

ERISA COMPLIANCE & ENFORCEMENT STRATEGY GUIDE

Government Agency Enforcement Activities

Who Is a Fiduciary and What Are Plan Assets?

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Introduction¹

Analysis of many questions under the Employee Retirement Income Security Act of 1974 (ERISA) depends on whether a party is a “fiduciary” with respect to a plan.² For example, without fiduciary status, one is not subject to the fiduciary duty standards of ERISA §404(a)(1).³ In addition, the statute's prohibited transaction provisions apply to transactions caused by a fiduciary,⁴ or where a fiduciary deals improperly with a plan or its assets.⁵ A third example is found in ERISA's remedies provisions, where a fiduciary is one of the limited classes of persons who may bring actions under ERISA's civil enforcement scheme.⁶

Fiduciary status should never be assumed. Instead, the first questions in any analysis of an ERISA issue that turns on fiduciary status are “Who is the fiduciary?” and “To what extent is that person a fiduciary?”

The ERISA Fiduciary Framework

The Statutory Definition

The definition of “fiduciary” under ERISA is primarily an operational one. ERISA § 3(21)(A) states that a party is a fiduciary to the extent it: (1) exercises discretionary authority or control with respect to the management of the plan or the management or disposition of plan assets; (2) renders investment advice, with respect to plan assets, for a fee or other compensation (or has the authority or responsibility to render such advice); or (3) has discretionary authority or responsibility in the administration of the plan.

The three-part definition of fiduciary in ERISA §3(21)(A) can be broken down further. Doing so, we find five ways in which a person can have fiduciary status with respect to a plan:

- exercise of discretionary authority or control respecting management of a plan,
- exercise of any authority or control respecting management or disposition of the plan's assets,⁷
- providing investment advice for a fee or other compensation (direct or indirect) with respect to money or other property of the plan,
- having authority or responsibility to provide investment advice for a fee or other compensation (direct or indirect) with respect to money or other property of the plan, or
- having discretionary authority or responsibility respecting administration of the plan.

Importantly, the statute provides that one is a fiduciary “*to the extent*” he or she acts in one of the above ways with respect to a plan. Fiduciary status for one purpose does not make one a fiduciary for other purposes.⁸ Therefore, fiduciary status must exist with respect to the transaction being examined before one has fiduciary duty or prohibited transaction responsibility with respect to it.⁹

The Department of Labor (DOL) has stated:

Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, by the very nature of his position, have “discretionary authority or discretionary responsibility in the administration” of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries.¹⁰

This statement does not convert a plan administrator or trustee of a plan to a fiduciary for all purposes, however. If the transaction under analysis relates to administration of the plan, then the plan administrator or trustee's discretion may well be implicated. Other transactions may not implicate that discretion and, with respect to those situations, the plan administrator or trustee would not have fiduciary status by reason of its position.¹¹ DOL has also enumerated other relationships with plans which will not, ordinarily, create fiduciary status.¹² Even a person with such a relationship to a plan will become a fiduciary if he or she “crosses the line” to conduct described in §3(21)(A).¹³

“Named Fiduciaries”

Each plan subject to ERISA must, under §402(a)(1) of the statute, provide for at least one “named fiduciary,” and the named fiduciary or named fiduciaries, jointly or severally, shall have the authority to control and manage the operation and administration of the plan. One becomes a “named fiduciary” by being named as such in the plan or pursuant to a procedure specified in the plan.¹⁴

The statute permits allocation of the responsibilities for operation and administration of the plan among named fiduciaries and delegation of fiduciary responsibilities (other than trustee responsibilities) to persons other than named fiduciaries.¹⁵ Of course, “to the extent” another person, as a result of such delegation, has any of the authority or responsibility described in § 3(21)(A), that person is a fiduciary. Further, the appointment of, or ability to replace, a fiduciary is itself authority, control, or responsibility described in §§3(21)(A)(i) or (iii), such that one who makes such an appointment has an ongoing duty to monitor the conduct of the appointee.¹⁶

Trustees and the Fiduciary Duty of Managing Plan Assets

Other elements of ERISA's fiduciary framework are supplied by §403(a). Subject to exceptions in § 403(b), most importantly, for plans funded through insurance contracts or custodial accounts, §403(a) requires that all assets of a plan be held in trust, and that the plan's trustee or trustees have the exclusive authority and discretion to manage and control plan assets. This, of course, makes the trustee a fiduciary with respect to the plan.

Two exceptions to the trustee's responsibility to manage and control plan assets are permitted. First, if the plan expressly makes a trustee subject to the direction of a named fiduciary, such as a plan investment committee, the trustee may follow the directions of that named fiduciary, but only if the directions are consistent with the plan and not contrary to ERISA.¹⁷ Second, a plan provision (or a named fiduciary acting under a plan provision) may delegate authority to manage, acquire or dispose of plan assets to an investment manager.¹⁸ "Investment manager" for this purpose is a defined term under ERISA, and includes a bank, insurance company, or registered investment adviser that has acknowledged its fiduciary status to the plan in writing.¹⁹ If there is proper delegation to an investment manager, a trustee is not liable for the investment manager's acts or omissions and has no obligation to manage any assets for which investment authority has been delegated to the investment manager.²⁰

Broker-Dealer Activity and Fiduciary Status

DOL regulations interpreting the term "fiduciary" set out rules for when broker-dealers, reporting dealers, and banks may execute transactions on behalf of a plan without assuming fiduciary status.²¹ A broker-dealer, reporting dealer, or bank acting in the ordinary course of its business will not be an ERISA fiduciary solely by reason of executing a transaction for the purchase or sale of securities on behalf of a plan pursuant to instructions received from a plan fiduciary.²² The broker-dealer, reporting dealer, or bank may not be the fiduciary providing the instructions, nor an affiliate of such fiduciary.²³ The instructions must specify (1) the security to be purchased or sold, (2) the permissible price range for the named security's purchase or sale, (3) the time span (of no more than five business days) for the purchase or sale, and (4) the minimum or maximum quantity of the security to be purchased or sold.²⁴

Where a broker-dealer, reporting dealer, or bank conducts a transaction on behalf of a plan that fails to meet the criteria in the regulations, the regulation provides that the broker-dealer, reporting dealer, or bank shall be a fiduciary with respect to the plan because it has discretionary authority or control in the management or disposition of plan assets in connection with the execution of such transaction.²⁵ This fiduciary status is limited to the transaction executed—a broker-dealer, reporting dealer, or bank will not be a fiduciary with respect to the assets of a plan where the broker-dealer, reporting dealer, or bank does not have any discretionary authority, control, or responsibility, does not render investment advice for a fee, and does not have any responsibility or authority to render such investment advice.²⁶ However, a broker-dealer, reporting dealer, or bank may still be liable under other provisions of ERISA as a co-fiduciary and as a "party in interest."²⁷

"Investment Advice for a Fee" vs. "Investment Education"

Fiduciary status will arise when a person is giving "investment advice for a fee."²⁸ A person gives "investment advice" if the person

- (1) renders advice to the plan as to the value of securities or investing in, purchasing, or selling securities or other property;
- (2) either directly or indirectly has discretionary authority or control to purchase or

sell securities or other property for the plan; or

(3) directly or indirectly renders any advice on a regular basis and pursuant to a mutual agreement (written or otherwise) with the plan (or a fiduciary of the plan) that such advice will serve as a primary basis for the plan's investment decisions.²⁹ A person who renders such "investment advice" will not be a fiduciary with respect to any assets of the plan to which the person does not have any discretionary authority, control, or responsibility, does not render investment advice for a fee or other compensation, and does not have any authority or responsibility to render such investment advice.³⁰ However, this qualification does not exempt a person from co-fiduciary liability or liability as a party in interest to the plan.³¹

Although fiduciary status attaches to a person who gives investment advice for a fee, DOL has issued guidance, in the form of Interpretive Bulletin 96-1 that permits a person to provide participants with "investment education" without any fiduciary liability attaching to such action.³² However, the selection and monitoring of those who provide such investment education is a fiduciary act.³³

Under the Interpretive Bulletin, the following four types of "investment education" can be provided without incurring fiduciary liability:

- (1) *plan information* that relates to the plan and plan participation without reference to the appropriateness of any individual investment option for a particular participant or beneficiary under the plan;³⁴
- (2) *general financial and investment information* that has no direct relationship to the investment alternatives available to participants and beneficiaries;³⁵
- (3) *asset allocation models*, such as graphs and case studies, that provide a participant or beneficiary with models of asset allocation portfolios of hypothetical individuals with different time horizons and risk profiles;³⁶ and
- (4) *interactive investment materials*, including questionnaires, worksheets, and software, that provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income.³⁷

Generally, these materials should be based on generally accepted investment theories and include all material facts and assumptions that may affect the participant's or beneficiary's assessment, such as retirement ages, life expectancies, income levels, financial resources, inflation rates, etc.³⁸ To the extent a specific investment alternative is mentioned in the materials, the materials should include a statement indicating that other investment alternatives having similar risk and return characteristics may be available and identifying how participants and beneficiaries can obtain such information.³⁹ This type of information may be used to help participants and beneficiaries independently design and assess multiple investment allocations.⁴⁰

The Statutory Standards of Fiduciary Duty

To the extent a person or organization is a fiduciary under ERISA, the fiduciary must act according to the fiduciary duty standards found in § 404(a)(1). Under these rules, a fiduciary must discharge its duties with respect to a plan "solely in the interest of participants and beneficiaries" and

- for the exclusive purpose of providing benefits to participants and beneficiaries

and defraying reasonable plan administration expenses;

- with the care, skill, prudence, and diligence of a prudent person acting in like capacity and under similar circumstances;
- by diversifying plan investments to avoid large losses, unless diversification is not prudent;⁴¹ and
- in accordance with the plan documents and instruments, to the extent they are consistent with ERISA.⁴²

Fiduciaries and Prohibited Transactions

ERISA prohibits a fiduciary from engaging in any “prohibited transaction.” There are two classes of prohibited transactions, “party in interest” and “self-dealing.”

Party in interest prohibited transactions

Party in interest prohibited transactions (those set out in § 406(a) of ERISA) arise when there is a transaction between a plan and a “party in interest” — a term that describes a person or entity with one of several broadly defined relationships to a plan. The term “party in interest” includes, among others, the sponsoring employer of a plan, its affiliates and any officer, employee, director or 10 percent shareholder of an employer or affiliate.⁴³ Absent an applicable exemption, a party in interest prohibited transaction occurs when a fiduciary causes any direct or indirect:

- sale, exchange, or lease of property between the plan and a party in interest;
- loan of money or other extension of credit between the plan and a party in interest;
- furnishing of goods, services or facilities between the plan and a party in interest;
- transfer to, or use of plan assets by, or for the benefit of, a party in interest; or
- acquisition of employer securities or real property in violation of the limits under ERISA §407(a).⁴⁴

Self-dealing prohibited transactions

The “self-dealing” prohibited transactions do not require involvement of a party in interest. Rather, there is a prohibited transaction whenever a fiduciary:

- deals with plan assets for its own interest or own account,
- acts on behalf of parties with interests adverse to a plan in a transaction involving the plan, or
- receives consideration for its personal account from a party dealing with a plan in connection with a transaction involving plan assets (i.e., a kickback).⁴⁵

The application of ERISA's fiduciary duty and prohibited transaction rules depends on the facts and circumstances of each situation, and an analysis of these rules is not within the scope of this summary. Having seen the framework of ERISA's rules that define fiduciary and establish the framework within which fiduciaries must function, we turn to the

question of “plan assets.” Identifying plan assets is necessary in order to apply the definitions of fiduciary in §§ 3(21)(A)(i) and (ii); it is also necessary in application of the fiduciary duty and prohibited transaction rules, many of which are keyed to plan assets.

Fiduciary Status and the Definition of Plan Assets

ERISA does not define the term “plan assets.” Rather, we are left to piece together a “definition” from various provisions of ERISA and DOL interpretations. The definition changes from asset to asset, context to context, and there are some frustrating complexities and inconsistencies.

While individual bonds, stocks or buildings owned by a plan can readily be identified as the plan's assets, it is more difficult to identify plan assets when a plan invests, directly or indirectly, in an entity along with other investors (for example, in a partnership, mutual fund, or bank collective fund). Additionally, employee deferrals and employer contributions are sometimes plan assets even though they are not yet in the plan's possession.

Following is a summary of the rules for identifying “plan assets” in different collective investments or other situations.

Mutual Funds

Mutual fund shares are subject to a blanket rule under ERISA § 401(b)(1). Where a plan invests in securities issued by an investment company registered under the Investment Company Act of 1940, the securities are plan assets, but the underlying assets of the investment company are not. Similarly, the investment by a plan in the securities of a registered investment company do not make the investment company or its investment adviser or principal underwriter a fiduciary or party in interest of the plan (unless the investment company, its adviser or underwriter acts in connection with an employee benefit plan covering its employees).⁴⁶

Insurance Company General Accounts

The status of insurance company general account assets as plan assets is addressed in ERISA §401(a)(2), which provides:

In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.⁴⁷

The term “guaranteed benefit policy” is defined in ERISA § 401(b)(2)(B):

The term “guaranteed benefit policy” means an insurance policy or contract *to the extent* that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.⁴⁸

The phrase “to the extent” has caused most of the trouble. It implies that if a portion of an insurance contract does not represent benefits guaranteed by the insurer, the contract would not, to that extent, qualify as a guaranteed benefit policy, so that the portion of the plan's investment in the contract that was not represented by such guaranteed benefits would be plan assets.

Assume that the X Corporation Pension Plan invests funds in an insurance contract with Insurer which, in turn, invests those assets in its general account, for which all investment decisions are made by Insurer. If the Plan's assets are deemed to include an interest in Insurer's general account, then the general account's purchase of X Corporation notes would be an indirect extension of credit between the Plan and A Corporation (which, as the Plan's sponsoring employer, is a party in interest). Similarly, a lease of office space in a building owned by Insurer's general account to a subsidiary of X Corporation would be a lease of property between the Plan and a party in interest. In each case Insurer, by exercising discretion over the investment of plan assets (which makes it a fiduciary under ERISA's operational definition), has caused a transaction which, absent an applicable exemption, is a prohibited transaction.

The same issues arise whenever transactions like the ones described above occur within a pooled separate account. Separate account assets are generally treated as plan assets, but the prohibited transaction is addressed by complying with DOL Prohibited Transaction Class Exemption 90-1.49

Under the fiduciary duty rules, to the extent an insurer's general account assets are treated as ERISA plan assets, the insurer, when it "exercises any authority or control respecting management or disposition" of those assets, would fall within the definition of a fiduciary. All its actions as a fiduciary with respect to those plan assets would then be subject to the standards of conduct in ERISA § 404(a)(1).

Until 1995, the insurance industry relied on DOL Interpretive Bulletin 75-250. Paragraph (b) of 75-2 provided that:

If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.⁵¹

The two sentences of 75-2(b) quoted above can be read as a blanket exemption from the prohibited transaction provisions for all transactions involving insurance company general account assets. Could the first sentence, standing alone, be read to provide a similar exemption from ERISA §404, too? In other words, does this sentence mean that, for all purposes under ERISA, general account assets are not plan assets? If this was true, the act of managing or disposing of general account assets would not be a fiduciary act, because one was not dealing with plan assets.⁵² This question was litigated in the federal courts, culminating in the Supreme Court's decision in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank (Harris Trust)*.⁵³

The majority opinion in *Harris Trust* held that amounts held in a general account that did not meet the requirements for a "guaranteed benefit policy" were ERISA plan assets, and that the insurer was therefore subject to ERISA's fiduciary duty rules in its management of those funds.⁵⁴ However, to the extent general account assets were applied to provide benefits guaranteed by the insurer, those benefits were "squarely within the 'guaranteed' category."⁵⁵

Therefore, general asset accounts reduced to benefits guaranteed by the insurer *will* satisfy the guaranteed benefit policy exception and that other general account assets held under a contract *can* satisfy that exception, provided the contract provides for (1) a reasonable rate of return on those funds and (2) a means to convert those assets into guaranteed benefits at rates set by the contract, i.e., a guaranteed annuity purchase

rate.⁵⁶

The language in 75-2(b) quoted above was read to go solely to the prohibited transaction issue, and not to the fiduciary duty issue.⁵⁷ Any other reading would run right into the language of the statute:

Had the Department intended Interpretive Bulletin 75-2 to apply to the guaranteed benefit policy exclusion, it would have had to explain how an unqualified exclusion for an insurer's general asset account can be reconciled with Congress' choice of a more limited ("to the extent that") formulation of the statute itself.⁵⁸

The ruling in *Harris Trust*, due to its retroactive effect, meant that numerous insurance companies operating under DOL's informal guidance may have been exercising fiduciary responsibilities over plan assets. In response, DOL issued Prohibited Transaction Exemption 95-60 and regulation 29 C.F.R. §2550.401c-1, covering transactions involving insurance company general accounts.

PTE 95-60. Class Exemption 95-60 provides a two-part Basic Exemption and three Specific Exemptions from prohibited transactions that would otherwise result from an insurance company's general account being deemed to hold plan assets under the *Harris Trust* decision.⁵⁹ In general, PTE 95-60 is retroactively effective to Jan. 1, 1975.⁶⁰

Part (a) of the Basic Exemption provides an exemption for "[a]ny transaction between a party in interest with respect to a plan and an insurance company general account in which the plan has an interest either as a contractholder or as the beneficial owner of a contract, or any acquisition, or holding by the general account of employer securities or employer real property."⁶¹

Part (b) permits a plan to acquire qualifying employer securities or qualifying employer real property where the acquisition would otherwise have violated ERISA §§ 406(a)(1)(E), 406(a)(2), or 407(a)⁶² solely because other plan holdings are aggregated with employer securities or employer real property held in a general account.⁶³

To qualify retroactively for either part of the Basic Exemption, a transaction occurring before July 12, 1995, must meet three General Conditions:

- (1) its terms must be at least as favorable to the general account as an arm's-length transaction between unrelated parties, both when entered into and at any renewal;
- (2) it must not be part of an agreement, arrangement, or understanding to benefit a party in interest; and
- (3) the party in interest must not be the insurance company or its "affiliate" or a pooled separate account of the insurance company.

A transaction occurring on or after July 12, 1995, must also meet a "percentage test."⁶⁴ The percentage test is met so long as all reserves and liabilities for general account contracts of the insurance company held by or on behalf of the plan in question and affiliates' plans do not exceed 10 percent of the insurance company's total reserves and liabilities (less separate account liabilities) plus surplus. Reserves, liabilities, and surplus are determined from the National Association of Insurance Commissioners Annual Statement for the insurance company.⁶⁵

The Specific Exemptions apply to (1) persons who are parties in interest to the plan solely because they are service providers or affiliates of service providers;⁶⁶ (2)

transactions involving a place of public accommodation;⁶⁷ and (3) certain issues that arose under Class Exemption 83-168 and the series of individual Prohibited Transaction Exemptions known as the “Underwriter Exemptions”⁶⁹ where the asset pool investment trusts that were the subject of those exemptions could, after the *Harris Trust* decision, be deemed to hold assets of plans having interests in general accounts that had invested in those trusts.⁷⁰

Regulation 29 C.F.R. §2550.401c-1. ERISA §401(c) required DOL to issue regulations as to (1) which insurance company assets are plan assets of a plan that acquires a policy backed by the insurer's general assets, and (2) the application of Title I of ERISA to insurers' general accounts.

Insurers who comply with the regulations will be deemed in compliance with all provisions of ERISA §§ 404, 406, and 407 with respect to any policy governed by the regulations, i.e., any policy that is not a guaranteed benefit policy that was issued on or before Dec. 31, 1998.⁷¹ Breach of fiduciary duty or prohibited transaction claims against an insurer with respect to such policies will have to be based on allegations that the insurer did not follow the regulations.

ERISA §401(c)(5)(B) excuses defendants from liability under Part 4 of Title I of ERISA or the prohibited transaction excise tax provisions of the Internal Revenue Code for a claim based on insurance company assets (other than separate account assets) being plan assets, if the claim relates to any conduct taking place prior to 18 months after the regulations become final.⁷² This relief is not conditioned on compliance with the regulations. It makes only three exceptions: conduct intended to avoid the regulations under § 401(c),⁷³ actions brought by the Secretary of Labor under ERISA § 502(a)(2) or (5);⁷⁴ and civil actions commenced before Nov. 7, 1995.⁷⁵

The regulations under §401(c) provide that the exculpatory provisions do not relieve any person from compliance with any state law regulating insurance which imposes duties or obligations not inconsistent with §401(c).⁷⁶ Further, the regulations state that a claim for a breach of ERISA is not precluded if it does not require a finding that general account assets are plan assets.⁷⁷

The regulations also provide continued protection for “Transition Policies” from a “look-through” under *Harris Trust*, even after the § 401(c)(5)(B) exculpatory provision is no longer applicable. A Transition Policy is any “policy or contract of insurance (other than a guaranteed benefit policy) that is issued by an insurer to, or on behalf of, an employee benefit plan on or before December 31, 1998, and which is supported by the assets of the insurer's general account.”⁷⁸ A policy or contract which is a “guaranteed benefit policy” does not need to rely upon the Transition Policy rules because it is already covered by ERISA §401(b)(2). If a Transition Policy satisfies the § 401(c) regulations, it will be treated like a guaranteed benefit policy, specifically, “where a Plan has acquired a Transition Policy ... the Plan's assets include the Transition Policy, but do not include any of the underlying assets of the insurer's general account.”⁷⁹

Taking ERISA §401(c) and its regulations together, beginning 18 months after the regulations' Jan. 5, 2000, effective date (generally, on or after July 5, 2001), policies that are “guaranteed benefit policies” under ERISA §401(b)(2) will be governed by that section, Transition Policies will be subject to the special rules for such policies under the § 401(c) regulations, and policies that are neither Transition Policies nor guaranteed benefit policies will be subject to ERISA, as interpreted by *Harris Trust* and related law.

The §401(c) regulations also modify ERISA's general prudence requirement, in line with § 401(c)'s general distinctions among policies supported by general account assets. For policies issued on or before Dec. 31, 1998 (whether or not Transition Policies), prudence under ERISA is determined with reference to all obligations supported by the insurer's

general account, not just the obligations to plan policyholders.⁸⁰ For policies issued after Dec. 31, 1998, which are supported by the insurer's general assets, ERISA's more stringent standard of prudence will apply to the extent the policy is treated as giving the plan an interest in the insurer's general assets.⁸¹

Insurance company separate accounts are subject to different rules, contained in the "plan asset regulations" discussed next.

The ERISA Plan Asset Regulations and Their "Look-Through Rule"

Because the statute does not address the extent to which many types of commingled investment vehicles are deemed plan assets, DOL issued regulations (the "plan asset regulations") to address many of these other vehicles.⁸² For the entities covered by them, these regulations answer the critical question "What is the plan asset?"

Specifically, is the plan asset the interest in the entity in which the plan invests, or is the plan deemed to own an interest in the underlying assets of the entity, i.e., is there a "look-through?" This is critical, for if the entity's underlying assets are plan assets, the act of managing or operating them will involve discretion or control that triggers fiduciary status, and direct or indirect transactions involving these assets with any party in interest of an investing plan will raise prohibited transaction issues.

General rule for "publicly offered securities" and mutual fund shares. The general rule of the plan asset regulations is that if a plan invests in an equity interest⁸³ that is (1) a publicly offered security or (2) securities issued by an investment company registered under the Investment Company Act of 1940, the plan's assets include its investment but not the underlying assets of the entity.

A *publicly offered security* is one that is "freely transferable," part of a class of securities that is "widely held," and which meets certain registration requirements.⁸⁴ "Widely held," for this purpose, means that securities must be of a class of securities owned by 100 or more investors independent of the issuer and of one another.⁸⁵

Whether a security is "*freely transferable*" is generally to be determined under a facts and circumstances test.⁸⁶ The plan asset regulation does, however, provide guidance on the facts and circumstances analysis for offerings in which the minimum investment is \$10,000 or less. In those circumstances, certain restrictions, alone or in combination, will not affect a finding that securities are freely transferable.⁸⁷ These restrictions are:

- requiring that some minimum number of units of the security be transferred (so long as this does not prevent transfer of all of an investor's then-remaining units);
- prohibiting transfer or assignment to an ineligible or unsuitable investor;
- restricting a transfer or assignment that would change the entity's tax status or violate applicable law;
- assessing reasonable transfer or administrative fees;
- requiring advance notice;
- restricting substitution of a limited partner (provided that the economic benefits of ownership may be transferred without regard to such restriction);
- establishing a point in time prior to which a transfer or assignment will not be effective; and
- any limitation or restriction not created or imposed by the issuer or the issuer's agent.⁸⁸

Other equity securities: look-through rule applies absent applicable exception.

Where the plan invests in equity interests of other types of entities, the plan's assets include both the investment itself (the "equity interest") *as well as* an undivided interest in the entity's underlying assets *unless* one of the exceptions under the "plan asset regulations" is proven.⁸⁹ This is called the "look-through rule."⁹⁰ Furthermore, under the plan asset regulations, the look-through rule always applies to certain entities, including group trusts, bank common or collective trust funds, and insurance company separate accounts.⁹¹ Thus, a plan will always be deemed to hold both its equity interest in such an entity as well as an undivided interest in the entity's underlying assets.

Exception to application of look-through rule. No "look-through" to the underlying assets of the entity in which a plan invests is required if the entity is an "operating company"⁹² or if equity participation in the entity by benefit plan investors is *not significant*.⁹³ Investments in a "government mortgage pool" are also not subject to the look-through rule.⁹⁴

Operating Companies

An operating company is an entity primarily engaged (directly or through majority-owned subsidiaries) in the production or sale of a product or service other than the investment of capital.⁹⁵ Two special cases are "venture capital operating companies" and "real estate operating companies." The plan asset regulations set out detailed tests for these two entity types; if satisfied, the entity will be deemed an operating company and an investing plan will not be deemed to own an undivided interest in the entity's operating assets.

A "venture capital operating company" must satisfy the following requirements: (1) on its initial valuation date (and annually thereafter) at least 50 percent of its assets (valued at cost) are invested in "venture capital investments" or "derivative investments"⁹⁶ and (2) in the ordinary course of its business, the entity actually exercises "management rights" with respect to one or more of the operating companies in which it invests.⁹⁷ For purposes of satisfying these requirements, short-term investments pending long-term commitment or distribution to investors are excluded.⁹⁸

A "real estate operating company" must satisfy the following requirements: (1) on its initial valuation date (and annually thereafter) at least 50 percent of its assets (valued at cost) are invested in real estate that is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities, and (2) in the ordinary course of its business, the entity is engaged directly in real estate management or development activities.⁹⁹ For purposes of satisfying these requirements, short-term investments pending long-term commitment or distribution to investors are excluded.¹⁰⁰ As the examples in the plan asset regulations illustrate, mere ownership of real estate is insufficient—the real estate operating company must actively and directly participate in (or influence) the management of the property.¹⁰¹

Significant Participation by Benefit Plan Investors: The "25 Percent Test"

Equity participation in an entity by benefit plan investors will not be significant unless 25 percent or more of the value of any class of equity interests in the entity is held by "benefit plan investors."¹⁰² This is commonly called the "25 percent test." The 25 percent test is recalculated after each new acquisition of an equity interest in the plan.¹⁰³ This means an entity that has accepted (or may accept in the future) assets from any benefit plan investor should monitor its assets frequently to determine when the amount of assets held by benefit plan investors hits 25 percent.

The definition of "benefit plan investor" is broader than the definition of "plan." It includes: any employee benefit plan (whether or not subject to the provisions of Title I of ERISA),

any plan described in § 4975(e)(1) of the Internal Revenue Code, and any entity whose underlying assets include plan assets by reason of a plan's investment in the entity.¹⁰⁴ This includes: pension and welfare benefit plans, IRAs, Keogh plans, governmental plans, church plans, and foreign plans, as well as entities that are themselves deemed to hold plan assets, such as a common or collective trust fund, or an entity that itself meets the 25 percent test.

When applying the 25 percent test, the value of any equity interests held by a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee with respect to such assets (or an affiliate of such person) should be disregarded.¹⁰⁵

Some issues under the 25 percent test can be illustrated with this example:

XYZ Fund is a private investment fund organized as a limited partnership, and is exempt from registration under the Securities Act of 1933 and the Investment Company Act of 1940. XYZ has a single class of limited partnership interests. These interests are owned as follows: 2 units each by A, B, and C, individuals who jointly manage XYZ Fund, 1 unit by B's IRA, 5 units by F, an unrelated individual, 5 units by G, another unrelated individual, 1 unit by P, a U.S. pension plan subject to ERISA, 1 unit by Q, a Canadian pension plan not subject to ERISA, and 1 unit by R, a collective trust fund managed by a U.S. bank. Approximately 20 percent of the units in R are owned by pension plans subject to ERISA and IRAs. The value of each limited partnership interest in XYZ is \$10.

In making the 25 percent test calculation, the interests of A, B and C are excluded, because they are persons who have discretionary authority or control with respect to the assets of XYZ. B's IRA is not excluded, because it is a benefit plan investor. P, Q and R are each benefit plan investors. Therefore, the total value of nonexcluded interests in XYZ is \$700, of which \$200 (approximately 28.5 percent) is owned by benefit plan investors. Therefore, the look-through rule applies to XYZ and, with respect to P and B's IRA (for purposes of the Internal Revenue Code), an undivided interest in XYZ is plan assets, and A, B, and C are fiduciaries with respect to those plan assets. Further, if XYZ was to invest in another entity subject to the 25 percent test, all of XYZ's investment (*not* 28.5 percent of it) would be treated as investment by a benefit plan investor.

A special benefit plan investor rule applies when an insurance company general account is an investor. Because the plan asset regulations were issued prior to the *Harris Trust* decision, they did not address general account assets. Subsequently, DOL established a special rule for these assets.¹⁰⁶ To the extent an investment by an insurance company general account does not represent guaranteed benefit contracts, the pro rata portion of the investment that corresponds to the percentage of benefit plan investor assets in the general account will be deemed investment by a benefit plan investor.¹⁰⁷ For example, if the general account's benefit plan investor percentage of general account A is 5 percent, and the benefit plan investor's percentage of general account B is 31 percent, then 5 percent of general account A's investment and 31 percent of general account B's investment will be considered investments by a benefit plan investor.

Joint Ownership of Property

Under the plan asset regulations, special rules apply to situations involving joint ownership of property. If a plan jointly owns property with others, or if the value of the plan's equity interest in an entity relates solely to identified property of the entity, such property will be treated as the sole property of a separate entity and not as plan assets.¹⁰⁸ The plan asset regulations give an example of a private transaction where Plan A acquires 30 percent of the value of a debt instrument held by a bank, and because the value of the participation relates solely to the jointly held debt instrument, that debt instrument is treated as a sole asset of a separate entity. Equity participation in

that separate entity would exceed 25 percent; therefore, the plan's assets include both the participation and the undivided interest in the debt interest. Furthermore, the bank is a fiduciary of the plan to the extent it has discretionary authority or control over the debt instrument.¹⁰⁹

Employee Deferrals and Employer Contributions as Plan Assets

Generally, ERISA requires that all of a plan's assets be deposited in the plan's trust account pursuant to a written trust agreement.¹¹⁰ In some instances, however, employee deferrals and employer contributions may be considered plan assets even though they are not yet in the plan's possession.

DOL has issued regulations under ERISA §403 that establish guidelines to assist plan administrators in determining when employee deferrals should be transferred to the plan's trust.¹¹¹ The general rule is that participant (or beneficiary) contributions and other amounts withheld from employee compensation should be allocated to the plan trust on the earliest date such contributions can reasonably be segregated from the employer's general assets.¹¹² In addition, pension plans must allocate such contributions and employee deferrals by the 15th business day of the month following the month in which the amount is received, or otherwise payable to the participant in cash.¹¹³ Welfare plans must make such allocations within 90 days of receipt of the contribution or, for payroll deferrals, within 90 days of when the amount would otherwise have been payable in cash.¹¹⁴ The 15-day rule for pension plans and 90-day rule for welfare plans are not safe harbors—they are the outer limits (subject to qualifications for special circumstances).

Thus, participant and beneficiary contributions, whether in the form of separate payment or employee payroll deferrals, are plan assets once they are allocated to the plan trust. It is DOL's position, upheld by several courts, that "employee contributions to benefit plans which are withheld from employees' paychecks and for deposit into their benefit plans, even though the contributions have not actually been delivered to the benefit plan" are plan assets.¹¹⁵ In the case of employee deferrals, once the employer withholds the employee contributions, the funds are "deemed to be held in trust for the plan, even if the funds remain in the [employer's] general checking account."¹¹⁶ Therefore, when corporate officers divert employee contributions for other purposes, those officers are acting as fiduciaries because they are exercising control over plan assets. Accordingly, they are subject to ERISA's fiduciary duty rules and the sanctions for violating them.¹¹⁷

While employee contributions usually become plan assets as soon as a contribution is made or wages are withheld, employer contributions are subject to a different rule. Most courts agree that employer contributions to a pension benefit plan do not become plan assets until they are actually delivered to the fund unless the plan documents or "other related agreements" clearly and specifically designate unpaid employer contributions as plan assets.¹¹⁸ The phrases "due and owing" and "accrued to" often appear in the plan documents, trust agreements, and other documents when a court has found that unpaid employer contributions are plan assets and therefore the plan's fiduciaries have a duty to use these assets for the exclusive benefit of participants and beneficiaries of the plan and *not* to pay the general debts of the employer's business.¹¹⁹ For example, where a plan document or trust agreement specifies that the trust fund includes "all assets of any and every kind in nature, consisting of property of the trustees in their trust capacity and subject to administration by them hereunder, including *all employer contributions made or due to the trustees,*" the plan's assets include unpaid employer contributions.¹²⁰

Where such language is absent, courts have been reluctant to find that unpaid employer contributions are plan assets.¹²¹

While there is a dearth of caselaw on the subject, it would seem

as a matter of logic that fungible monies in the hands of an employer who fails to make its plan contributions is no more of a plan asset than an asset of the landlord to whom the employer owes overdue rent or an asset of a bank to which the employer owes delinquent credit line payments.¹²²

In some instances, however, courts have simply held that unpaid employer contributions are not plan assets until they are paid to the fund without specifically discussing the underlying plan and trust document language.¹²³

Footnotes

¹ Special thanks to Kelly A. Powis, also of Gardner, Carton & Douglas, for helping us with the research.

² For purposes of this analysis, we use the term “plan” to include any plan as defined in, and subject to, ERISA. See *generally* ERISA §§3(1), (2) and (3) and 4(a) and (b).

³ See, e.g., *Reich v. Rowe*, 20 F.3d 25, 26, 17 Employee Benefits Cas. (BNA) 2521 (1st Cir. 1994) (ERISA “does not authorize suits against nonfiduciaries charged solely with participating in a fiduciary breach”) and *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757, 18 Employee Benefits Cas. (BNA) 1769 (7th Cir. 1994) (“Congress’s omission to impose on nonfiduciaries a duty not to participate knowingly in an ERISA fiduciary’s breach of fiduciary obligations was not inadvertent”).

⁴ ERISA §406(a).

⁵ ERISA §406(b).

⁶ See, e.g., ERISA §§502(a)(2), (3) and (9).

⁷ See, however, ERISA §3(21)(B), which provides that, where a plan invests in shares of an investment company registered under the Investment Company Act of 1940 (i.e., a mutual fund), that investment by itself will not cause the mutual fund, its investment adviser or its principal underwriter to be deemed a fiduciary or party in interest. Thus, when a plan invests in mutual fund shares, there is no “look through” to the operation or investment of the mutual fund for purposes of fiduciary status. This exception does not apply where the mutual fund, investment adviser, or principal underwriter acts in connection with a plan covering employees of the mutual fund, investment adviser, or principal underwriter.

⁸ See, e.g., *Klosterman v. W. Gen. Mgmt. Inc.*, 32 F.3d 1119, 1122, 18 Employee Benefits Cas. (BNA) 1850 (7th Cir. 1994) (“a person deemed to be a fiduciary is not a fiduciary for every purpose but only to the extent that he performs one of the described functions”).

⁹ See, e.g., *Nationwide Life Ins. Co. v. Roofing Concepts, Inc.*, 969 F.2d 54, 61 (4th Cir. 1994) (“a court must ask whether a person is a fiduciary with respect to the particular activity at issue”).

¹⁰ 29 C.F.R. §2509.75-8(D-3).

¹¹ DOL has acknowledged elsewhere that a trustee can be without discretion. See, e.g., Part (E) of the “Discussion of the Comments” preceding Prohibited Transaction Class Exemption 86-128 (51 Fed. Reg. 41,686) (trustees whose duties limited like those of non-trustee custodians not subject to exception from exemption applicable to other trustees). See also 67 Fed. Reg. 31,839 at 31,840-42 (discussion of discretionary and nondiscretionary trustees in context of proposed amendment to Prohibited Transaction Class Exemption 86-128) (amendment adopted Oct. 17, 2002, 67 Fed. Reg. 64,137).

¹² See *generally* 29 C.F.R. §§2509.75-5 and 2509.75-8, especially §2509.75-5 (D-1)

(“attorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries” to a plan); § 2509.75-8 (D-2) (enumerates “ministerial functions” in plan administration that do not entail sufficient authority or control to result in fiduciary status); §§2509.75-8 (D-4) and (D-5) (directors and officers of employer that maintains a plan).

13 See *Martin v. Feilen*, 965 F.2d 660, 672, 15 Employee Benefits Cas. (BNA) 1545 (8th Cir. 1991).

14 ERISA §402(a)(2).

15 See ERISA §§402(b)(2) and 405(c).

16 29 C.F.R. §2509.75-8 (FR-17).

17 ERISA §403(a)(1).

18 ERISA §403(a)(2).

19 See ERISA §3(38).

20 ERISA §405(d).

21 29 C.F.R. §2510.3-21(d).

22 29 C.F.R. §2510.3-21(d)(1).

23 *Id.*

24 *Id.*

25 29 C.F.R. §2510.3-21(d)(2).

26 *Id.*

27 *Id.*

28 ERISA §3(21)(A)(ii).

29 29 C.F.R. §2510.3-21(c)(1).

30 29 C.F.R. §2510.3-21(c)(2).

31 *Id.*

32 29 C.F.R. §2509.96-1.

33 29 C.F.R. §2509.96-1(e).

34 29 C.F.R. §2509.96-1(d)(1).

35 29 C.F.R. §2509.96-1(d)(2).

36 29 C.F.R. §2509.96-1(d)(3).

37 29 C.F.R. §2509.96-1(d)(4).

38 29 C.F.R. §2509.96-1(d).

39 *Id.*

40 *Id.*

41 For an “eligible individual account plan” (for our purposes here, a profit sharing plan, ESOP or similar defined contribution plan that provides for investment in “qualifying employer securities” or “qualifying employer real property”), ERISA §404(a)(2) provides

that the diversification requirement and the prudence requirement (to the extent it requires diversification) are not violated by acquisition or holding of qualifying employer securities or qualifying employer real property. See *generally* ERISA §407.

42 ERISA §404(a)(1).

43 ERISA § 3(14).

44 ERISA § 406(a).

45 ERISA § 406(b).

46 ERISA §3(21)(B).

47 ERISA § 401(b)(2).

48 ERISA § 401(b)(2)(B)(emphasis added).

49 55 Fed. Reg. 2891 (1990).

50 29 C.F.R. § 2509.75-2 (1992).

51 29 C.F.R. § 2509.75-2(b).

52 Two subsequent DOL advisory opinions suggested that the department would not take such an expansive view of the status of general account assets, but would focus on whether a particular contract provided “guaranteed benefits.” See DOL Adv. Op. No. 83-51A (Sept. 21, 1983) (separate account assets supporting fixed obligations with no variable component are not plan assets) and DOL Adv. Op. No. 78-8A(March 13, 1978) (general account assets supporting variable annuity contracts are plan assets). See *Jacobsen v. John Hancock Mut. Life Ins. Co.*, 662 F. Supp. 1103, 1110-11, 8 Employee Benefits Cas. (BNA) 1924 (D. Conn. 1987) (judgment withdrawn and vacated pursuant to settlement).

53 *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517, 530, 17 Employee Benefits Cas. (BNA) 1657, 1666 (1993).

54 114 S. Ct. at 521.

55 *Id.*

56 *Id.*

57 *Id.* at 530.

58 *Id.* at 530-31.

59 PTE 95-60, 60 Fed. Reg. 35,925 (July 12, 1995).

60 60 Fed. Reg. at 35,932.

61 60 Fed. Reg. at 35,931.

62 29 U.S.C. §§1106(a)(1)(E), 1106(a)(2), 1107(a).

63 60 Fed. Reg. at 35,931.

64 *Id.* at 35,931.

65 *Id.*

66 *Id.*

67 *Id.*

68 PTE 83-1, 48 Fed. Reg. 895 (Jan. 7, 1983).

69 The Underwriter Exemptions refer to the following prohibited transaction exemptions: PTE 89-88, 54 Fed. Reg. 42,582 (Oct. 17, 1989); PTE 89-89, 54 Fed. Reg. 42,569 (Oct. 17, 1989); PTE 89-90, 54 Fed. Reg. 42,597 (Oct. 17, 1989); PTE 90-22, 55 Fed. Reg. 20,542 (May 17, 1990); PTE 90-23, 55 Fed. Reg. 20,545 (May 17, 1990); PTE 90-24, 55 Fed. Reg. 20,548 (May 17, 1990); PTE 90-28, 55 Fed. Reg. 21,456 (May 24, 1990); PTE 90-29, 55 Fed. Reg. 21,459 (May 24, 1990); PTE 90-30, 55 Fed. Reg. 21,461 (May 24, 1990); PTE 90-31, 55 Fed. Reg. 23,144 (June 6, 1990); PTE 90-32, 55 Fed. Reg. 23,147 (June 6, 1990); PTE 90-33, 55 Fed. Reg. 23,151 (June 6, 1990); PTE 90-36, 55 Fed. Reg. 25,903 (June 25, 1990); PTE 90-39, 55 Fed. Reg. 27,713 (July 5, 1990); PTE 90-59, 55 Fed. Reg. 36,724 (Sept. 6, 1990); PTE 90-83, 55 Fed. Reg. 50,250 (Dec. 5, 1990); PTE 90-84, 55 Fed. Reg. 50,252 (Dec. 5, 1990); PTE 90-88, 55 Fed. Reg. 52,899 (Dec. 24, 1990); PTE 91-14, 55 Fed. Reg. 48,178 (Feb. 22, 1991); PTE 91-22, 56 Fed. Reg. 3,277 (Apr. 18, 1991); PTE 91-23, 56 Fed. Reg. 15,936 (Apr. 18, 1991); PTE 91-30, 56 Fed. Reg. 22,452 (May 15, 1991); PTE 91-39, 56 Fed. Reg. 33,473 (July 22, 1991); PTE 91-62, 56 Fed. Reg. 51,406 (Oct. 11, 1991); PTE 93-6, 58 Fed. Reg. 7255 (Feb. 5, 1993); PTE 93-31, 58 Fed. Reg. 28,620 (May 5, 1993); PTE 93-32, 58 Fed. Reg. 28,623 (May 14, 1993); PTE 94-29, 59 Fed. Reg. 14,675 (Mar. 29, 1994); PTE 94-64, 59 Fed. Reg. 42,312 (Aug. 17, 1994); PTE 94-70, 59 Fed. Reg. 50,014 (Sept. 30, 1994); PTE 94-73, 59 Fed. Reg. 51,213 (Oct. 7, 1994); PTE 94-84, 59 Fed. Reg. 65,400 (Dec. 19, 1994); and any other exemption providing similar relief to the extent that DOL expressly determines, as part of the proceeding to grant such exemption, to include the exemption within the underwriter exemption definition for purposes of Class Exemption 95-60. 60 Fed. Reg. at 35,932.

70 60 Fed. Reg. at 35,931.

71 See ERISA §§401(c)(3) and 401(c)(1)(D).

72 ERISA §401(c)(5)(B).

73 ERISA §401(c)(5)(B)(i).

74 ERISA §401(c)(5)(B)(ii).

75 Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §1460(b)(2), 110 Stat. 1820 (1996).

76 29 C.F.R. §2550.401c-1(i)(2).

77 29 C.F.R. §2550.401c-1(i)(3).

78 29 C.F.R. §2550.401c-1(h)(6)(i).

79 29 C.F.R. §2550.401c-1(a)(2).

80 29 C.F.R. §2550.401c-1(g).

81 Preamble to the final regulation, 65 Fed. Reg. 613, 625 & n.11 (Jan. 5, 2000); see *generally* ERISA §404(a)(1)(B).

82 29 C.F.R. §2550.3-101.

83 "Equity interest" means any interest in an entity other than one treated as indebtedness under applicable local law and that has no equity features. See 29 C.F.R. §2510.3-101(b)(1).

84 29 C.F.R. §2510.3-101(a)(2).

85 29 C.F.R. §2510.3-101(b)(3). After the initial offering, if the number of independent investors falls below 100, the securities will not fail to be widely held, provided that such drop is the result of events beyond the control of the issuer.

86 29 C.F.R. §2510.3-101(b)(4).

87 *Id.*

88 *Id.*

89 29 C.F.R. §2510.3-101(a)(2).

90 The plan asset regulation's look-through rule reversed the DOL's earlier position under Interpretive Bulletin 75-2 in which the DOL indicated that the acquisition by a plan of an equity interest in a corporation or a limited partnership generally would not cause the underlying assets of the corporation or partnership to become assets of the investing plan.

91 29 C.F.R. §2510.3-101(h).

92 29 C.F.R. §2510.3-101(a)(2).

93 *Id.*

94 *See* 29 C.F.R. §2510.3-101(i).

95 29 C.F.R. §2510.3-101(c).

96 A "venture capital investment" is an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights, defined as follows: "Derivative investments" are either: (1) a venture capital investment in which the investor's management rights have ceased in connection with a public offering or (2) an investment acquired (in the ordinary course of business) by the venture capital investment company in exchange for an existing venture capital investment in connection with a public offering of securities or a merger or reorganization of the operating company to which the existing venture capital investment relates. 29 C.F.R. §2510.3-101(d)(4).

97 A venture capital operating company has "management rights" if it has contractual rights to substantially participate in, or substantially influence the conduct of, the management of the operating company. 29 C.F.R. §2510.3-101(d)(1).

98 29 C.F.R. §2510.3-101(d)(1)(i).

99 29 C.F.R. §2510.3-101(e).

100 29 C.F.R. §2510.3-101(e)(1).

101 29 C.F.R. §2510.3-101(j)(7).

102 29 C.F.R. §2510.3-101(f).

103 29 C.F.R. §2510.3-101(f)(1).

104 29 C.F.R. §2510.3-101(f)(2).

105 *Id.*

106 PTE 95-60, 60 Fed. Reg. 35,925 (July 12, 1995). *See also* the discussion of "Insurance Company General Accounts."

107 60 Fed. Reg. at 35,930, Discussion of Comments, § G(4).

108 29 C.F.R. §2510.3-101(g).

109 29 C.F.R. §2510.3-101(j)(10).

110 ERISA §403; 29 C.F.R. §2550.403a-1. DOL regulations do, however, exempt certain assets from the trust requirement. *See* 29 C.F.R. §2550.403b-1.

111 29 C.F.R. §2510.3-102.

112 29 C.F.R. §2510.3-102(a).

113 29 C.F.R. §2510.3-102(b). Under certain limited circumstances, the employer may extend this time period for up to 10 days. 29 C.F.R. §2510.3-102(d).

114 29 C.F.R. §2510.3-102(c).

115 United States v. Grizzle, 933 F.2d 943, 946, 14 Employee Benefits Cas. (BNA) 1650 (11th Cir.), *cert. denied*, 502 U.S. 897 (1991). See also Bannister v. Ullman, 287 F.3d 394, 402 (5th Cir., April 2, 2002); Professional Helicopter Pilots Ass'n v. Denison, 804 F. Supp. 1447, 1453 (M.D. Ala. 1992); In re College Bound, Inc., 172 B.R. 399, 403 (Bankr. S.D. Fla. 1994); and DeFelice v. Daspin, 2002 U.S. Dist. LEXIS 11334 (E.D. Pa. June 25, 2002).

116 In re College Bound, Inc., 172 B.R. at 403. See also In re U.S. Lan Systems Corp., 235 B.R. 847, 853-854 (Bankr. E.D. Va 1998).

117 See, e.g., Lopresti v. Terwilliger, 126 F.3d 34, 21 Employee Benefits Cas. (BNA) 1716 (2d Cir. 1997), and United States v. Grizzle, 933 F.2d 943, 14 Employee Benefits Cas. (BNA) 1650(11th Cir. 1991).

118 See, e.g., Cadegan v. McCarron, 2002 U.S. Dist. LEXIS 14535 (Dist. N.H. Aug. 6, 2002); United States v. LaBarbara, 129 F.3d 81, 99 (2d. Cir. 1997) (document "obligated" employer to make contributions to the trust fund based on the number of hours worked by an employee once wages were paid to an employee for those hours). See also In re Philpott, 281 B.R. 271 (Bankr. W.D. Ark. July 31, 2002) (collective bargaining agreement required employer to make contributions for each hour worked in covered employment; court held that once employees worked the hours, the employer had an obligation to make the employer contributions and the obligation to pay constituted an asset of the plan), and Hanley v. Giordano's Restaurant, 1995 WL 442143, at *4 (S.D.N.Y. 1995)(trust agreement provided that contributions required pursuant to the collective bargaining agreement "shall be deemed Trust assets whether or not collected").

119 See, e.g., PMTA-ILA Containerization Fund v. Rose, No. 94-5635, 1995 WL 461269 (E.D. Pa. 1995), and Connors v. Paybra Mining Co., 807 F. Supp. 1242, 1246 (S.D. W. Va. 1992).

120 Chicago Dist. Council of Carpenters Pension Fund v. Angulo, 150 F. Supp. 2d 976, 978, 26 Employee Benefits Cas. (BNA) 2878 & 2850 (N.D. Ill. 2001)(emphasis in original). See also Galgay v. Gangloff, 677 F. Supp. 295, 301-02 (M.D. Pa. 1987), *aff'd*, 932 F.2d 959 (3d Cir. 1991) (employer contributions were plan assets where wage agreement stated, "all the monies paid into and/or *due and owing* said fund shall be *vested in*and remain exclusively in the trustees of the fund" (emphasis added)).

121 See, e.g., Cadegan v. McCarron, 2002 DNH 152; 2002 U.S. Dist. LEXIS 14535 (D. N.H. Aug. 6, 2002); In re College Bound, Inc., 172 B.R. 399 (Bankr. S.D. Fla. 1994); and Professional Helicopter Pilots Ass'n v. Denison, 804 F. Supp. 1447 (M.D. Ala. 1992).

122 DeFelice v. Daspin, 28 Employee Benefits Cas. (BNA) 2144 (E.D. Pa. 2002).

123 See, e.g., DeFelice v. Daspin, 28 Employee Benefits Cas. (BNA) 2144 (E.D. Pa. 2002), and Cline v. Indus. Maintenance Eng'g & Contracting, 200 F.3d 1223 (9th Cir. 2000).