* note 168, at 31966; PTE 90-1, *supra* note 168, at 2891. A collective trust fund or separate account more than 10% of the assets of which are assets of a 401(k) plan or certain other types of defined contribution plan may acquire employer securities or employer real property if certain conditions are met. PTE 91-38, *supra* note 168, at 31968; PTE 90-1, *supra* note 168, at 2893.

or by a fiduciary other than the **bank**.¹⁹⁵ A plan may also enter into insurance and annuity contracts with an insurer which is either the employer maintaining the plan or a party in interest which is wholly-owned by the employer maintaining the plan, or by another party in interest with respect to the plan, if the plan pays no more than adequate **consideration**.¹⁹⁶

Regulation 9 permits national banks to deposit collective trust fund assets awaiting investment or distribution in their time or savings deposits or those of their affiliates.¹⁹⁷

3. Joint Transactions

Section 17(d) of the Investment Company Act, and rule 17d-1 thereunder, make it unlawful for any affiliated person of or principal underwriter for a registered investment company, or any affiliated person of **such** a person or principal underwriter, to engage in any transaction in which the registered investment company, or a company controlled by the registered investment company, jointly participates without obtaining prior Commission approval by exemptive application?'' The rule also provides certain exceptions for which applications are not required?'' Because of the Commission's broad exercise of its rulemaking authority, many transactions come within rule 17d-1's ambit; these transactions generally require individual approval under a standard that requires the investment company to participate on a basis no less advantageous than that of the other joint participants?''

¹⁹⁵The approving fiduciary must be expressly authorized by the plan to instruct the trustee with respect to the investment. 29 U.S.C. § 1108(b)(4); 29 C.F.R. § 2550.408b-4.

¹⁹⁶29 U.S.C. § 1108(b)(5).

¹⁹⁷12 C.F.R. § 9.18(b)(8)(i).

¹⁹⁸15 U.S.C. § 80a-17(d); 17 C.F.R. § 270.17d-1(a).

¹⁹⁹These exceptions include the following: a profit-sharing, stock option, and stock purchase plan covering affiliates or employees of a company controlled by the registered investment company; a qualified employee benefit plan provided by a registered investment company for its employees; certain joint transactions in which a registered investment company and a company that is a "downstream" affiliated person, participate, provided that no "upstream" affiliated persons participate; the receipt of cash or securities by **an** investment company and its affiliated persons pursuant to the reorganization of a portfolio company; and any arrangement regarding liability insurance policies (other than a fidelity bond required by rule 17g-1). 17 C.F.R. § 270.17d-1(d).

²⁰⁰The Commission will also consider whether the registered investment company's participation in the joint transaction is consistent with the Investment Company Act. 17 C.F.R. § 270.17d-1(b).

Unlike the Investment Company Act, ERISA does not expressly prohibit joint transactions between a plan and a party in interest or fiduciary. The general fiduciary responsibilities imposed by ERISA and the prohibited transactions provisions may nonetheless protect plans from some joint transactions. For example, if a fiduciary participates in a transaction with the plan on its own behalf, it might violate its duty under section 404(a) to act solely in the interests of the participants.

Federal banking law and regulation **9** do not expressly prohibit banks and their affiliates from engaging in joint transactions with their collective trust funds.

4. Underwriting Involving Fiduciaries and Their Affiliates

To prevent dumping of unwanted securities into investment companies' portfolios, section 10(f) of the Investment Company Act prohibits a registered investment company from acquiring any security during the existence of an underwriting or selling syndicate for that security containing an affiliated person (or any person of whom that person is an affiliated person).²⁰¹ This prohibition applies only where the affiliate is a "principal underwriter."²⁰² Where the prohibition applies, the investment company may not purchase the securities from any member of the syndicate. Rule 10f-3 allows a registered investment company to purchase securities in a transaction that would otherwise violate section 10(f) if certain safeguards are met.²⁰³

ERISA prohibits a plan, during the existence of an underwriting or selling syndicate for a security of which a fiduciary is a member, from purchasing the security from the fiduciary or an affiliate of the fiduciary.²⁰⁴ Where a fiduciary is a member of the underwriting syndicate for a security, a plan's purchase of those securities during the underwriting from a member of the syndicate other

²⁰¹See Chapter 12.

²⁰²*Id.* See 15 U.S.C. § 80a-2(a)(29) (definition of "principal underwriter").

²⁰³An investment company that engages in transactions in reliance upon rule 10f-3 must report these transactions on its semi-annual report (Form N-SAR) filed with the Commission. 17 C.F.R. § 270.10f-3(g). The investment company's board of directors, including a majority of the disinterested directors, must adopt and periodically review procedures designed to ensure compliance with rule 10f-3 and must determine, at least quarterly, that all transactions during the period were effected in compliance with the rule. 17 C.F.R. § 270.10f-3(h). Rule 10f-3 also prohibits the investment company from acquiring more than the greater of 4% or \$500,000 (but in no case more than 10%) of the principal amount of the offering and from paying an amount greater than 3% of its assets for the acquisition. 17 C.F.R. § 270.10f-3(d)-10f(3)(e).

²⁰⁴PTE 75-1, *supra* note 146, at 50848 (the Department of Labor did not specify which prohibited transactions provision(s) would be violated by such purchase).

than the fiduciary or its affiliate *might* also be a prohibited transaction in that it could constitute a use of plan assets for the benefit of a party in interest.²⁰⁵

The Department of Labor has issued a class exemption, Prohibited Transaction Exemption ("PTE") 75-1, that permits a plan to acquire securities, during the existence of an underwriting or selling syndicate, from any person other than the plan's fiduciary (or its affiliate) of the plan that is also a member of such syndicate.²⁰⁶ No fiduciary involved in causing the plan to purchase securities in a transaction that is exempt under this class exemption may be a "manager" of the underwriting or selling syndicate. The transaction must also meet certain requirements relating to the security, its price, the nature of the underwriting and the extent of a plan's investment.²⁰⁷ It *might* be a prohibited transaction for a bank participating in an underwriting to have its collective trust fund holding plan assets purchase the securities from another member of the syndicate.²⁰⁸

The prohibition under the Investment Company Act seems somewhat broader, affecting more parties and transactions than the ERISA prohibition. Where section 10(f) applies, the investment company may not purchase the securities from any member of the syndicate?'' PTE 75-1 exempts transactions

²⁰⁵See *id.*

²⁰⁶PTE 75-1, *supra* note 145, at 50848. If the purchase is from a *non-fiduciary party in interest*, the transaction does not have to comply with this class exemption. However, the transaction would be a principal transaction, prohibited by section 406(a) of ERISA unless exempt under a separate class exemption for principal transactions. See *supra* note 170 and accompanying text (class exemption for principal transactions with *non-fiduciary* parties in interest).

The Department of Labor has stated that the purchase of securities during the existence of an underwriting or selling syndicate for that security, of which a fiduciary or an affiliate thereof is a member, from a member that is not **that** fiduciary or an affiliate thereof will *not* be deemed a prohibited transaction where that fiduciary is not involved in any way in causing the plan to make the purchase, *e.g.*, the fiduciary does not recommend the purchase to the plan or participate in the plan's decision to make the purchase. PTE 75-1, *supra* note 145, at 50848. See also 29 U.S.C. § 1106(b)(1) (use of plan assets for benefit of fiduciary); *ERISA Five Years Later*, *supra* note 186, at 272-73 (purchase from a syndicate member other than the fiduciary *might* benefit the fiduciary because each member may have an interest in the success of the entire offering).

²⁰⁷The plan may not acquire more than 3% of the offering or pay an amount greater than 3% of the market value of the plan's assets (or 1% of plan assets if the amount exceeds \$1 million) for the acquisition. PTE 75-1, *supra* note 145, at 50849.

²⁰⁸See *id.* at 50848.

²⁰⁹Rule 10f-3 provides a safe harbor that conditionally allows an investment company to purchase from members of the syndicate other than the prohibited parties. See 17 C.F.R. § 270.10f-3(f).

between a plan and any syndicate member that is not a plan fiduciary so long as the fiduciary causing the plan to make the purchase (or affiliate) does not serve as manager of the syndicate.²¹⁰ Further, the ERISA prohibition only reaches fiduciaries and their affiliates that act as managers -- not other parties in interest. As previously discussed, the Investment Company Act definition of "affiliated person" is substantially broader than the ERISA definitions of "fiduciary" and "affiliate."²¹¹ The Investment Company Act prohibitions thus reach more persons with potential conflicts of interest.

Another significant difference between the Investment Company Act and ERISA anti-dumping provisions is that the ERISA class exemption permits the purchase of any security issued by a bank, whether or not registered and regardless of quality, and certain other types of unregistered securities.²¹² Rule 10f-3 exempts only purchases of securities registered under the Securities Act and municipal securities and then only if the securities have at least an investment grade rating (for municipal securities)²¹³ or the issuers are "seasoned" (for registered securities). Securities acquired under the class exemption must also be seasoned (*i.e.*, the issuer must have been in continuous operation for at least three years), but securities "fully guaranteed" by a bank or certain others are excepted from the seasoning requirement. By more closely restricting the availability of its anti-dumping safe harbor to securities that are rated or that have been registered under a statute with civil liabilities for material misstatements and omissions, the Investment Company Act more successfully removes the opportunity for the dumping of securities by affiliated underwriters.

²¹⁰It may still be a prohibited transaction for a plan to purchase securities offered in an underwriting from a member of the syndicate other than the fiduciary or its affiliate if the fiduciary profits from the transaction. See Pianko & Nelson, *supra* note 187, at 763.

²¹¹See *supra* notes 155, 156 and accompanying text.

²¹²PTE 75-1, *supra* note 145, at 50848. Securities issued or guaranteed by a bank are generally not subject to the registration requirements of the 1933 Act. See Securities Act § 3(a)(2), 15 U.S.C. § 77c(a)(2). Further, the class exemption allows the purchase of securities (1) issued by a common or contract carrier under the Interstate Commerce Act, (2) exempt from registration by a federal statute other than the Securities Act, or (3) the subject of a distribution and of a class required to be registered under section 12 of the Exchange Act and the issuer of which has been subject to the reporting requirements of section 13 of the Exchange Act for at least 90 days and has filed all required reports with the Commission during the preceding year. PTE 75-1, *supra* note 145, at 50848.

²¹³See 17 C.F.R. § 270.10f-3(c). If the municipal issuer has been in continuous operation for less than three years, the issue must receive one of the three highest ratings. *Id.*

5. Use of Offering Proceeds to Retire Debts to Affiliates

The Commission has supported legislation that would specifically prohibit an investment company from acquiring, during the existence of an underwriting or selling syndicate, securities of an issuer that will use the proceeds of the offering to defray indebtedness owed to an entity that is an affiliated person of the investment company.²¹⁴ The Investment Company Act currently does not explicitly proscribe such activity. This legislation is needed to prevent banks and others from using affiliated investment companies as a source of capital to bail out themselves or their financially troubled debtors or to otherwise further its own interest as creditor of such issuers.²¹⁵

ERISA generally prohibits the use of offering proceeds to retire debts to affiliates, but the Department of Labor has issued a class exemption permitting a plan to purchase securities in two situations where the offering proceeds would be so used. First, the class exemption conditionally allows a fiduciary that is a bank or an affiliate thereof to purchase securities on behalf of a plan in a public offering where the proceeds *may* be used by the issuer to retire or reduce indebtedness owed to that fiduciary or its affiliate.²¹⁶ If the fiduciary "knows" that the proceeds of the issue will be used by the issuer to reduce or retire indebtedness owed to that fiduciary or its affiliate, the transaction must comply with several additional conditions relating to the timing and terms of the purchase, the nature of the offering, and the extent of the plan's participation. Second, the class exemption conditionally allows a plan fiduciary to purchase securities on behalf of a plan in a public offering where the issuer may use the proceeds of the offering to retire or reduce indebtedness owed to a party in interest other than the fiduciary.²¹⁷ The class exemption does not apply if the securities to be purchased are issued by the employer or any affiliate of the employer.

²¹⁴See, e.g., *The Securities Regulatory Equality Act of 1991: Hearings on H.R. 797 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991) (statement of Richard C. Breeden, Chairman, SEC) [hereinafter H.R. 797 Testimony]; Hearings on S. 543 and S. 713 Before the Senate Comm. on Banking, Housing, and Urban Affairs, 102d Cong., 1st Sess. (1991) (statement of Richard C. Breeden, Chairman, SEC); see also S. 543, 102d Cong., 1st Sess. § 742(a) (1991); H.R. 6, 102d Cong., 1st Sess. § 462(b) (1991).*

²¹⁵In connection with any such legislation, the Commission has stated that it should be given the authority to exempt proposed transactions from such a prohibition in the interest of investment company shareholders. See H.R. 797 Testimony, *supra* note 214, at 21.

²¹⁶See Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest, Prohibited Transaction Exemption 80-83, 45 FR 73189 (1980).

²¹⁷*Id.*

Regulation 9 does not specifically prohibit a collective trust fund from investing in securities where the offering proceeds will be used by the issuer to reduce or retire indebtedness owed to the bank or an affiliate of the bank.²¹⁸

6. Agency Transactions by Affiliates

The Investment Company Act does not prohibit all affiliated agency transactions. Instead, section 17(e) establishes limits within which an affiliate, acting as agent, may receive compensation in connection with the purchase or sale of any property from or to the investment company. The transaction must be in the course of the affiliate's business as an underwriter or broker. Any commissions received by an affiliated person acting as broker must meet the limitations of section 17(e)(2).²¹⁹ Further, an investment adviser has a duty to obtain best execution for transactions in which it has brokerage discretion.

Section 406 of ERISA generally prohibits a party in interest from acting as agent for a plan. Because service providers are, by definition, parties in interest, ERISA section 408 exempts certain essential services from section 406.²²⁰ In addition, the Department of Labor has issued class exemptions to enable plans to obtain certain services from fiduciaries and other parties in interest. One class exemption conditionally permits a plan fiduciary to execute securities transactions for a plan for a fee, if the transactions are not "excessive, under the circumstances, in either amount or frequency."²²¹ Further, a plan fiduciary may generally act as the agent in an agency cross transaction involving the plan and receive reasonable compensation from the plan and the other parties to the

²¹⁸The Glass-Steagall Act prohibition of stock underwriting by commercial banks and their affiliates has significantly eroded. Recently, J.P. Morgan Securities, an affiliate of Morgan Guaranty, helped underwrite a public offering of common stock. The issuer planned to use about 18% of the proceeds of the offering to pay off part of its indebtedness to Morgan Guaranty, the lead commercial bank for its line of credit. See David B. Hilder, *Stock Offering Shows Hurdles Faced by Banks*, WALL ST. J., Feb. 25, 1991, at A5.

²¹⁹Section 17(e)(2)(A) limits an affiliated broker's commission on transactions effected on an exchange to the "usual and customary broker's commission;" rule 17e-1, a safe harbor under section 17(e)(2)(A), permits commissions that are reasonable and fair compared to commissions paid to other brokers involving similar transactions. 17 C.F.R. § 270.17e-1.

²²⁰See *supra* notes 183, 185 and accompanying text.

²²¹Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, Prohibited Transaction Exemption 86-128, 51 FR 41686, § II(a) (1986) [hereinafter PTE 86-1281].

transaction.²²² A plan fiduciary that is a discretionary trustee or administrator of the plan, or an employer whose employees are covered by the plan, may engage in agency or agency cross transactions with the plan only if it returns or credits to the plan all "profits"²²³ it earns in those transactions.²²⁴

An independent fiduciary of a plan must give written authorization in advance for any agency or agency cross transaction executed by a fiduciary and the executing fiduciary must furnish the authorizing fiduciary with certain disclosures. A fiduciary engaging in agency cross transactions with a plan must provide additional disclosures beyond those required when the fiduciary executes transactions on behalf of the plan. The fiduciary executing an agency cross transaction may have investment discretion and/or render investment advice only with respect to either buyers or sellers in the transaction, but not both.²²⁵

While a service provider is not always a plan fiduciary, it is always a party in interest and therefore subject to the prohibited transactions provisions under ERISA section 406(a). A party in interest, or an affiliate of a party in interest, may provide, by class exemption, the following services to the plan: effecting securities transactions on behalf of the plan, acting as agent for the plan, performing clearance, settlement, and custodial functions incidental to effecting transactions, and providing investment advice and analyses to the plan under circumstances which do not make the party in interest a fiduciary of the

²²²*Id.* at 41695. This class exemption only exempts transactions from the fiduciary self-dealing and conflicts provisions of section 406(b) of ERISA, not from the prohibited transactions provisions of section 406(a). If a plan fiduciary purchases securities for the plan from a person the fiduciary knows is a party in interest in an agency cross transaction and the fiduciary receives a commission from the party in interest for effecting a transaction, the fiduciary will not be deemed to have received a kickback in violation of section 406(b)(3). *Id.* at 41690. However, the purchase of the securities on behalf of the plan from the party in interest would still be a prohibited transaction under section 406(a)(1). *Id.*

• "Profit" is defined to allow a discretionary trustee, plan administrator, or employer to recoup its expenses, both direct and indirect, including overhead. *Id.* at 41694.

²²⁴*See id.* at 41696. A bank that maintains a collective trust fund would be a discretionary trustee and thus a plan fiduciary of a plan that invests in the fund. That bank cannot execute securities transactions on behalf of the plan as agent for the plan or engage in agency cross transactions involving the plan unless the bank returns or credits to the plan all "profits" it earns in connection with those transactions. *Id.*

²²⁵The conditions for engaging in agency cross transactions do not apply in every case. A fiduciary may engage in agency cross transactions with **the** plan if it, in effect, is not acting **as** a fiduciary with respect to the plan assets used for the transaction. *Id.* at 41696.

plan.²²⁶ A fiduciary of a plan cannot rely upon this class exemption.²²⁷ Each exempted transaction must be effected on behalf of the plan, and any advice or analysis must be provided to the plan, on terms that are at least as favorable to the plan as would be obtained in an arm's length transaction with an unrelated party.

While regulation 9 is largely silent on affiliates acting as agent to a collective trust fund, the Comptroller has construed regulation 9 to prohibit national banks from engaging in securities transactions for trust accounts they administer through an affiliated discount broker except where neither the bank nor the affiliated broker profits from the transaction.²²⁸ However, a bank may execute transactions through an affiliated broker if authorized by the trust instrument, local law, or the trust beneficiaries.²²⁹

C. Fund Management

The Investment Company Act subjects the management of a registered investment company to extensive regulation.³⁰ A majority of shareholders must approve any change in its fundamental policies and certain changes in its investment policies.²³¹ A registered investment company must obtain shareholder approval to vary the fund's policies described in the registration statement regarding borrowing money, issuing senior securities, underwriting other issuers' securities, purchasing or selling real estate or commodities, or making loans to other persons.²³² Shareholders elect the investment company's

²²⁶See PTE 75-1, *supra* note 145, at 50846.

²²⁷Fiduciaries may execute transactions for a plan as previously discussed. See PTE 86-128, *supra* note 221 and accompanying text (execution of transactions by a fiduciary).

²²⁸OFFICE OF THE COMPTROLLER OF THE CURRENCY, Trust Banking Circular No. 23 (Oct. 4, 1983), 5 Fed. Banking L. Rep. (CCH) ¶ 60,575. A bank or its affiliate may impose a fee to cover the cost of the transaction. *Id.*

²²⁹*Id.*

²³⁰See Chapter 7.

²³¹See 15 U.S.C. § 80a-13(a)(3).

²³²15 U.S.C. § 80a-13(a)(2).

board of directors.²³³ Shareholders must also approve any amendments to the investment advisory contract.²³⁴

ERISA requires that every covered employee benefit plan be established under a written instrument which provides for one or more "named fiduciaries" to manage and control the operation and administration of the plan.²³⁵ All assets of the plan must be held in trust by one or more trustees:³⁶ except for plan assets held by an insurance company.²³⁷ The plan may provide that a named fiduciary with responsibility for managing the plan assets may appoint an investment manager to manage those assets.²³⁸ The appointed investment manager must be a bank, insurance company or registered investment adviser and must acknowledge, in writing, that it is a fiduciary of the plan.²³⁹ Under **ERISA**, participants in employee benefit plans are generally not entitled to vote on any matter affecting the management of the plan. Rather, **ERISA** regulates the management of plan assets by establishing certain basic duties of plan fiduciaries under section 404(a).²⁴⁰

A bank collective trust fund must be established pursuant to a written plan.²⁴¹ Participants in bank collective trust funds are not entitled to vote on any matters with respect to the funds. A collective trust fund's fundamental policies may be changed without the approval of representatives of participating plans.²⁴² Regulation 9 requires that the bank have the exclusive management

²³³15 U.S.C. § 80a-16.

²³⁴15 U.S.C. § 80a-15(a). In connection with shareholder votes, an investment company must file proxies containing the disclosures specified under the proxy rules of the Exchange Act, including certain additional information where a proxy relates to the election of directors or approval of the investment advisory contract. 17 C.F.R. §§ 270.20a-1, 270.20a-2, 270.20a-3.

²³⁵29 U.S.C. § 1102(a).

²³⁶29 U.S.C. § 1103(a).

²³⁷29 U.S.C. § 1103(b).

²³⁸29 U.S.C. § 1102(c)(3).

²³⁹29 U.S.C. § 1002(38).

²⁴⁰See *supra* notes 133-137 and accompanying text.

²⁴¹12 C.F.R. § 9.18(b)(1). A collective trust fund's written plan must be approved by the bank's board of directors and filed with the Comptroller. *Id.*

²⁴²Apparently the plan may be amended by the bank's board of directors. See Martin E. Lybecker, *Bank-Sponsored Investment Management Services: Consideration of the Regulatory Problems*, (continued...)

of a collective investment fund.²⁴³ Regulation 9 also requires that a periodic audit be made by auditors responsible only to the bank's board of directors.²⁴⁴

D. Valuation and Redemption

Open-end investment companies generally must value their portfolios on a "mark-to-market" basis daily. This requirement assures that fund assets are valued accurately and that sales and repurchases of fund shares occur at prices that prevent the interests of new, existing, or redeeming shareholders from being diluted. Investment company securities may not be sold or redeemed except at a price based on their current net asset value which is next computed after receipt of a redemption or purchase order. Rule 22c-1 generally requires a registered open-end investment company to calculate its current net asset value per share at least daily. Under section 22(e) of the Investment Company Act, an investor tendering shares for redemption generally must be paid within seven days of tender.

The regulations adopted under the Internal Revenue Code provide that a qualified pension plan is a plan established primarily to provide retirement benefits.²⁴⁵ Accordingly, defined contribution plan participants generally cannot redeem their investments before they retire or cease working for their employer, in which case they are entitled to receive the vested portion of their individual accounts. Some defined contribution plans allow participants to withdraw their own account contributions.²⁴⁶ A qualified pension plan may not, however, permit participants to withdraw the employer's contributions prior to retirement, termination of employment, or termination of the plan.²⁴⁷ Participants in participant-directed defined contribution plans are allowed to transfer funds among the investment options available under the plan, in accordance with the terms of the plan. Defined contribution plans must value

²⁴²(...continued)

and Suggested Legislative and Statutory Interpretive Responses, 1977 DUKE L.J. 983, 1032 (regulation 9 does not contain any restriction on changing a collective trust fund's investment policy once the fund is established).

²⁴³12 C.F.R. § 9.18(b)(12).

²⁴⁴12 C.F.R. § 9.18(b)(5)(i).

²⁴⁵See 26 C.F.R. § 1.401(b)(1)(i).

²⁴⁶See Rev. Rul. 69-277, 1969-1 C.B. 116.

²⁴⁷See Rev. Rul. 74-417, 1974-2 C.B. 131; Rev. Rul. 74-254, 1974-1 C.B. 91.

each individual account at least annually, on a specified date.²⁴⁸ The plan must use the fair market value of the plan assets as of the valuation date in determining the value of the individual accounts.²⁴⁹

Bank collective trust funds are required to describe in their written plans the basis and method used to value the fund assets, and generally to value their assets at market value.²⁵⁰ Plans invest in and withdraw from bank collective trust funds on the basis of this valuation, which must be made at least quarterly.²⁵¹

E. Advertising

Investment companies must file copies of the full text of their sales literature with the Commission, or the **NASD**, not later than ten days after they are transmitted or distributed to prospective investors.²⁵² If a registered investment company chooses to advertise its performance, it must do so in accordance with rules that standardize and prescribe certain performance indicators. Generally, a registered investment company is required to portray total return data for one, five, and ten year periods. If an investment company advertises its yield, it must use a standardized thirty day yield. Investment companies, bank collective trust funds, and insurance company separate accounts are subject to the antifraud provisions of section 10(b) of the Exchange Act, rule lob-5 thereunder, and section 17(a) of the Securities Act.

ERISA does not specifically address the promotion or advertisement of pooled investment vehicles.

The Comptroller generally permits unrestricted advertising of collective trust funds, except that advertisement of future performance or comparative performance with funds other than those offered by the bank is not permitted. National banks are not required to file copies of collective trust fund sales literature with the Comptroller, although the Comptroller does monitor such

²⁴⁸Rev. Rul. 80-155,1980-1 C.B. 84, 85.

²⁴⁹*Id.*

²⁵⁰12 C.F.R. §§ 9.18(b)(1), 9.18(b)(15).

²⁵¹12 C.F.R. § 9.18(b)(4).

²⁵²15 U.S.C. § 80a-24(b); 17 C.F.R. 270.24b-3.

advertisements for compliance with the antifraud provisions of the securities laws.²⁵³

F. Diversification

To qualify for pass-through tax treatment, an investment company must meet the Internal Revenue Code's two-part diversification standard. First, with respect to fifty percent of an investment company's assets, no more than five percent may be invested in the securities of any one issuer and the investment company may not own more than ten percent of the outstanding voting securities of any one issuer. Second, as to 100% of the investment company's assets, no more than twenty-five percent may be invested in the securities of any one issuer.²⁵⁴

Under **ERISA**, plan fiduciaries are required to ensure that the plan's investments are diversified to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.²⁵⁵ Failure of a plan's investment manager to investigate the plan's cash flow requirements and to adequately diversify the plan's investments to meet its liquidity needs is a breach of fiduciary duty for which the manager may be liable.²⁵⁶ The Conference Committee's report on the adoption of **ERISA** states that, with respect to the requirement of diversification, the fiduciary should consider factors **such** as (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment; (5) distribution as to **geographical** location; (6) distribution as to industries; and (7) the dates of **maturity**.²⁵⁷ In determining whether plan assets are sufficiently diversified, the fiduciary should look to the plan's underlying assets held in a mutual fund, bank collective fund, or insurance company separate account.²⁵⁸

²⁵³COMPTRROLLER OF THE CURRENCY, COMPTRROLLER'S HANDBOOK FOR FIDUCIARY ACTIVITIES 243 (Sept. 1990).

²⁵⁴26 U.S.C. § 851.

²⁵⁵29 U.S.C. § 1104(a)(1)(C).

²⁵⁶See **GIW** Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729 (11th Cir. 1990).

²⁵⁷Similarly, diversification could be achieved through the **use** of several different investment managers, each of whom concentrated in specific forms of investment, **so long as** the portfolio of the plan as a whole was diversified. See ERISA CONFERENCE REPORT, *supra* note 193, at 304.

²⁵⁸*Id.* Investments of a separate account underlying a variable annuity, endowment, or life insurance contract are adequately diversified if (1) no more than 55% of the value of its assets is represented by any one investment; (2) no more **than 70%** is represented by any two investments; (continued..)

Regulation 9 does not specifically require that collective trust funds diversify their investments, except that the fund must be maintained as set forth in the written plan.²⁵⁹

G. Liquidity

All three regulatory frameworks impose requirements that an investment vehicle maintain a sufficient portion of its assets in liquid investments. Open-end investment companies generally may not invest more than fifteen percent of their net assets in illiquid investments.²⁶⁰ ERISA's prudence standard includes a requirement to consider liquidity needs in the management of plan assets.²⁶¹ Collective trust funds, other than short-term investment funds,²⁶² may invest any percentage of their assets in illiquid investments consistent with anticipated redemption needs.

VI. Conclusion

As the foregoing somewhat lengthy analysis shows, ERISA and, to a lesser extent, the Comptroller's rules provide important safeguards to ensure that plan participants will receive the benefits at retirement that they both expect and need. Nonetheless, participants increasingly are expected to rely on the investment performance of their individual accounts to provide their retirement benefits.

²⁵⁸(...continued)

(3) no more than 80% is represented by any three investments; and (4) no more than 90% is represented by any four investments. 26 C.F.R. § 1.817-5; see also Announcement 88-68, 1988-16 I.R.B. 36 (diversification requirements for variable annuity, endowment and life insurance contracts).

²⁵⁹By contrast, a bank's common trust fund may not invest more than 10% of its assets in securities of any one issuer. See 12 C.F.R. § 9.18(b)(9)(ii).

²⁶⁰See Guide 4 to Form N-1A, Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828; Restricted Securities, Investment Company Act Release No. 5847 (Oct. 21, 1969), 35 FR 19989. The Commission has stated that an "illiquid security" generally is any security that cannot be disposed of within seven days in the ordinary course of business at approximately the amount at which the investment company has valued the instrument. See Resale of Restricted Securities, Securities Act Release No. 6862 (April 23, 1990), 55 FR 17933 (adopting rule 144A under the Securities Act); Acquisition and Valuation of Certain Portfolio Instruments by Registered Investment Companies, Investment Company Act Release No. 14983 (Mar. 12, 1986), 51 FR 9773 (adopting amendments to rule 2a-7).

²⁶¹29 C.F.R. § 2550.404a-1(b)(2)(ii)(B).

²⁶²See 12 C.F.R. § 9.18(b)(15)(i), 9.18(b)(15)(iv) (liquidity requirements for short-term investment funds).

Further, a growing number of plans are requiring that the participants, themselves, decide how to invest their individual accounts.

For many pension plan participants, choosing where to invest their retirement plan assets will be the most important investment decision they will ever make. Participants need to be furnished complete information about their investment options, both concerning initial investment decisions (*i.e.*, prospectuses) and reallocations (*i.e.*, prospectuses and shareholder reports). To provide employees with adequate information about their investment decisions, legislation is needed to (1) amend section 3(a)(2) of the Securities Act to remove the exception for interests in collective trust funds and separate accounts in which participant-directed defined contribution plans invest, and (2) amend the federal securities laws to require delivery of prospectuses for the underlying investment vehicles, including investment companies, to plan participants who direct their investments (see Table 3-2 for a summary of our proposed legislative changes). Further, to provide employees with adequate information to enable them to monitor their investments' performance, the Exchange Act and the rules under the Investment Company Act should be amended to ensure that all plan participants receive semiannual and annual shareholder reports issued by the pooled investment vehicles in which they invest.

We do not recommend that Investment Company Act regulation (other than the shareholder reporting provisions) be imposed on collective trust funds and separate accounts in which employee benefit plans invest. The participants in these plans are sufficiently protected by other regulatory schemes, and the additional benefits to be derived by imposing Investment Company Act regulation are outweighed by the costs.

Table 3-2

Summary of *Status Quo* and Recommendations

Current Federal Securities Law

Defined Benefit Plans (and Non-participant-Directed Defined Contribution Plans)

1. Interests in defined benefit plans excepted from Securities Act and Exchange Act registration and plans excepted from Investment Company Act regulation.
2. Interests in collective trust funds and separate accounts consisting solely of assets of defined benefit plans excepted from Securities Act and Exchange Act registration and the funds and separate accounts excepted from Investment Company Act regulation.
3. Neither prospectuses nor semiannual reports for underlying investment vehicles of defined benefit plans required to be delivered to plan participants under federal securities laws.

Participant-Directed Defined Contribution Plans

1. Interests in participant-directed defined contribution plans excepted from Securities Act registration (except plans that invest employee contributions in employer stock) and Exchange Act registration, and plans excepted from Investment Company Act regulation.
2. Interests in collective trust funds and separate accounts containing assets of participant-directed defined contribution plans excepted from Securities Act and Exchange Act registration and the funds and separate accounts excepted from Investment Company Act regulation.
3. Neither prospectuses nor semiannual reports for underlying investment vehicles of participant-directed defined contribution plans required to be delivered to plan participants under federal securities laws.

Recommendations

1. Interests in defined benefit plans excepted from Securities Act and Exchange Act registration and plans excepted from Investment Company Act regulation.

2. Interests in collective trust funds and separate accounts consisting solely of assets of defined benefit plans excepted from Securities Act and Exchange Act registration and the funds and separate accounts excepted from Investment Company Act regulation.

3. Neither prospectuses nor semiannual reports for underlying investment vehicles of defined benefit plans required to be delivered to plan participants under federal securities laws.

1. Interests in participant-directed defined contribution plans excepted from Securities Act registration, except plans that invest employee contributions in employer stock and Exchange Act registration, and plans excepted from Investment Company Act regulation.

2. Interests in collective trust funds and separate accounts containing assets of participant-directed defined contribution plans required to be registered under the Securities Act, but the funds and separate accounts excepted from Investment Company Act regulation.

3. Federal securities laws amended to require that participants in participant-directed defined contribution plans *receive* prospectuses and shareholder reports for the underlying investment vehicles in which the plan invests.

APPENDIX 3-A

Chronology

- 1938: Section 165 of Internal Revenue Code enacted.
- 1940: Investment Company Act enacted. Section 3(c)(13) excepts employee benefit plans qualified under section 165 of Internal Revenue Code.
- Late 1940's: Rapid growth of corporate pension plans begins.
- 1955: Federal Reserve Board amends regulation F, permitting collective investment of pension assets.
- 1956: Internal Revenue Service rules that collective trust funds, and pension plans whose assets are invested collectively, qualify under section 401 (successor to section 165).
- Late 1950's: State legislation permits insurance companies to establish separate accounts to fund pension plans.
- 1962: Section 401 amended to create H.R. 10 ('Keogh') plans.
- 1962-63: Comptroller of the Currency assumes authority over collective trust funds of national banks, adopts regulation 9.
- 1963-69: Commission adopts rules exempting separate accounts from various provisions of Investment Company Act.
- 1963: Commission construes section 3(c)(13) of Investment Company Act to apply to Keogh plans and collective trust funds containing Keogh plan assets.
- 1968: Commission staff takes position that interests in collective trust funds must be registered under Securities Act if the participating plans were voluntary and contributory.
- 1970: Section 3(c)(13) amended, changed to section 3(c)(11). Collective trust funds and separate accounts containing solely assets of section 401 pension plans excepted from Investment Company Act regulation. Section 3(a)(2) of Securities Act amended to except interests in collective trust funds and separate accounts, except interests sold to Keogh plans. Interests in a plan under which employee contributions are invested in employer stock also required to register under Securities Act.

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- 1974: ERISA enacted.
- 1978: 401(k) plans created by amendment to section 401 of Internal Revenue Code.
- 1979: Supreme Court' holds that interests in involuntary, noncontributory pension plans are not securities.
- 1980: Securities Act and Investment Company Act amended to except governmental plans, collective trust funds and separate accounts containing governmental plan assets, and interests therein.
- 1980-81: Commission issues interpretive releases clarifying staff's treatment of pension plans under Securities Act.
- 1981: Commission adopts rule 180 conditionally excepting collective trust funds and separate accounts in which certain Keogh plans invest.
- 1981: IRS permits employees to make pre-tax contributions to 401(k) plans through salary reduction.