[COMMITTEE PRINT]

DUAL JURISDICTION UNDER ERISA

EXPLANATION AND ANALYSIS OF S. 901

PREPARED FOR THE USE OF THE

COMMITTEE ON FINANCE

BY THE STAFFS OF THE

JOINT COMMITTEE ON TAXATION

AND THE

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I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA) provides standards of fiduciary conduct, prohibitions against self-dealing by fiduciaries of employee plans and others, and minimum standards for plan provisions regarding such matters as vesting, funding, and employee participation.

Under present law, the Internal Revenue Service and the Department of Labor both have responsibility for the administration of ERISA, requiring close coordination between the two agencies in the promulgation of regulations and rulings and in the enforcement of the Act. Under several of the ERISA provisions, one agency has the chief responsibility for promulgating regulations within a broad area, the other agency has the responsibility for prescribing regulations pertaining to a specific topic within that broad area, and both agencies share enforcement responsibility.

To the extent the requirement of close coordination between these two agencies has contributed to delay in the implementation of ERISA, dual jurisdiction appears to have resulted in a frustration of the purposes of the Act and additional cost for employees, employers, and the Government.

II. SUMMARY

S. 901 is intended to divide jurisdiction between the Internal Revenue Service and the Department of Labor under ERISA so that matters involving prohibited self-dealing or fiduciary misconduct could be resolved by the Department of Labor without coordination with the Internal Revenue Service, and cases involving whether plan provisions (and compliance with plan provisions) or plan funding satisfy ERISA standards can be resolved by the Internal Revenue Service, without coordination with the Department of Labor.

III. PRESENT LAW

A. In General

Responsibility for administering the provisions of ERISA at present is generally assigned to the Internal Revenue Service and the Department of Labor.[1]

Generally, under pre-ERISA law, the Internal Revenue Service was responsible for administering provisions of the tax law providing favorable tax treatment for pension plans, profit-sharing plans, stock bonus plans, and trusts under those plans; for plan participants (or their beneficiaries); and for employers who maintain plans.

Generally, the pension, etc., plan rules administered by the Internal Revenue Service originated in the Revenue Act of 1942.[2] The prohibited transaction rules, which were applied to tax-exempt charitable foundations in 1950, were extended to pension trusts in 1954.

If a pension, etc., plan qualifies under the tax law then, under ERISA and prior law, (1) a trust under the plan is generally exempt from income tax, (2) employers are generally allowed deductions (within limits) for plan contributions for the year the contributions are made, even though participants are generally not taxed on plan benefits derived from employer contributions until the benefits are distributed or made available, (3) benefits distributed as a lump sum distribution are accorded special income averaging treatment (and, under ERISA, may generally be "rolled over" tax-free to an individual retirement account or another qualified plan), and (4) certain estate and gift tax exclusions are provided.

Under ERISA and prior law, a trust qualifies if (1) employer contributions to the trust are made for the purpose of distributing the corpus and income of the trust to employees and their beneficiaries, (2) under the trust instrument, it is impossible for any part of the trust corpus or income to be used for, or diverted to, purposes other than *the exclusive benefit* of employees at any time before its liabilities to employees and their beneficiaries are satisfied, and (3) the trust is a part of a plan which qualifies under the tax law.

Under ERISA and prior law, plans are required to satisfy tests designed to assure that they cover employees in general, rather than merely those employees who are officers, shareholders, or highly compensated—the prohibited group.[3]

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[1] Responsibility for administering the pension plan termination insurance provisions of ERISA is assigned to the Pension Benefit Guaranty Corporation, a corporation within the Department of Labor (ERISA sec. 4002). The Social Security Administration informs employees (or their beneficiaries) of their vested rights under plans when application is made for Social Security benefits by (or with respect to) an employee (ERISA sec. 1032).

[2] Before the 1942 Act, a pension, etc., trust could qualify for a tax exemption as a charitable organization.

[3] A fourth category, supervisory employees, was deleted by ERISA.

Under pre-ERISA law, a pension, etc., trust lost its income tax exemption (and the plan of which it was a part generally lost qualification under the "exclusive benefit" rule) if it engaged in certain types of transactions with anyone who was a creator of the trust, a substantial contributor to the trust, or certain related persons, unless the transaction met "arms length" standards. These rules are replaced, under ERISA, with a more detailed list of prohibitions, violations of which result in sanctions against the self-dealers rather than the trusts or plans.

Under ERISA and prior law, pension, etc., plan trusts are subject to the tax imposed on unrelated business taxable income (sec. 512).

Under the tax provisions of ERISA and prior law, a plan covering a self-employed individual [4] (an H.R. 10, or Keogh, plan) is required to meet special rules relating, for example, to the group of employees covered by the plan, preretirement vesting, plan fiduciaries,[5] and the time benefits are distributed. Contributions on behalf of any self-employed individual are limited in terms of the individual's net earnings from self-employment, as defined for purposes of the tax on self-employment income (sec. 1402),[6] with certain modifications.

Under pre-ERISA law, an employee covered by a pension, etc., plan which did not qualify under the tax law could not compel compliance with the qualification requirements of the tax law—the employee's rights under the plan were determined under State law on the basis of the plan provisions. Noncompliance resulted in loss of the plan's tax qualification (and a loss of the tax exemption for a trust forming a part of the plan).[7]

Under pre-ERISA law, the Welfare and Pension Plans Disclosure Act (WPPDA) required reporting and disclosure by administrators of both welfare and pension, etc., plans. However, the WPPDA exempted any plan covering fewer than 26 participants and plans administered by tax-exempt fraternal benefit societies or tax-exempt charitable, educational, religious, or civic organizations.

In addition to filing with the Department of Labor, plan administrators had to make copies of filings available for inspection by any

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[4] A self-employed individual is one who owns the trade or business as a sole proprietor or a partner who owns more than a 10-percent interest in a partnership which operates the trade or business.

[5] Only a bank could serve as trustee of a trust under a pre-ERISA H.R. 10 plan.

[6] Pre-ERISA limits were the lesser of $2,500 or 10 percent of such earnings; ERISA limits are the lesser of $7,500 or 15 percent of such earnings. ERISA also provides for defined benefit H.R. 10 plans under which benefits, rather than contributions, are subject to special limits. Benefits and contributions under H.R. 10 plans are also subject to overall limits applicable to other qualified plans (sec. 415).

[7] Generally, under a funded nonqualified plan, the value of an employee's benefits is taxed when the benefits are transferable or are not subject to a substantial risk of forfeiture, so that, if the plan provides for preretirement vesting, an employee could be taxed currently on plan benefits even though those benefits are not distributed (sec. 83). No special treatment is accorded to lump-sum distributions from nonqualified plans and no special estate or gift tax exclusions or tax-free rollovers are provided. Additionally, employer contributions to a nonqualified plan are deductible only when the plan benefits are includible in the gross income of employees (sec. 404(a)(5)), but only if employees have separate accounts under the plan. The income of a trust under a nonqualified plan is subject to tax under the usual trust rules.

participant or beneficiary at the plan's principal office and, upon written request by a participant or beneficiary, furnish a copy of the plan description and an adequate summary of the latest annual report.

B. Pension, Etc., Trusts Under ERISA

(1) In General

Generally, ERISA preserved the plan and trust qualification requirements [8] prescribed by prior law, established additional qualification requirements, and provided minimum standards for pension, etc., plans which, if violated, could result in tax sanctions as well as nontax civil and criminal sanctions and injunctive relief to compel compliance. Also, ERISA preempted the regulation of most private pension, etc., and welfare plans by the States. The United States Tax Court was given jurisdiction to issue declaratory judgments in some cases with respect to the qualified status of pension, etc., plans.

(2) Minimum Age and Service Standards

Under the minimum age and service standards of ERISA (sec. 410(a) and ERISA sec. 202), a plan generally cannot exclude employees from plan participation on the basis of age or length of service if the employee has attained age 25 and completed one year of service.[9] Generally, a year of service consists of 1,000 hours of service within a designated 12-month period.

Although the authority to prescribe regulations under the minimum age and service standards is generally assignd to the Treasury Department, authority to prescribe regulations defining an hour of service is assigned exclusively to the Labor Department.[10] The minimum age and service standards are tax qualification requirements for plans; accordingly, they are administered by the Internal Revenue Service. The nontax provisions of ERISA also require compliance with these standards by qualified and most nonqualified plans; accordingly, the minimum age and service standards are also enforced by the Labor Department.

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[8] Under pre-ERISA law, if contributions to a plan were completely discontinued, the plan was disqualified if it did not provide participants with fully vested rights to their benefits (to the extent the benefits were funded). This qualification requirement was deleted by ERISA for plans subject to the funding standard of the Act so that failure to fund such a plan would subject the employer to an excise tax but would not result in plan disqualification because of a failure by the plan to provide added vesting. Similarly, under ERISA, because an excise tax was imposed on prohibited transactions and civil sanctions were established for prohibited transactions and certain fiduciary violations, the pre-ERISA prohibited transaction rules of the Code were deleted for plans subject to the new rules. Also, the "exclusive benefit rule" for plan qualification was modified for these plans. In addition, new rules were provided dealing with the extent to which vesting could be required by the Service in order to prevent discrimination, and supervisors were deleted from the "prohibited group."

[9] Special rules permit a requirement of 3 years of service and age 25 by a plan providing full, immediate vesting Alternatively, plans of certain educational institutions (defined in sec. 170(b)(A)(iii) and tax exempt under sec. 501(a)) may require that an employee attain age 30 and complete 1 year of service before plan participation. If the plans provide full, immediate vesting.

[10] The Labor Department also has exclusive authority to prescribe regulations defining a year of service in seasonal industries. In maritime industries, ERISA provides that 125 days of service are treated as 1,000 hours of service, subject to Labor Department regulations.

(3) Coverage Standards

Since 1942 the tax law [11] has explicitly required that qualified plans cover employees in general rather than merely an employer's key employees. A plan satisfies the coverage rule if (1) it benefits a classification of employees that does not discriminate in favor of employees who are officers, shareholders, or highly compensated, or (2) the plan benefits a prescribed percentage of the employees.

In applying the percentage rule, however, only those employees who have satisfied the plan's minimum age and service requirements are taken into account. In addition, in applying either the classification or percentage tests, employees covered by an agreement which the Labor Department finds to be a collective bargaining agreement may be excluded from consideration if the Internal Revenue Service finds that retirement benefits were the subject of good faith bargaining.[12]

Neither the minimum age and service standard nor the coverage standard applies to a governmental plan, a church plan,[13] a plan established by a tax-exempt society, order, or association (described in sec. 501(c)(8) or (9)) or certain plans not providing for employer contributions. In addition, the nontax minimum age and service standards do not apply to certain tax-exempt pension trusts under plans funded solely by employee contributions (sec. 501(c)(18)).[14] Plans exempted from the ERISA minimum age and service standards and coverage standards are required to meet the pre-ERISA coverage standards of the tax law in order to be tax-qualified.

(4) Vesting Standards—Percentage Schedules

ERISA established three alternate vesting schedules under which the percentage of an employee's nonforfeitable benefit derived from employer contributions [15] depends upon the number of years of service the employee has completed.[16] As under the minimum service standard, a year of service consists of 1,000 hours of service within a designated 12-month period. In addition, the Internal Revenue Service may require more rapid vesting, in certain circumstances, in order to prevent discrimination in favor of employees who are officers, shareholders, or highly compensated.

Generally, administration under the vesting standards follows the same pattern as that under the minimum age and service standards.

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[11] Revenue Act of 1942, sec. 165, and sec. 410(b) of the 1954 Code.

[12] Other exclusions are provided (1) in the case of plans established or maintained pursuant to collective bargaining agreements (determined by the Labor Department) between air pilots and employers, and (2) for nonresident alien employees who receive no earned income (defined by sec. 911(b)) from the employer which is income from sources within the United States (defined by sec. 861(a)(3)).

[13] The standards do not apply to the plan of a church (or convention or association of churches) exempt from tax under sec. 501(a). However, the standards apply to a plan covering employees of a church's (a convention's or an asssociation's) unrelated trade or business (within the meaning of sec. 513).

[14] The tax exemption applies only to trusts created before June 25, 1959.

[15] All benefits derived from employee contributions are required to be nonforfeitable. (Sec. 411(a) and ERISA sec. 203.)

[16] Under one of the vesting schedules, the nonforfeitable portion may also depend upon the employee's age.

Accordingly, the authority to prescribe regulations under the vesting standards is generally assigned to the Treasury Department and authority to define an hour of service by regulation is assigned to the Labor Department.[17] In addition, the Labor Department has exclusive authority to prescribe regulations under rules permitting a suspension of benefit payments where a former employee is reemployed. Also, the Department of Labor has exclusive authority to prescribe regulations which may prohibit the use of a particular 12-month period for measuring service under the vesting standards.

The vesting standards are administered by the Internal Revenue Service in connection with the qualification of a plan or trust under the tax laws. The vesting standards (other than the rules requiring additional vesting to prevent discrimination) are also a part of the nontax law enforced by the Labor Department. Under the nontax law, the vesting standards apply to both qualified and nonqualified plans.

(5) Vesting Standards—Accrued Benefit Standards

In addition to providing minimum standards for the nonforfeitable percentage of an employer's benefit accrued under a plan ERISA provides minimum standards for the accrued benefit to which that percentage is applied (sec. 411(b) and ERISA sec. 204). Under ERISA, benefits under a defined benefit plan [18] are accrued by an employee on the basis of the number of years the employee has been a plan participant.

Generally, authority to prescribe regulations under the accrued benefit standards is assigned to the Treasury Department. However, the Department of Labor has exclusive authority to prescribe regulations (1) for calculating an employee's period of participation on a reasonable and consistent basis, (2) for calculating the period of participation for a part-time employee, and (3) for seasonal or maritime industries. Enforcement authority is assigned in the same manner as under the vesting standards (the rules enforced by the Labor Department generally apply to qualified and most nonqualified plans).

(6) Funding Standards

Under ERISA, pension plans are required to satisfy minimum funding standards.[19]

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[17] See footnote 10 above. Special regulatory authority with respect to seasonal or maritime industries is also assigned to the Labor Department.

[18] Generally, a defined benefit plan provides a specified benefit level (e.g., as under the Federal civil service pension plan). Defined contribution plans, in contrast, are plans under which separate accounts are maintained for plan contributions allocated to each employee, and an employee's accrued benefit depends solely upon the balance of his or her separate account (e.g., as in a profit-sharing plan).

[19] The standards apply to defined benefit penson plans because those plans promise a specified benefit (for which funding is required), and to pension plans which promise a fixed or determinable contribution rate. The Internal Revenue Service may waive the standard for up to 5 out of 15 years, but the waived contributions must be made up in subsequent years. The Labor Department may approve retroactive plan amendments which reduce funding requirements and may extend the period over which funding liabilities are amortized. (Sec. 412 and ERISA secs. 301 through 306.

Amounts required to be contributed to a qualified plan under the funding standards are generally deductible. Although authority to prescribe regulations under the funding standards is generally assigned to the Treasury Department, the Labor Department prescribes the rules under which retroactive amendments are approved or amortization periods are extended.

Under the Internal Revenue Code, the funding standard is enforced by application of an excise tax on funding deficiencies. Failure to satisfy the funding standard does not result in the disqualification of a pension plan.[20] The funding standard is also a part of the nontax law enforced by the Department of Labor (the nontax rules apply to qualified and most nonqualified plans).

The funding standard does not apply to profit-sharing plans, stock bonus plans, or certain plans funded exclusively by insurance contracts.

(7) Limits on Benefits and Contributions

In order to limit the extent to which individuals can use tax-favored arrangements to provide for retirement, the Code provides overall limits on benefits and contributions to qualified pension, etc., plans, tax-sheltered annuities, and individual retirement accounts or any combination of these arrangements (sec. 415). No equivalent rule is provided by the nontax rules of ERISA. The limitation for an individual under a tax-favored retirement arrangement is based, in part, upon the individual's compensation. In the case of a self-employed individual, the limitations are generally based upon income subject to the tax on self-employment income. Special limitations apply to employee stock ownership plans (ESOPs) which satisfy the requirements of the investment tax credit rules. In part, the investment tax credit rules require these ESOPs to satisfy ERISA standards relating to participation and coverage as well as the limitations on benefits and contributions. These ESOPs may also be qualified plans.

Under the limitation rules, benefits and contributions for an individual under plans of related employers (sec. 1563(a), with modifications) are aggregated.

(8) Plans for Self-Employed Individuals and Shareholder-Employees

The Code permits a self-employed individual who operates a trade or business (within the meaning of sec. 162) to enjoy the benefits of a tax-qualified plan if the plan meets special additional requirements. Under these rules, plan contributions to a defined contribution plan on behalf of a self-employed individual are limited to the lesser of $7,500 or 15 percent of the individual's earned income from a trade or business in which the individual's services are a material income-producing factor. Generally, for this purpose, earned income is income subject to the tax imposed on income from self-employment (defined in sec. 1402(a)). Under rules applicable to electing small business

[20] Church plans which have not elected to be covered by ERISA and governmental plans are not subject to the ERISA funding standard. Accordingly, they remain subject to prior law under which a plan does not qualify unless it provides full vesting of benefits (to the extent the benefits are funded) in the event of a complete discontinuance of contributions.

corporations (subchapter S corporations), if contributions on behalf of a shareholder-employee [21] exceed the $7,500/15-percent limit under a defined contribution plan, the excess is taxed to the shareholder-employee. The Code also provides for defined benefit H.R. 10 plans and subchapter S plans. In addition, H.R. 10 plans and plans of subchapter S corporations are subject to the overall limits on benefits and contributions applicable to other qualified plans (sec. 415).

No equivalent rules are provided under the nontax provisions of ERISA.

(9) Individual Retirement Accounts

Within limitations, the Code allows a deduction for an individual's contributions to an individual retirement account (IRA), secs. 219, 220, 408, and 409. The deduction is not to exceed the lesser of (1) 15 percent of the individual's compensation includible in gross income (including self-employment income), or (2) $1,500 ($1,750 in the case of certain IRAs covering an individual and spouse). Deductions are not generally allowed to an individual who is covered by a qualified pension, etc., plan, a tax-sheltered annuity, or a government plan.[22]

A lump-sum distribution (defined in sec. 402(e)) from a qualified plan can be "rolled over" tax-free to an IRA. If an individual engages in a prohibited transaction with an IRA, the account is disqualified and amounts held in the account are taxed to the individual. No equivalent rules are provided under the nontax provisions of ERISA.

(10) Life Insurance Companies

The tax law provides special rules under which the tax treatment of qualified pension, etc., plan assets (and related income, expense, gain, and loss) invested in annuity contracts issued by a life insurance company (or in the separate asset account of a life insurance company) are accorded similar tax treatment to that provided for assets held in a tax-exempt trust under a qualified plan (subchapter L).

(11) Exclusive Benefit of Employees

A tax-qualified pension, etc., plan must be for the exclusive benefit of the employees or their beneficiaries (sec. 401(a)). Each fiduciary [23] of a tax-qualified plan must act solely in the interests of the plan's participants and beneficiaries, and must act exclusively to provide benefits to the participants and beneficiaries or to pay reasonable plan administrative costs.

The nontax provisions of ERISA require each fiduciary to discharge fiduciary duties solely in the interest of the participants and beneficiaries for the exclusive purposes of providing them with benefits and

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[21] A shareholder-employee is an officer or employee who owns (or is considered to own under sec. 318(a)(1)) more than 5 percent of the stock of a subchapter S corporation.

[22] Special rules permit deductible IRA contributions by certain members of the Armed Forces reserves and firefighters who are covered by governmental plans.

[23] For purposes of ERISA, a fiduciary with respect to a plan is a person who (1) exercises discretionary authority or control over management of the plan or any authority over management or disposition of its assets, (2) renders investment advice for a fee with respect to money or property of the plan or has authority or responsibility to do so, or (3) has discretionary authority or responsibility in the administraton of the plan.

defraying the reasonable expenses of administering the plan. A fiduciary must exercise the care, skill, prudence, and diligence under the prevailing circumstances that a prudent man acting in a like capacity and familiar with such matters would use in conducting a similar enterprise. To the extent that a fiduciary complies with the prudent man rule of the nontax provision of ERISA, the fiduciary will be deemed to have complied with the exclusive benefit requirements of the tax provisions of ERISA.

Because the assets of a tax-qualified retirement plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally may not inure to the benefit of the employer before the plan's liabilities to employees and their beneficiaries are satisfied. However, the provisions of ERISA allow an employer's contribution to be returned in certain limited situations.[24]

Under the nontax provisions of ERISA, the transfer or distribution of the assets of an employee welfare plan upon termination of the plan is to be in accordance with the terms of the plan except as otherwise prescribed by regulations of the Secretary of Labor. Normally, the terms of the plan govern such a distribution or transfer of assets, except to the extent that implementation of the terms of the plan would unduly impair the accrued benefits of the plan participants or would not be in their best interests.

Also, under the nontax provisions of ERISA, on termination of a defined benefit pension plan to which the plan termination insurance provisions do not apply, the assets of the plan are to be allocated in accordance with the plan termination insurance provisions of ERISA governing such allocation, except as otherwise provided in regulations prescribed by the Secretary of Labor.

(12) Self-Dealing

Self-dealing rules are provided both in the tax and nontax provisions of ERISA (sec. 4975 and ERISA sec. 406). The tax provisions regulate transactions involving "disqualified persons", while the nontax provisions regulate transactions involving "parties-in-interest". These two terms have substantially similar definitions.

The self-dealing rules under the tax provisions apply to all tax-qualified pension, etc., plans and to individual retirement accounts, and annuities. The tax law rules continue to apply even if a plan loses its tax qualification. The self-dealing rules under the nontax provisions of ERISA apply to all plans to which the general nontax fiduciary rules apply.

The self-dealing rules under both the tax and nontax provisions of ERISA prohibit certain transactions between a plan and a disqualified person (or party-in-interest). Also, they prohibit uses of plan assets or income for the benefit of a disqualified person (or party-in-interest).

Under the tax provisions of ERISA, a disqualified person who participates in a self-dealing transaction is subject to a two-level excise tax sanction. The excise tax consists of two levels. Initially, the disqualified person is subjected to a tax of 5 percent of the amount

[24] For example, an employer's contributions can be returned within one year after they are made to the plan, if made because of a mistake of fact.

involved in the transaction per year. A second tax of 100 percent of the amount involved is imposed if the transaction is not corrected after notice from the Internal Revenue Service that the 5-percent tax is due. These taxes are to be imposed automatically, that is, whether or not the self-dealer realizes that a violation has occurred and whether or not it can be shown that the particular violation harms the trust.

Under the nontax provisions of ERISA, a fiduciary who knowingly engages in a prohibited transaction or otherwise breaches any of the responsibilities imposed upon him or her by ERISA is personally liable to the plan for any losses it may suffer, as well as any profits that the fiduciary may realize through the use of plan assets, as a result of the misconduct. Also the fiduciary is subject to other appropriate relief as ordered by a court, including the fiduciary's removal.

Both the tax and nontax provisions of ERISA contain similar exceptions from the specifically enumerated prohibited transactions. In addition to specifically enumerated exceptions to the prohibited transaction rules. ERISA provides for the granting of exemptions (variances) by the administering authorities (ERISA sec. 408(a); Code sec. 4975(c)(2)). The granting of a variance for a qualified pension, etc., plan requires the concurrent action of both the Secretary of Labor and the Secretary of the Treasury and a full-scale hearing procedure, including notice in the Federal Register, by at least one of the two departments. A variance will be granted only when each Secretary separately determines that the transaction in question is an appropriate case for a variance.[25] Further, a variance may not be granted unless each Secretary finds that the transaction is in the interests of the plan and its participants and beneficiaries, that it does not present administrative problems, and that adequate safeguards are provided for participants and beneficiaries.

Both the Treasury Department and the Department of Labor are authorized to prescribe regulations under, and enforce, the self-dealing rules.

(13) General Fiduciary Standards

The fiduciary standards contained both in the tax and nontax provisions of ERISA prescribe a comprehensive scheme of Federal regulations governing the activities of fiduciaries and other persons involved in the administration of employee benefit plans (secs. 401(a) and 4975 of the Code and secs. 401 through 406 of ERISA.)

Prior to ERISA, the Federal requirements applicable to the administration of employee benefit plans were contained mainly in the reporting, disclosure, and bonding requirements of the WPPDA, and the Labor Management Relations Act of 1947. Qualified pension, etc., plans were subjected to the loss of income tax exemptions for their related trusts if they engaged in self-dealing (Code sec. 503).

ERISA contains rules governing the conduct of plan fiduciaries under its nontax provisions and also contains rules governing the conduct of disqualified persons with respect to the plan under its tax rules.

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[25] In this regard, the Secretary of one department may accept the record of a hearing in another department, and make a determination on the material in that record.

The nontax provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax provisions apply an excise tax to disqualified persons who violate the self-dealing rules.

The nontax provisions of ERISA deal with the structure of plan administration, provide general standards of conduct for fiduciaries, and prohibit plan fiduciaries from engaging in certain transactions involving self-dealing. The excise tax provisions include only the self-dealing rules and apply only to disqualified persons.

The nontax fiduciary responsibility rules of ERISA generally apply to all pension, etc., plans and welfare plans of employers or organizations in, or affecting, interstate commerce.[25a] They do not apply to unfunded plans devoted to providing deferral of compensation primarily for a select group of management or highly compensated employees, or to unfunded excess benefit plans [26] that are unfunded.

ERISA sets forth a general standard of fiduciary conduct, based upon "the prudent man rule", which applies (1) specifically to the investment of plan assets and (2) to all other aspects of plan administration. The Act also prescribes the manner in which fiduciary responsibilities may be allocated and delegated among those persons involved in a plan's administration and the extent to which those responsibilities may be allocated and delegated.

(14) Reporting and Disclosure

The Internal Revenue Code (sec. 6058) requires every employer who maintains a pension, etc., plan to file an annual return stating such information as is required under Treasury regulations with respect to the plan's (1) qualification, (2) financial condition, and (3) operations. The Treasury may relieve an employer of the requirement of reporting information contained in other returns.

The nontax rules of ERISA require the filing of an annual report with respect to employee benefit plans (including welfare plans). A copy of the report must be available for inspection by participants and beneficiaries and, upon request, must be furnished to them (ERISA secs. 103 and 104).

ERISA also requires the filing of a registration statement detailing the vested plan benefits of separated employees (sec. 6057 and ERISA sec. 105). The reports are filed with the Internal Revenue Service and forwarded by the Service to the Social Security Administration so that retirees (or their beneficiaries) can be advised of private pension rights when application is made for Social Security benefits.

The nontax provisions also requires that each employee benefit plan file a plan description and summary plan description with the Labor Department (ERISA sec. 102). A summary annual report and a summary plan description are required to be furnished to plan participants and beneficiaries.

The Labor Department and Internal Revenue Service have announced a procedure under which, beginning with 1977 annual reports

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[25a] There are exceptions for governmental plans, certain church plans, workmen's compensation plans, and nonresident alien plans.

[26] An "excess benefit plan" is one maintained to provide benefits in excess of the limitations on benefits and contributions, described above.

and registration statements filed in 1978, a single report will be filed only with the Service for each year of a plan. Under this procedure, the Service will process the reports and furnish data to the Labor Department. The new procedure applies to pension, etc., plans and welfare plans.

(15) Other Standards

ERISA provides several standards which are administered by both the Treasury Department and the Labor Department. The law does not assign regulation writing authority exclusively to either agency. These standards apply with respect to—

(a) joint and survivor benefits,
(b) mergers and consolidations of plans,[26a]
(c) assignment and alienation of plan benefits,
(d) the time that benefits commence,
(e) plan benefit reductions due to increases in Social Security benefits, and
(f) forfeiture of benefits upon withdrawal of employee contributions.

(16) Civil and Criminal Sanctions

ERISA provides the sanctions flowing from tax disqualification if any of a number of standards (e.g., participation, antidiscrimination, and vesting) standards are not met. Penalty excise taxes are imposed on self-dealers and those who exceed the contribution limits for IRA's and H.R. 10 plans. Penalty excise taxes are imposed on employers who fail to meet the minimum funding standards. Penalties are imposed for failure to file reports on time.

On the Labor side, fiduciaries who violate standards may be forced to make up plan losses or disgorge private profits and may be removed from office. The Act also provides criminal sanctions (up to $5,000 fine and one year in prison for individuals and up to $100,000 fine for corporations, etc.) for willful violations of the reporting and disclosure provisions.

The Act also authorizes suits by participants or beneficiaries to enforce their rights under the plan or under the statute, or to enjoin violations of the plan or the statute. Suits also may be brought, under specified circumstances, by fiduciaries, the Labor Department, and the Treasury Department.

ERISA makes it unlawful to retaliate against anyone for exercising rights under the plan or the Act, or for giving information in any inquiry or proceeding under the Act. Coercive interference with the exercise of any right under the plan or the Act may be punished by a fine of up to $10,000 and imprisonment for up to one year.

(17) Termination Insurance

ERISA provides for insurance of employee benefits, up to specified limits, under defined benefit pension plans, under a program administered by the Pension Benefit Guaranty Corporation (PBGC), a

[26a] The rule applies to multiemployer plans only to the extent determined by the Pension Benefit Guaranty Corporation.

corporation within the Labor Department.[27] Generally, only private tax-qualified defined benefit plans are covered by the insurance.[28]

The guarantee of benefits is limited, in part, by a plan participant's average compensation (includible in gross income) from the employer. For this purpose, gross income generally means earned income within the meaning of section 911(b) of the Code. The guarantee is limited in the case of owner-employees or individuals who own more than 10 percent of the stock of a corporation (the constructive ownership rules of Code sec. 1563(e) apply for this purpose with modifications).

To permit the PBGC to have advance notice of situations which may lead to plan termination, ERISA requires that certain events be reported to the PBGC within 30 days. Among these events are—

(*a*) notice by the Internal Revenue Service that a plan has ceased to qualify,

(*b*) a determination by the Internal Revenue Service that a plan has terminated or partially terminated, and

(*c*) failure of a plan to meet the minimum funding standard.

In addition, if the Internal Revenue Service finds a plan in which an event has occurred which it believes indicates the plan is unsound, the Service is required to notify the PBGC of the event.

In the event of plan termination, plan assets are allocated to plan participants in accordance with a schedule contained in ERISA, and the PBGC insures a participant's benefits (up to the limits of the insurance) to the extent the assets allocated to the participant are insufficient. In some cases, the amount of assets allocated to a participant is increased or decreased in order to prevent discrimination (prohibited by Code sec. 401(a)(4)) in favor of employees who are officers, shareholders, or highly compensated.

C. The Reorganization Act

The Reorganization Act of 1977 (Public Law 95–17) extends for three years the authority of the President to submit plans to Congress proposing the reorganization of agencies in the Executive Branch. Under this Act, a reorganization plan takes effect 60 days after transmittal to the Congress unless either House of Congress passes an unfavorable resolution.

The intent of the Reorganization Act is to give the President the ability to reorganize the means by which the Executive Branch administers the law, not the substantive content of the programs it administers.

It would appear that the problem of overlapping jurisdiction in the administration of ERISA could be dealt with by the Congress legisla-

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[27] The board of directors of the PBGC consists of the Secretaries of Labor (Chairman), Treasury, and Commerce. The PBGC has a seven-member advisory committee, appointed by the President, consisting of (1) two members representing employee organizations, (2) two members representing employers who maintain pension, etc. plans, and (3) three members representing the interests of the general public.

[28] Generally, plans do not qualify for termination insurance unless they are subject to the funding, fiduciary, and self-dealing provisions of ERISA.

tively or by the President (if the Congress does not disapprove) under the provision of the Reorganization Act. For example, pursuant to Public Law 95–17, the President could recommend that regulatory functions under ERISA be allocated in a specific manner between the Treasury and Labor Departments and this recommendation would become law if it is not vetoed by either House of Congress. (ERISA functions that are now in the Labor Department could be transferred to the Treasury Department. Similarly, ERISA functions now in the Department of the Treasury [29] might be transferred to the Labor Department.)

A reorganization plan may provide for:

(1) the transfer of all or a part of an agency (or its functions) to a new agency,

(2) the abolition of all or a part of the functions of an agency,[30]

(3) the consolidation or coordination of agencies (or their functions) internally or with other agencies,

(4) delegations of authority by officers, and

(5) the abolition of an agency (or part of an agency) which has no function when the plan is effective.[31]

A reorganization plan may not have the effect of:

(1) creating or consolidating executive departments (or all of their functions),

(2) abolishing or transferring an executive department or independent regulatory agency or all of its functions, or

(3) consolidating independent regulatory agencies (or all of their functions).[32]

Each reorganization plan must be based upon a Presidential finding that the proposed action is necessary to accomplish one or more of the purposes of the statute, and a statement to that effect must be included in the President's message transmitting the plan to the Congress. The message must specify, with respect to each plan, the reduction of expenditures or increased expenditures (itemized so far as practicable) which is likely to result from the plan, as well as any improvements in the effectiveness or efficiency of the government anticipated as a result of the plan.

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[29] Since enactment of the Reorganization Act of 1949 some 93 reorganization plans have been submitted more than three-fourths of which have gone into effect. Reorganization plans were used, for example, in creating ACTION, Drug Enforcement Administration, Domestic Council, and OMB. Some of these plans involved the Department of the Treasury, such as the removal of certain drug enforcement authority from the Treasury. However, no reorganization plan involved the removal of any revenue authority from the Treasury or the Service. For example, the Treasury's revenue authority in connection with drug enforcement was removed by statute, not by a reorganization plan.

[30] No enforcement function or statutory program may be abolished.

[31] In addition, a plan (1) may change agency names or the titles of agency heads, (2) may provide for the appointment of agency heads and their compensation, (3) must provide for the transfer of records, property, and personnel, (4) must provide for transfers of unexpended balances of appropriations, etc., and (5) must provide for terminating the affairs of an abolished agency.

[32] Also, a plan cannot (1) continue an agency, a function of an agency, or a term of office beyond the time authorized by law, (2) authorize a function not expressly provided by law, or (3) deal with more than one logically consistent subject matter.

Reorganization plans, submitted in accordance with the requirements of the statutes, become law at the end of the first period of 60 calendar days of continuous session of the Congress after the date on which the plan is transmitted to the Congress, unless, between the date of transmittal and the end of the 60-day period, either House, by a majority of those present and voting, adopts a resolution of disapproval. For the purpose of determining whether there has been a 60-day period of continuous session, continuity is considered broken by an adjournment of the Congress *sine die*. Moreover, if either House is not in session because of an adjournment to a day certain of more than 3 days, the period is excluded in the computation of the 60-day period.

The Reorganization Act requires the appropriate Committees [33] in both Houses of Congress to file recommendations on each plan with the full House within 45 days. If a committee recommends that the plan not be allowed to go into effect, then it reports to the full House a resolution of disapproval in the form prescribed by the Act.[34]

A reorganization plan that is not rejected by either House of Congress may go into effect at the end of the 60-day period, or at any later date specified in the plan.

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[33] Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House.

[34] The reorganization statute makes no provision for the amendment of a plan by the Congress. Within the first 30 days after the plan has been submitted, however, the President may amend the plan so long as a committee of either House has already ordered reported a resolution of disapproval, or any other recommendation it has on the plan. The legislation provides special rules to make sure that if a majority of the Members of either House wish to consider or adopt a resolution disapproving a plan, they will be able to do so within the 60 days before the plan otherwise would become effective. The rules are adopted as an exercise of the rule-making power of the Senate and the House of Representatives. Debate on the floor of either House on a resolution of disapproval, and on appeals and motions made in connection with the resolution, is limited to no more than 10 hours, after which a final vote on the resolution must occur. Motions to postpone consideration of the resolution or to amend the resolution will not be in order.

IV. PROBLEMS IN DUAL JURISDICTION

The operation of ERISA over a period of almost three years has made manifest two basic types of problems caused by the dual jurisdiction of the Internal Revenue Service and the Department of Labor over administration of the Act. On the one hand, there are difficulties where both agencies must deal with the same specific issue or problem at the same time. On the other hand, there are difficulties where a plan or plan sponsor must deal with both agencies regarding a particular problem. These situations can occur either independently or together.

A. Dual Agency Action

The promulgation of regulations and other guidelines for the implementation of the law is a process carried on by the agencies without direct interaction with plans or plan sponsors. ERISA contains many parallel provisions under its tax and nontax portions. In some instances, regulations implementing a particular aspect of the law are issued by only one agency and are binding upon both. In general, regulations regarding minimum standards for participation, vesting, and funding of plans are issued by the Internal Revenue Service and are, in effect, the regulations interpreting the corresponding nontax provisions of ERISA. However, the Department of Labor issues regulations on various subsidiary aspects of these provisions. These nontax are binding upon both the Department of Labor and the Treasury Department. Internal Revenue Service in carrying out their functions. In order to accommodate their respective interests, the Department of Labor and the Internal Revenue Service engage in extensive consultations with each other in the development of regulations and guidelines issued under these provisions.

In other instances, there is no mandate under ERISA for unified regulations under parallel tax and nontax provisions of the Act. In these cases, both agencies may promulgate regulations. The agencies have consulted about these regulations in order to achieve uniformity in the interpretation of similar statutory standards.

The consultations undertaken by the agencies have necessarily delayed the issuance of regulations and other guidelines. (On the other hand, less consultation would have markedly increased the chance of conflicting regulations and other guidance.) The intensity of this problem has diminished as the regulations and other guidelines have begun to be issued.

B. Plans Dealing With Both Agencies

Plans and plan sponsors have encountered duplication of expense and effort in connection with the annual reporting requirements for plans imposed by ERISA. The agencies were able to alleviate this problem somewhat by the development of a joint form. However, they experienced difficulty in arriving at a uniform filing date for the

annual report. Thus, plans and plan sponsors were faced for a time with the requirement of filing duplicate information with the two agencies and with different filing dates for the duplicate information.

The agencies ultimately resolved their differences and announced a uniform filing date for annual reports for 1977. (Internal Revenue Service News Release, IR–1819, May 24, 1977.) More important, the same announcement stated that the agencies have agreed that the annual reports for 1977 and subsequent years need be filed only with the Internal Revenue Service. The information filed with the Internal Revenue Service will be shared by the Service with the Department of Labor and the Pension Benefit Guaranty Corporation.

C. Plans Subject to Action by Both Agencies

The basic problems described above coalesce when a plan or plan sponsor must deal with both agencies with regard to a transaction concerning the plan. This multiple problem has occurred in connection with applications for exemption from the prohibited transaction provisions. Both the labor law and tax law titles of ERISA prohibit certain transactions with plans. Both titles also provide for administrative exemptions by the agencies. If a prohibited transaction with a qualified plan is contemplated, the practical effect is that an exemption must be considered by each agency. This has created the largest number of problems in connection with dual agency jurisdiction. Each agency independently examines the case to determine whether it is satisfied that an exemption should be issued. The result has been duplication of effort and extensive delays in the issuance or denial of exemptions, particularly where the agency have had difficulty agreeing upon the result in a particular case.

In some cases the agencies have issued class exemptions which dispose of numerous individual exemption requests. The agencies have also entered into an administrative agreement in an attempt to streamline the process. However, significant delays in the processing of exemption applications still exist.

V. JURISDICTION UNDER S. 901

A. Explanation of Provisions

Under the bill, the Internal Revenue Service would be given exclusive enforcement jurisdiction over all qualification requirements and funding requirements as they relate to pension, etc., plans. The present role of the Department of Labor in prescribing regulations under the qualification rules of the Code would be preserved. To enable the Service to protect employee rights under these plans (a role presently assigned to the Labor Department), the bill would provide the Service with the authority to institute a civil action to require compliance. This authority would be in addition to the tax sanctions that the Service can impose.

The bill would repeal the prohibited transactions penalty excise tax of the Internal Revenue Code, thus generally removing the Internal Revenue Service from the areas of fiduciary responsibility and prohibited transactions.[1] The Department of Labor would be given authority to impose a civil penalty against parties in interest who engage in prohibited transactions. The civil penalty is designed to be equivalent to the penalty excise tax on prohibited transactions presently imposed under the tax law (however, the tax is imposed annually, where the civil penalty is imposed only once for a particular transaction). To assist the Department of Labor in the exercise of its duties in the area of prohibited transactions, the bill would require the Secretary of the Treasury to notify the Secretary of Labor and the Attorney General whenever he believes that a violation of the prohibited transaction rules of ERISA has occurred.

B. Staff Analysis

(1) In General

By assigning to the Internal Revenue Service exclusive enforcement jurisdiction over all pension, etc., plan qualification requirements under the Code and ERISA, and funding matters involving pension, etc., plans, the bill would substantially reduce the possibility that the Service and the Labor Department both will have to consider whether a particular plan meets the requirements of ERISA. Similarly, by assigning to the Labor Department exclusive enforcement jurisdiction over the self-dealing rules for pension, etc., plans, the bill eliminates the necessity for both agencies to consider whether a particular transaction is prohibited under ERISA or should be granted an administrative exemption.

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[1] The bill would retain the provisions of pre-ERISA and present law (Sec. 503) which imposes a sanction of loss of exemption in the case of certain types of self-dealing with respect to governmental plans and with respect to church plans that have not elected to be subject to the standards of ERISA. The bill would also retain the provisions of present law (sec. 401(a)) which require that a tax-qualified pension, etc., plan be "for the exclusive benefit" of the employees or their beneficiaries.

(2) The Reorganization Act

The President has authority under the Reorganization Act to reassign the functions of the Treasury and Labor Departments in a manner that would substantially eliminate dual jurisdiction (unless either House of the Congress [2] disapproves the plan). Consequently, some believe that it would be advisable for the Congress to await the President's plan before proceeding to deal with dual jurisdiction legislatively. The staff understands that the Office of Management and Budget, the Treasury Department, and the Labor Department are presently studying solutions to the problems of dual jurisdiction under ERISA with a view to resolving these problems under the Reorganization Act.

(3) Qualification Requirements

In general.—The bill would assign to the Treasury exclusive jurisdiction over enforcement of the standards for plan qualification and funding. Under present law, the Treasury generally has jurisdiction to prescribe regulations under these standards, but certain qualification regulations are prescribed by the Department of Labor [3] because it was believed that the Department of Labor had greater expertise in those areas. The Treasury presently has exclusive jurisdiction over individual retirement accounts (other than certain group IRAs), special rules for H.R. 10 plans, and limits on benefits and contributions. Consequently, under the bill, a plan seeking qualification would deal only with the Treasury on most issues involving the qualification of a plan document under ERISA and the application of sanctions in the event qualification standards are not satisfied.

If the committee concludes that the qualification standards should be moved entirely to the jurisdiction of the Treasury Department, then it should modify the bill to provide that the Treasury Department would make the determinations in the subsidiary issues described in footnote 3, above.

A further question would arise in such a case with respect to the treatment of plans that are not tax-qualified. In 1973, this committee concluded that the new pension, etc., standards should apply only with respect to those deferred compensation arrangements for which tax benefits were sought. However, the Congress determined to apply the new standards to all deferred compensation plans (with certain exceptions), whether or not tax benefits were sought. If the committee agrees that the standards should also apply to nonqualified plans, then it may choose to have those standards applied by the Internal Revenue Service

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[2] Under the Reorganization Act, the President's reorganization plan would be referred to the Senate Committee on Governmental Affairs and the House Committee on Government Operations.

[3] For example, under present law, Labor Department regulations (1) define the term "hour of service" for participation and vesting purposes, (2) determine whether benefits may be suspended in the case of a former employee who returns to employment, and (3) restrict the computation of periods of participation for purposes of computing accrued benefits. In addition, the Labor Department (1) determines whether an agreement is a collective bargaining agreement for purposes of the coverage rules, (2) may permit retroactive plan amendments which reduce funding requirements, and (3) may extend the period a plan uses to amortize its liabilities under the funding standard. The Treasury enforces these standards by applying tax sanctions and the Labor Department enforces them by applying civil and criminal sanctions.

(notwithstanding the absence of tax benefits) or by the Department of Labor. Application by the Internal Revenue Service would avoid the necessity of two agencies being required to interpret the same statute, but would result in a diversion of Internal Revenue Service personnel from administration of the tax laws.

Separate agency.—It has been suggested by some that the problem of dual jurisdiction can be resolved by assigning jurisdiction over all pension-related matters to a new agency which would be a nontax agency. Under that approach, the new agency would certify to the Internal Revenue Service that a plan meets the requirements of ERISA. It appears, however, that the new agency approach would not end dual jurisdiction with respect to plan qualification because several of the plan qualification rules under ERISA incorporate tax rules which apply for nonpension purposes (e.g., determinations as to whether business entities are under common control). Also, concern has been expressed that if jurisdiction under ERISA is assigned to a new agency at this time, the transition will further disrupt the administration of pension, etc., and welfare plans because of changes in policy and personnel.[4] Concern has also been expressed that creation of a new agency would lead to yet another layer of bureaucracy in the pension area.

Also, under the rules for individual retirement accounts (IRAs) deductions are not allowed to a participant in a qualified pension plan. In addition, tax-free rollovers may be made to an individual retirement account only if the amount rolled over is a lump-sum distribution from a qualified plan. Consequently, if jurisdiction to determine the qualified status of a plan is assigned to a new nontax agency, the result would tend to be dual jurisdiction over IRAs.

Certification.—It has been argued that, in nonpension areas, the tax law permits the tax treatment of a transaction to depend upon certification by a nontax agency (e.g., the role of the Labor Department in certifying an "eligible employee" under the work incentive tax credit (sec. 50B(g)(1)(A)) or the role of the Department of Housing and Urban Development in approving the classification of urban renewal areas for purposes of rules defining a domestic building and loan association (sec. 7701(a)(19)(C)(vi)). It has been suggested, therefore, that certification by a nontax agency is appropriate under the pension rules. However, it appears that certification has, in the past, been limited to areas in which the Internal Revenue Service does not have extensive experience, where tax considerations taken into account by the nontax agency are not the predominant considerations, or where the amount of revenue at stake is relatively small. The Internal

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[4] It has been suggested that disruption due to changes in personnel could be minimized by transferring to the new agency those employees of the Internal Revenue Service, the Department of Labor, and the PBGC, who are presently engaged in administering ERISA. However, many of the employees at the Internal Revenue Service who administer ERISA also work on other tax matters and consider themselves "tax people" as well as "pension people". Consequently, it is likely that many of these employees, particularly those outside of the national office, would not wish to lose their tax expertise and would not transfer to the new agency.

Revenue Service has been deeply involved in the regulation of pension plans since 1942; it is estimated that the pension, etc., plan rules will result in a reduction of revenues of $11.5 billion for fiscal 1978, rising to $19.5 billion for fiscal 1982. Further, it is believed by many that tax considerations are a major inducement to the formation of pension, etc., plans. In the case of plans of professional corporations, tax considerations are generally the principal reason for establishing the plan and the tax treatment of the plan is generally the principal tax consideration.

The bill would remove nonqualified plans from the ERISA standards. The Committee may wish to consider extending these standards to nonqualified plans.

(4) Self-Dealing

The bill would assign exclusive jurisdiction over the nontax self-dealing rules under ERISA, including special rules for ESOP's, to the Labor Department. The self-dealing rules for governmental plans and certain church plans would continue to be administered by the Service. The Labor Department would retain exclusive jurisdiction of ERISA rules regulating fiduciary conduct, but the rule requiring that a qualified pension plan be for the exclusive benefit of employees or their beneficiaries would continued to be administered by the Internal Revenue Service.

Because ESOPs are designed to encourage ownership of employer stock by employees and are not retirement or welfare plans, the Committee may wish to consider assigning to the Treasury exclusive jurisdiction over ESOP regulations and enforcement of fiduciary and self-dealing rules relating to ESOPs.

Although the bill would substantially eliminate dual jurisdiction with respect to self-dealing and fiduciary conduct, it is not entirely clear whether such an act of self-dealing or a breach of the fiduciary rules could result in the disqualification of a plan under the Internal Revenue Code as well as nontax sanctions under rules administered by the Department of Labor. If disqualification could result, a plan seeking a ruling or exemption under the self-dealing or fiduciary rules would be required to deal with both the Labor Department and the Service. The Committee may wish to consider providing that the exclusive benefit rule of the Code is not violated by reason of self-dealing or fiduciary misconduct.[5]

Also, situations may arise under the bill (and present law) in which the same fact situation gives rise to a tax issue as well as a self-dealing or fiduciary issue. For example, if a company wishes to rent property from a pension plan for its employees, the company could apply to the Labor Department for an exemption from the self-dealing rules and also might be required to convince the Internal Revenue Service that

[5] The nontax rules of ERISA presently require that a plan be administered by a fiduciary for the exclusive purpose of (1) providing benefits to participants and their beneficiaries, and (2) defraying reasonable expenses of administering the plan (ERISA sec. 404(a)(1)(A)). Consequently, the elimination of the exclusive benefit rule under the Code would remove tax sanctions for violation of the rules but would not reduce the standard of care applicable to fiduciaries.

the rent is not unreasonably high.[6] Also, certain assignments or alienations of plan benefits are permitted under qualified plans if permitted under an exception to the self-dealing rules relating to loans to plan participants or beneficiaries. Consequently, the Internal Revenue Service could not approve a plan with an assignment provision until the Department of Labor finds that a self-dealing exemption applies.

(5) Funding

Under the tax law, a deduction is generally allowed for amounts which must be contributed by an employer to a qualified plan to satisfy the minimum funding standard of ERISA.[7] Consequently, agency decisions which interpret the provisions of the funding standard can have a significant revenue impact. The bill assigns jurisdiction over the provisions of the funding standard solely to the Treasury but preserves the authority of the Department of Labor to permit retroactive plan amendments and to extend amortization periods. The Committee may wish to consider assigning this authority to the Treasury. In addition, the bill would remove nonqualified plans from the funding standard; the Committee may wish to consider extending the funding standard provided by the Code to nonqualified plans.

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[6] Excessive rent could be paid in an effort to circumvent the tax law limits on deductions for contributions to pension, etc., plans. Therefore, the Internal Revenue Service may assert that a portion of the amounts paid by a company as rent is, in reality, a contribution to the plan, and that the deduction for that portion is limited by the pension rules. Similar problems arise where interest is paid to a plan by an employer or a plan purchases property from an employer at a bargain price.

[7] Deductions for compensation paid to an employee may be disallowed to the extent the compensation (including deferred compensation under a pension plan) is unreasonable.

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