OVERVIEW OF THE ENFORCEMENT AND ADMINISTRATION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Scheduled for a Hearing

Before the

SUBCOMMITTEE ON OVERSIGHT

of the

HOUSE COMMITTEE ON WAYS AND MEANS

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Prepared by the Staff

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INTRODUCTION

This document,[1] prepared by the staff of the Joint Committee on Taxation, provides an overview of present-law rules relating to the enforcement of the Federal laws relating to employer-provided pension and welfare benefits under the Employee Retirement Income Security Act of 1974 (ERISA). The House Ways and Means Subcommittee on Oversight has scheduled hearings on June 12-14, 1990, on the enforcement and administration of ERISA.

The first part of the document is a summary. The second part is a brief description of present-law Internal Revenue Code and labor law rules relating to employer-provided pension and welfare benefit plans. The third part discusses the allocation of ERISA enforcement responsibility between the Department of the Treasury and the Department of Labor. The fourth part is a brief discussion of issues relating to the enforcement and administration of ERISA.

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[1] This document may be cited as follows: Joint Committee on Taxation, Overview of the Enforcement and Administration of the Employee Retirement Income Security Act of 1974 (JCX-16-90), June 6, 1990.

I. SUMMARY

Employee Retirement Income Security Act of 1974

As enacted in 1974, the Employee Retirement Income Security Act of 1974 (ERISA) created a dual system of rules governing employer-provided retirement benefits and nonretirement benefits (referred to as welfare or employee benefits). Requirements affecting such plans were added to the Federal labor laws by Titles I and IV of ERISA and to the Internal Revenue Code (the Code) by Title II of ERISA. Together, the Code and labor law rules provide comprehensive and, at times, overlapping requirements for pension and employee benefit plans and for the persons who administer such plans. This dual system of regulation has continued with the enactment of subsequent legislation affecting pension and employee benefit plans.

Internal Revenue Code requirements

The Internal Revenue Code contains qualification requirements for plans of deferred compensation. Plans that satisfy these rules receive favorable tax treatment. The employer maintaining the plan is entitled to a current deduction (within limits) for contributions to a qualified plan. However, employees do not include benefits in income until the benefits are distributed even though the plan is funded and the benefits are nonforfeitable.

The Code does not contain extensive rules relating to the investment of qualified plan assets. However, in order for a plan to be qualified under the Code, a plan is required to provide that the assets of the plan be used for the exclusive benefit of employees and their beneficiaries. In addition, the Code contains rules prohibiting transactions between a plan and disqualified persons with respect to a plan that are designed to prevent certain parties related to a plan from misusing plan assets or engaging in transactions with the plan that are detrimental to plan participants. The prohibited transaction rules are not a plan qualification requirement. Rather, the Code imposes excise taxes on a disqualified person who engages in a prohibited transaction.

Unlike the pension area, the Code does not contain a comprehensive set of rules that apply to nonretirement employee benefit plans. The Code does provide that certain employer-provided benefits, such as health benefits, are excludable from employees' gross income if certain requirements are satisfied.

ERISA minimum standards and fiduciary requirements

Title I of ERISA contains minimum participation, vesting, accrual, and funding rules that are similar to certain of the Code qualification rules. In addition, Title I contains rules governing the conduct of fiduciaries of pension and employee benefit plans. ERISA has general rules relating to the standard of conduct of plan fiduciaries, and also specific rules prohibiting certain transactions between a plan and parties in interest with respect to the plan that are similar to the prohibited transaction rules in the Code. These rules generally apply to all pension and welfare plans, whether or not such plans are qualified under the Code. Plan participants as well as the Department of Labor may bring suit to enforce the Title I rules. Plan fiduciaries are personally liable under ERISA for any losses to a plan resulting from a breach of fiduciary duty. A court may also impose whatever equitable or remedial relief it deems appropriate for a violation of the fiduciary standards.

Termination insurance program and the PBGC

The Pension Benefit Guaranty Corporation (PBGC), a Federal corporation within the Department of Labor, was created by Title IV of ERISA in order to provide an insurance program for benefits under certain defined benefit pension plans maintained by private employers in the event a plan is terminated at a time when the plan does not have sufficient assets to provide benefits promised under the plan. The PBGC guarantees the payment of certain benefits in the event of the termination of a defined benefit pension plan with assets insufficient to satisfy benefit liabilities. The termination insurance program is financed in part by a per-participant premium charged with respect to participants in covered plans.

Reporting and disclosure requirements

Reporting and disclosure requirements generally apply under Title I of ERISA to all pension and welfare benefit plans established or maintained by an employer or employee organization engaged in, or affecting, interstate commerce. In general, the reporting rules require the plan administrator to provide certain information, including an annual report, to the Department of Labor, whereas the disclosure rules require certain information to be provided to plan participants. Title IV of ERISA requires reporting to the PBGC of certain information that relates to plan solvency and the termination process.

The Code requires an annual return to be filed with respect to each pension and employee benefit plan. In addition, the Code requires certain other information to be provided to the IRS and plan participants. For convenience, the annual return and report are made on a single set of forms, the IRS Form 5500 series, Annual Return/Report of Employee Benefit Plan. Information regarding the investments of the plan, including investments involving parties in interest, is required to be reported on Form 5500.

Allocation of responsibility for ERISA enforcement

In general, the pension and employee benefit plan provisions of the Code that have no counterpart in the labor laws are administered and enforced by the Department of the Treasury, just as any other tax provision. Similarly, the Department of Labor administers the provisions of ERISA that do not have counterparts in the Code.

The overlapping provisions of the labor laws and the Code create the need to coordinate the activities of the Treasury and Labor Departments. In general, the Treasury Department (the Internal Revenue Service (IRS)) has primary responsibility for the administration of the qualification standards (including those that have corresponding labor law provisions) and other Code rules relating to pension and employee benefit plans (e.g., deduction limitations).

The IRS has the authority to audit plans to determine if they are in compliance with the qualification rules. Such audits may also involve prohibited transaction issues. The IRS also monitors compliance with the qualification rules through the determination letter process. Through this process, an employer may request a determination from the IRS that the plan document meets the qualification requirements. A plan can receive a favorable determination and still fail to be qualified if there is a failure to comply with the qualification rules in the operation of the plan.

The Labor Department has primary authority with respect to the fiduciary rules and the reporting and disclosure rules of Title I. In addition, the authority to grant prohibited transaction exemptions under both the Code and Title I has been transferred to the Department of Labor.

The authority of the Department of Labor is exercised by various agencies within the Department. The Pension and Welfare Benefits Administration (PWBA) is responsible for enforcement of the provisions of Title I of ERISA, whereas the PBGC is responsible for enforcement of the termination insurance provisions of Title IV.

The Inspector General Act of 1978 established Offices of Inspector General (OIG) within various parts of the executive branch, including the Department of Labor. The OIG is intended as an overseer of the activities of the Department. The OIG has recently criticized the enforcement efforts of the Department of Labor. In response, the Department has suggested various legislative proposals to improve compliance and enforcement.

Issues

The effectiveness of the enforcement and administration of the Federal laws relating to employer-provided pension and employee benefit plans is dependent on a number of factors, including the following: (1) the extent to which plan participants are able to enforce their rights, (2) the interaction of the various Federal agencies involved in the enforcement of ERISA, (3) the staffing of enforcement activity within the appropriate Federal agencies, (4) the willingness of Federal administrators to assess civil or criminal penalties or tax-law penalties in appropriate situations, and (5) the extent to which self policing of the Federal laws should be expanded thorough use of independent public accountants responsible for audits of pension and employee benefit plans.

II. PRESENT-LAW RULES

A. Background

As enacted in 1974, the Employee Retirement Income Security Act of 1974 (ERISA) created a dual system of rules governing employer-provided retirement benefits and nonretirement benefits (referred to as welfare or employee benefits). Requirements affecting such plans were added to the Federal labor laws by Titles I and IV of ERISA and to the Internal Revenue Code (the Code) by Title II of ERISA. Together, the Code and labor law rules provide comprehensive and, at times, overlapping requirements for pension and employee benefit plans, and for the persons who administer such plans. This dual system of regulation has continued with the enactment of subsequent legislation affecting pension and employee benefit plans.

In general, the Code contains rules with which employers must comply in order to obtain favorable tax treatment for (1) the employer sponsoring the plan, (2) the trust holding plan assets, and (3) the employees covered under the plan. Plans that satisfy these rules are referred to as qualified plans. Titles I and IV of ERISA contain rules that apply to most pension and welfare plans, whether qualified under the Code rules or not. ERISA provides for civil and, in some cases, criminal penalties for failure to comply with the Title I and IV rules.

With respect to pension plans, the Code contains qualification standards that must be satisfied in order for the plan to receive favorable tax treatment, as well as rules governing the taxation of benefits provided under qualified plans. The Code does not contain a single set of comprehensive rules applicable to nonretirement employee benefits, such as health and life insurance benefits. Rather, the Code includes various provisions containing rules that must be satisfied in order for an employee to receive special tax treatment for particular benefits.

Title I of ERISA contains minimum standards for pension plans that mirror certain of the Code's qualification rules and also contains rules that govern the conduct of fiduciaries of employee pension and benefit plans. Title IV of ERISA provides for the Federal insurance of defined benefit pension plans and contains procedures for termination of such plans.

Both the Code and labor law provisions of ERISA contain requirements regarding the provision of plan information to Federal agencies and plan participants. Most of these requirements are contained in the reporting and disclosure provisions of Title I of ERISA. The Code also contains some separate reporting and disclosure requirements. Finally, Title IV of ERISA requires the reporting of certain information that can affect the initiation of the plan termination process.

B. Internal Revenue Code Requirements

Retirement plan requirements[2]

Qualification requirements and related rules

A plan of deferred compensation that meets the qualification standards (a qualified plan) of the Code is accorded special tax treatment under present law. The employer maintaining the plan is entitled to a current deduction (within limits) for contributions to a qualified plan even though an employee is not required to include qualified plan benefits in income until the benefits are distributed from the plan, and the trust holding plan assets generally is not subject to tax.

The qualification standards and related rules governing qualified plans are generally designed to ensure that qualified plans benefit an employer's rank-and-file employees as well as the employer's highly compensated employees. They also define the rights of plan participants and beneficiaries and provide limits on the tax deferral possible under qualified plans.

The qualification rules include minimum participation rules that limit the age and service requirements an employer can impose as a requirement of participation in a plan; coverage and nondiscrimination rules designed to prevent qualified plans from discriminating in favor of highly compensated employees; vesting and accrual rules which limit the period of service an employer can require before an employee earns or becomes entitled to a benefit under a plan; limitations on the contributions and benefits of a plan participant; and minimum funding rules designed to ensure the solvency of defined benefit pension plans. The Code also contains rules regarding the taxation of qualified plan benefits, the deduction of employer contributions to qualified plans, and terminations of qualified plans.

The Code does not have extensive rules relating to the investment of qualified plan assets. The Code does require, however, that prior to the termination of a qualified plan no

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2 For a detailed description of the Internal Revenue Code rules relating to qualified retirement plans, see Joint Committee on Taxation, Present-Law Tax Rules Relating to Qualified Pension Plans (JCS-9-90), March 22, 1990.

part of the assets of the plan may be used for or diverted to purposes other than for the exclusive benefit of the employees covered by the plan and their beneficiaries. This provision is designed to prohibit objects or aims not solely for the proper satisfaction of all liabilities to employees or beneficiaries covered by the plan.

In addition, to prevent plan fiduciaries and others closely associated with a plan from misusing plan assets, the Code prohibits certain transactions between a plan and a disqualified person (prohibited transactions). A disqualified person includes any fiduciary, a person providing services to the plan, an employer any of whose employees are covered by the plan, an employee organization any of whose members are covered by the plan, and certain persons related to such disqualified persons. Transactions prohibited include (1) the sale or exchange, or leasing of property between the plan and a party in interest, (2) the lending of money or other extension of credit between the plan and a party in interest, (3) the furnishing of goods, services, or facilities between the plan and a party in interest, and (4) the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

The Code also contains rules designed to prevent a fiduciary from self dealing with respect to plan assets. Thus, it is a prohibited transaction for a fiduciary to (1) deal with plan assets in his or her own interest or for his or her own account, or (2) receive any consideration from any party dealing with a plan in connection with a transaction involving plan assets.

The Code contains a number of statutory exemptions to the prohibited transaction rules. For example, the Code permits a plan to make loans to participants and beneficiaries if certain requirements are satisfied. The Code also permits the Secretary of the Treasury to grant exemptions from the prohibited transaction rules on a case-by-case basis. The Secretary may grant an exemption for a particular transaction, for example, where a plan wishes to acquire a particular building from the employer sponsoring the plan, or may grant an exemption for a class of transactions that has certain common characteristics. The Secretary of the Treasury may not grant an exemption unless he or she finds that the exemption is administratively feasible, is in the interests of the plan and its participants and beneficiaries, and is protective of the rights of participants and beneficiaries of the plan. Exemptions granted by the Secretary do not apply to the self-dealing rules. The authority of the Secretary of the Treasury to grant administrative exemptions to the prohibited transaction rules has been transferred to the Secretary of Labor.

The minimum participation, vesting, accrual, and funding rules of the Code are also in Title I of ERISA. Title I also contains prohibited transaction rules that are similar, but not identical, to the prohibited transaction rules of the Code.

Sanction for failure to meet qualification rules

If a plan fails to meet the qualification standards, then the special tax benefits for qualified plans do not apply, and benefits and contributions are taxed under normal income tax rules. In general, if a plan fails to meet the qualification standards, then (1) contributions to the plan are includible in employees' gross income when such contributions are no longer subject to a substantial risk of forfeiture, (2) amounts actually distributed or made available to an employee are generally includible in income in the year distributed or made available under the rules applicable to the taxation of annuities, and (3) the trust under the plan loses its tax-exempt status. A special sanction applies with respect to the failure to meet certain qualification rules.

Sanction for violations of prohibited transaction rules

The Code imposes a two-tier excise tax on prohibited transactions. The initial-level tax is equal to 5 percent of the amount involved with respect to the transaction. In any case in which the initial tax is imposed and the prohibited transaction is not corrected within a certain period, a tax equal to 100 percent of the amount involved may be imposed. Each disqualified person engaging in the prohibited transaction (other than a fiduciary acting as such) is jointly and severally liable for the excise taxes. The Secretary of the Treasury has authority to waive the second-tier tax.

For purposes of determining the amount of the excise tax, the amount involved means the greater of the amount of money and the fair market value of other property given or the amount of money and the fair market value of other property received. For example, if a disqualified person obtains a one-year loan from a plan at an interest rate of 6 percent, and the fair market value of the use of the fund is 10 percent, the amount involved is 10 percent times the amount of the loan.

To correct a prohibited transaction means to undo the transaction to the extent possible. In any event, the plan must be placed in a financial position not worse than if the disqualified person had acted under the highest fiduciary standards.

Employee benefit plan rules

Unlike the pension area, the Code does not contain a comprehensive set of rules that apply to nonretirement employee benefit plans. The Code does provide that certain employer-provided benefits, including employer-provided health benefits, group-term life insurance, dependent care assistance, group legal assistance, and educational assistance, are excludable from employees' gross income if certain requirements are satisfied. The employer providing these or other employee benefits is generally entitled to deduct the value of the benefits as compensation.

The Code provides separate dollar limits on the annual exclusions for dependent care assistance ($5,000), educational assistance ($5,250), group-term life insurance ($50,000 of coverage), and group legal assistance ($70 of coverage). The Code also imposes separate nondiscrimination rules with respect to self-insured medical reimbursement plans and the other types of benefit plans described above. Other nondiscrimination rules may apply if the benefits are provided through a cafeteria plan, that is, a plan under which the employee has the choice of receiving cash or a nontaxable benefit. In general, the failure to satisfy the nondiscrimination and other applicable rules results in a loss of the income exclusion.

The Code permits certain employee benefits to be prefunded, within limits, through a welfare benefits fund, such as a voluntary employees' beneficiary association (VEBA) (Code secs. 419 and 419A). These rules generally apply to disability benefits, medical benefits, severance pay benefits, and life insurance benefits. The limits on deductions do not apply to plans maintained by more than 10 employers.

C. ERISA Minimum Standards and Fiduciary Requirements

In general

Title I of ERISA contains provisions designed to protect participants and beneficiaries of employee benefit plans. Both pension benefit plans and welfare benefit plans (e.g., employer-provided health plans) are subject to ERISA regardless of whether the plans satisfy any additional requirements under the Internal Revenue Code.

Certain plans are not subject to these requirements including: (1) governmental plans; (2) certain church plans; (3) plans established solely to comply with workers' or unemployment compensation, and disability insurance laws; (4) plans maintained outside the United States for the benefit of persons substantially all of whom are nonresident aliens; and (5) unfunded excess benefit plans (i.e., plans that provide benefits solely in excess of those that can be provided under the Code's limitations on contributions and benefits).

Minimum standards

Title I of ERISA contains minimum participation, vesting, benefit accrual, and funding standards that mirror those in the Code.

Fiduciary rules

Title I of ERISA contains rules governing the standard of conduct of plan fiduciaries. In general, these rules are designed to ensure that fiduciaries act in the interests of plan participants. A fiduciary is generally defined as a person who, with respect to a plan (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of plan assets, (2) renders investment advice with respect to plan assets for a fee or other compensation, or (3) has discretionary authority with respect to the administration of the plan.

The general fiduciary standard under Title I requires that a plan fiduciary discharge his or her duties with respect to a plan (1) solely in the interest of the plan participants and beneficiaries, (2) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable administrative expenses of the plan, (3) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and (4) in accordance with the documents and instruments governing the plan to the extent such documents and instruments are consistent with ERISA.

The prudence requirement is the basic rule governing the standard of conduct of plan fiduciaries, and it is against this rule that actions of plan fiduciaries are generally tested. The prudence standard charges fiduciaries with a high degree of knowledge. The standard measures the decisions of plan fiduciaries against the decisions that would be made by experienced investment advisers.

Title I also generally requires that plan fiduciaries diversify the investments of the plan so as to minimize the risk of large losses, unless it is clearly prudent under the circumstances not to do so.

In addition to those plans that are exempt from ERISA generally, (1) unfunded deferred compensation plans covering only management or highly compensated employees (so-called top hat plans), and (2) certain plans relating to the liquidation of a partnership interest of a deceased or retired partner, are specifically exempt from the fiduciary rules. Exceptions to the fiduciary standards (including the diversification requirement) also apply in the case of certain types of plan assets.

In order to prevent persons with a close relationship to a plan from using that relationship to the detriment of plan participants and beneficiaries, ERISA's fiduciary rules, in a manner similar to the rules contained in the Code, prohibit certain transactions between a plan and a party in interest. It is a breach of fiduciary duty for a fiduciary to cause a plan to engage in a transaction if the fiduciary knows or should know that the transaction is a prohibited transaction.

Enforcement of Title I minimum standards and fiduciary rules

In general

Title I provides for civil and, in some cases, criminal actions to enforce the minimum standards and fiduciary rules.[3]

The Secretary of Labor, participants, beneficiaries, and fiduciaries are generally authorized to bring civil actions to enforce ERISA. Such a suit may, for example, seek injunctive relief to enjoin or require action prohibited or required under ERISA, as the case may be, or to seek damages caused by a breach of fiduciary duty.

Civil penalties

Liability for breach of fiduciary duty.-- A fiduciary who breaches any of the duties imposed on fiduciaries by ERISA is personally liable to the plan for any losses resulting from the breach. A fiduciary may be required to restore to the plan any profits the fiduciary made through use of plan assets. A court may impose whatever additional equitable or remedial relief it deems appropriate, including removal of the fiduciary.

The Omnibus Reconciliation Act of 1989 added a new civil penalty provision to ERISA. Under this provision, a penalty equal to 20 percent of the amount recovered as a result of a settlement agreement or a judicial proceeding involving a breach of fiduciary duties under ERISA is imposed on a fiduciary or any other person who knowingly participated in

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[3] These remedies may also apply in some cases to violations of the reporting and disclosure requirements of Title I of ERISA. Specific sanctions for failure to comply with these rules are discussed below.

such a breach. The Secretary of Labor may waive or reduce the penalty in certain circumstances and the penalty is reduced by any penalty imposed under the prohibited transaction provisions of the Code or Title I of ERISA.

Penalty for violation of prohibited transaction rules.--In the case of a plan to which the prohibited transaction rules of the Code do not apply, the Secretary of Labor may assess a civil penalty against a party-in-interest engaging in the transaction. The penalty may not exceed 5 percent of the amount involved (as defined under the Code), for each year during which the failure exists. If the failure is not corrected within a specified period, the penalty may be increased to 100 percent of the amount involved.

Participant actions.--Participants and beneficiaries generally may commence a civil action in order to: (1) obtain relief from a failure of a plan administrator to respond to a request for information required to be provided under Title I; (2) obtain relief under the ERISA provision that imposes personal liability on fiduciaries who breach their responsibilities, duties, or obligations under Title I; (3) recover benefits due under the terms of the plan or enforce rights under the terms of the plan; (4) enjoin any act or practice that violates Title I or the terms of the plan; or (5) obtain other equitable relief to redress practices that violate Title I or the terms of the plan or enforce Title I or the terms of the plan.

Fiduciary actions.--In general, a fiduciary may bring a civil action in order to: (1) obtain appropriate relief relating to a breach of fiduciary duties; (2) enjoin any act or practice that violates Title I or the terms of the plan; or (3) redress practices that violate Title I or the terms of the plan, or enforce Title I or the terms of the plan.

Department of Labor actions.-- In general, the Department of Labor may bring a civil action in order to: (1) obtain appropriate relief relating to a breach of fiduciary duties; (2) enjoin any act or practice that violates Title I or the terms of the plan; (3) redress (except as otherwise provided in Title I) practices that violate Title I or the terms of the plan, or enforce Title I or the terms of the plan; and (4) collect any civil penalty imposed under Title I.

Criminal penalties

ERISA provides criminal penalties with respect to any person who interferes with the rights of plan participants and beneficiaries in certain ways or who willfully violates the reporting and disclosure requirements of Title I.

D. Termination Insurance Program and the Pension Benefit Guaranty Corporation

In general

The Pension Benefit Guaranty Corporation (PBGC), a Federal corporation within the Department of Labor, was created in 1974 by ERISA in order to provide an insurance program for benefits under certain defined benefit pension plans maintained by private employers in the event a plan is terminated at a time when the plan does not have sufficient assets to provide benefits promised under the plan. Thus, the PBGC guarantees the payment of certain benefits in the event of the termination of a defined benefit pension plan with assets insufficient to satisfy benefit liabilities. The plan termination may be voluntary (by the employer) or involuntary (by the PBGC).[4] A termination by an employer can be either a standard or a distress termination.

Covered plans

The PBGC insures most tax-qualified defined benefit pension plans established or maintained by an employer (or employee organization) engaged in commerce or in any industry or activity affecting commerce. Plans that are not insured by the PBGC include (1) defined contribution plans, (2) plans maintained by the Federal government or by State or local governments, (3) plans maintained by churches, and (4) plans established and maintained by a professional service employer that does not at any time have more than 25 active participants.

Guaranteed benefits

Subject to limits, the PBGC guarantees basic benefits under a covered plan. With respect to single-employer defined benefit pension plans, basic benefits consist of nonforfeitable retirement benefits other than those benefits that become nonforfeitable solely on account of the termination of the plan. Guaranteed benefits are limited to basic benefits of $750 per month adjusted for inflation since 1974 ($2,164.77 for 1990). Guarantees generally do not apply with respect to benefits in effect for fewer than 60 months at the time of plan termination and, in cases in which such benefits are guaranteed, the guarantee generally is phased in

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[4] The PBGC can commence a termination of a plan if the plan (1) does not satisfy minimum funding requirements, (2) cannot pay benefits when due, (3) makes certain distributions to substantial owners, or (4) is in such a condition that the long-run loss to the PBGC is expected to increase unreasonably unless the plan is terminated.

over 5 years.

The PBGC is authorized under ERISA to guarantee the payment of other classes of benefits (i.e., nonbasic benefits) and to establish the terms and conditions under which such other benefits are guaranteed. To date, the PBGC has not exercised this authority.

PBGC premiums

In order to cover the cost of PBGC guarantees, premiums are imposed with respect to covered plans. A flat-rate PBGC premium of $16 per-participant applies to single-employer defined benefit pension plans. An additional variable-rate per-participant premium based on a plan's funded status is imposed in an amount equal to $6 per $1,000 of the plan's unfunded vested benefits divided by the number of participants, with a maximum per-participant additional premium of $34 (i.e., a total possible premium of $50). Special rules apply with respect to the interest rate used to value unfunded vested benefits.

Termination procedures

A defined benefit pension plan is generally considered terminated when it is voluntarily terminated by the employer or involuntarily terminated by the PBGC. A plan may be terminated voluntarily only in a standard or distress termination.

A standard termination is permitted only if the plan has sufficient assets to satisfy benefit liabilities under the plan. Benefit liabilities are, in general, all fixed and contingent liabilities to plan participants and beneficiaries earned as of the date of the termination of the plan (i.e., those liabilities described in Code sec. 401(a)(2)).

A plan may be terminated in a distress termination only if the plan lacks sufficient assets to satisfy benefit liabilities and the employer meets certain requirements relating to financial distress. In the case of a distress termination, the PBGC will generally take responsibility for payment of benefits under the plan.

A plan may be terminated in a standard termination if: (1) the plan administrator provides 60-day advance notice of the intent to terminate to plan participants and other affected parties; (2) as soon as practicable after the 60-day notice is provided, the plan administrator (a) sends to the PBGC an actuarial certification that the plan has sufficient assets to cover benefit liabilities and certain other information, and (b) notifies each participant and beneficiary of their share of benefit liabilities; and (3) the PBGC does not issue a notice of noncompliance with regard to the termination.

The PBGC is authorized to issue a notice of noncompliance if it determines that the standard termination procedures have not been satisfied or that the plan's assets are not sufficient to meet benefit liabilities. The PBGC has 60 days after the plan administrator notifies the PBGC of the proposed termination to issue a notice of noncompliance. This 60-day period may be extended by written agreement of the plan administrator and the PBGC.[5]

If the PBGC does not issue a notice of noncompliance, the plan administrator is to proceed as soon as practicable with the final distribution of plan assets. In distributing plan assets, the plan administrator is to follow certain rules relating to the allocation of plan assets. Further, the plan administrator is required to purchase irrevocable commitments from an insurer to provide for all benefit liabilities under the plan or (in accordance with the provisions of the plan and any regulations) otherwise fully provide all benefit liabilities under the plan (e.g., pay a lump sum amount to a participant provided payment in such form is otherwise permitted under the Code and ERISA).

Within 30 days after the final distribution of assets is completed, the plan administrator certifies to the PBGC that the plan's assets have been distributed to pay all benefit liabilities under the plan.

E. Internal Revenue Code and ERISA Reporting and Disclosure Requirements[6]

<u>In general</u>

Reporting and disclosure requirements generally apply under Title I of ERISA to all pension and welfare plans established or maintained by an employer or employee organization engaged in, or affecting, interstate commerce. Governmental plans, certain church plans, plans maintained outside the United States for the benefit of persons substantially all of whom are nonresident aliens, and excess benefit plans (which provide benefits in excess of those permitted under the Code's limitation on contributions and

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[5] In the event that the PBGC determines that a possible fiduciary breach has occurred with respect to a plan that is terminating, the PBGC refers the case to the Pension and Welfare Benefits Administration (PWBA) in the Department of Labor.

[6] This is a general description of some of the major requirements. Other requirements may also apply.

benefits) are among the type of plans that are exempt from the reporting and disclosure requirements. In general, the reporting rules require the plan administrator to provide certain information to governmental agencies, whereas the disclosure rules require certain information to be provided to plan participants.

The Code requires all tax-exempt organizations, including pension plans, to file an annual return with the IRS. Additional information requirements are also imposed by the Code.

Title IV of ERISA requires the reporting of certain information that relates to plan solvency and the termination of plans subject to Title IV.

Reporting requirements; annual returns

Plan administrators are required to file an annual report with the Department of Labor and the Pension Benefit Guaranty Corporation and annual returns with the Internal Revenue Service. To ease the burden of complying with the various reporting requirements, a single set of forms is filed with the Internal Revenue Service Center for the area in which the principal office of the plan sponsor or plan administrator is located. In general, the annual return is filed and the annual report is made on an IRS Form 5500, Annual Return/Report of Employee Benefit Plan.

All plans subject to the reporting and disclosure provisions are required to file an annual report with the Secretary of Labor. The annual report generally includes audited financial statements prepared by an independent qualified public accountant, which include a statement of assets and liabilities and a statement of changes in net assets available for plan benefits, including details as to revenues and expenses and other changes aggregated by general source and application. The audited financial statement is to include the opinion of the independent public accountant as to whether the statements and schedules in the report are presented fairly and in conformity with generally accepted accounting principles. The opinion is not required with respect to statements prepared by banks, insurance carriers, and similar institutions. The audit presently required under ERISA is often referred to as a limited-scope audit because of this limitation.

In addition to the audited financial statement, the annual report includes a statement on separate schedules showing, among other things, a statement of plan assets and liabilities aggregated by categories, a statement of receipts and disbursements, a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessee, and a schedule of each transaction involving a person known to be a party in interest. In addition, the annual report is required to include a schedule of all loans and leases in default at the end of the year or which are classified during the year as uncollectible. The annual report also includes a schedule listing each transaction that exceeds 3 percent of the value of the fund.

The annual report is to include an actuarial statement for all pension plans subject to the minimum funding requirements. This statement is to include the funded status of the plan, if the plan's assets are less than 60 percent of plan liabilities. If plan benefits are purchased from, and guaranteed by, an insurance company, the annual report is to include the premiums paid, benefits paid, charges for administrative expenses, commissions, and other information.

The annual report for a plan is filed within 210 days after the close of the plan year.

If a plan merges, consolidates, or transfers assets or liabilities, the plan administrator must file an actuarial statement of valuation, not less than 30 days before the merger, etc., demonstrating that the vested benefits of plan participants will be protected.

A plan administrator is required to file a registration statement with the Internal Revenue Service whenever an employee separates from service with deferred vested benefits. This statement is required to include the name of the plan, the name and address of the plan administrator, the name and social security number of each participant in the plan who separated from service during the plan year with vested deferred benefits if the participant did not receive any benefits during the year. This registration statement is provided to the Department of Health and Human Services and is designed to ensure that individuals applying for social security benefits will be reminded of their rights to pension benefits from a former employer.

<u>Disclosure to plan participants</u>

Under Title I of ERISA, each administrator of an employee benefit plan is required to furnish to each plan participant and to each beneficiary a summary plan description written in a manner calculated to be understood by the average plan participant or beneficiary.[7] The summary is to include important plan provisions, names and addresses

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[7] This description is also required to be filed with the Department of Labor within 120 days after the plan becomes subject to the reporting and disclosure requirements of ERISA.

of persons responsible for plan investment or management, a description of benefits, the circumstances that may result in disqualification or ineligibility and the procedures to be followed in presenting claims for benefits under the plans.

Summary plan descriptions are required to be furnished to participants within the later of 120 days after the plan is established or 90 days after an individual becomes a participant. Updated plan descriptions are also to be provided to participants every 5 years thereafter if there have been plan amendments in the interim; in any case, a new description is to be provided every 10 years. The annual report and plan documents must be available for examination by participants or beneficiaries at the principal office of the plan administrator and such other places as necessary to provide reasonable access to these reports and documents.

In addition, plan participants are required to receive descriptions of material changes in a plan within 210 days after the end of any plan year in which the material change occurs.

Upon the request of a plan participant or beneficiary, a plan administrator is to furnish on the basis of the latest available information the total benefits accrued and the nonforfeitable pension benefit rights, if any, which have accrued. No more than one request may be made by any participant or beneficiary for this information during any one 12-month period.

A plan administrator is also required to provide plan participants and beneficiaries in pay status with a summary annual report containing basic financial information and a description of participants' rights to additional information.

While the major disclosure rules are in Title I of ERISA, the Code also requires the provision of information to plan participants in certain cases. For example, the Code requires the plan administrator to provide a written explanation of the rollover rules when making a distribution some or all of which may be rolled over to an IRA or another tax-qualified plan.

Reporting requirements relating to the PBGC

Under Title IV of ERISA, the PBGC is to receive notice from a plan administrator, the Secretary of the Treasury, or the Secretary of Labor upon the occurrence of certain events.

Within 30 days after the plan administrator knows or has reason to know that certain events have occurred, the plan administrator is required to notify the PBGC. A reportable event occurs with respect to a defined benefit pension plan in the following situations: (1) when the Secretary of the Treasury determines that the plan is not a qualified plan, or the Secretary of Labor determines that the plan is not in conformance with the labor law provisions of ERISA, (2) when a plan amendment is adopted if, under such amendment, the benefit payable under the plan to any participant may be reduced, (3) when there has been a significant reduction in the number of participants under the plan, (4) when the Secretary of the Treasury has determined that a termination or partial termination of the plan has occurred, but the occurrence of such termination does not require the termination of the plan under the PBGC provisions of ERISA, (5) when the plan fails to meet the minimum funding requirements, (6) when the plan is unable to pay benefits when due, (7) in the case of certain distributions to participants who are substantial owners of the employer, or (8) when there has been a merger or consolidation of the plan or other transfer of plan assets. The PBGC is authorized to designate additional reportable events.

The Secretary of the Treasury is required to report to the PBGC in the event a plan fails to be qualified, fails to meet the funding requirements, or is terminated (partially or otherwise).

The Secretary of Labor is required to report to the PBGC in the event a plan fails to meet the labor law requirements of ERISA, fails to meet the funding requirements, or when there has been a merger, consolidation or has otherwise been a transfer of plan assets.

In addition, the PBGC is to be notified by the Secretary of the Treasury or the Secretary of Labor whenever any other event occurs that indicates that the plan may not be sound.

Under the Code and Title I of ERISA, an employer is required to notify the PBGC of a failure to make a contribution required by the minimum funding rules. The notice is required within 10 days of the failure.

Penalties for failure to comply with reporting and disclosure rules

Penalties under Title I of ERISA

A penalty of up to $1,000 per day may be assessed by the Department of Labor for failure to file an annual report. A plan administrator who fails to provide information required to be provided at the request of a plan participant or beneficiary may, at the court's discretion, be personally liable to the participant or beneficiary for up to $100 per day from the date of such refusal. As noted above, plan participants and the Department of Labor may bring suit to force compliance with the reporting and disclosure rules.

Title I of ERISA also provides for the imposition of criminal penalties for willful failure to comply with the reporting and disclosure rules. The penalty is a maximum fine of $5,000 or imprisonment for a maximum of one year, or both. In the case of a violation by a person not an individual, the maximum fine is $100,000.

Internal Revenue Code penalties

The penalty for failure to file the annual return required by the Code is $10 per day during the duration of the failure, up to a maximum of $5,000. This penalty is separate from the penalty imposed under Title I for failure to file the annual report with the Department of Labor.

The penalty for failure to file registration statements is $1 per participant with respect to whom there is a failure, multiplied by the number of days the failure exists, up to a maximum for any plan year of $5,000. Other penalties may apply in the case of failures to provide other returns or reports required by the Code.

Penalties with respect to reporting to the PBGC

The PBGC is authorized under Title IV of ERISA to assess a penalty against any person who fails to provide information required to be provided to the PBGC under ERISA. The penalty is not to exceed $1,000 per day for each day for which the failure continues.

III. ALLOCATION OF RESPONSIBILITY FOR ERISA ENFORCEMENT

A. Allocation of Responsibility Between the Department of the Treasury and the Department of Labor

<u>In general</u>

The pension and employee benefit plan provisions of the Code that have no counterpart in the labor laws are administered by the Department of the Treasury, just as is the case with any other tax provision. Similarly, the Department of Labor administers the provisions of ERISA that do not have counterparts in the Internal Revenue Code.

The overlapping provisions of the labor laws and the Internal Revenue Code enacted as part of ERISA created the need to coordinate the activities of the Treasury and Labor Departments. In some cases, the Congress recognized this need by specifying by statute the agency responsible for promulgating regulations under the duplicative provisions. ERISA's procedural and administrative provisions also addressed this need by providing for certain procedures in the case of requests for determination letters regarding the qualified status of a plan, plan disqualification due to certain provisions that are in both the labor and tax laws, and prohibited transactions. ERISA also generally provided that, to the extent the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter, they are to consult with each other and develop rules, regulations, practices, and forms which are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries.

In 1978, the Administration issued Reorganization Plan No. 4 (the ERISA Reorganization Plan), which addresses areas in which both the Treasury Department and the Labor Department have jurisdiction under ERISA. The purpose of the Reorganization Plan is to clarify the jurisdiction of each Department in order to avoid administrative delay and to facilitate the enforcement of ERISA.

The need to coordinate enforcement has continued and grown since the enactment of ERISA as the duplicative provisions are amended, or as new provisions are added to both the Internal Revenue Code and the labor laws. For example, the joint and survivor rules added by the Retirement Equity Act of 1984, the health care continuation rules added by the Consolidated Omnibus Reconciliation Act of 1985, and the pension funding changes enacted by the Pension Protection Act of 1987, contain provisions that appear in both the tax and labor laws. In some cases the legislation deals with the issue of overlapping jurisdiction by assigning responsibility to one department or another or providing for coordination between the two.

Plan qualification standards and other tax rules

In general, the Treasury Department (Internal Revenue Service) has primary responsibility for the administration of the qualification standards (including those that have corresponding labor law provisions) and other Internal Revenue Code rules (e.g., deduction limitations) relating to pension and employee benefit plans. The qualification rules are enforced through the determination letter process as well as the audit process. The determination letter process is intended to identify failures to satisfy the qualification standards in the design of a plan, whereas the audit process identifies failures to qualify in the operation of the plan. Other tax rules relating to employee benefit plans are enforced through the usual audit mechanism. An example of the IRS audit process is the recent auditing of employers in order to identify those who made excessive deductions to defined benefit pension plans based on unreasonable actuarial assumptions. Because the primary purpose of the IRS is the collection of tax revenues, the IRS audit mechanism tends to focus on factors that affect revenues, rather than on participant rights.

ERISA provides for some involvement by the Department of Labor in the determination letter process. The Secretary of Labor may comment on the request for determination on behalf of plan participants in some circumstances. In addition, the Secretary of the Treasury is required to notify the Secretary of Labor upon the issuance of a favorable determination letter. The Secretary of the Treasury is also generally required to notify the Secretary of Labor when the Secretary of the Treasury issues a notice of intent to disqualify a plan due to the failure to satisfy the minimum participation and vesting standards that are in both the tax and labor laws. Under the ERISA Reorganization Plan, the Secretary of the Treasury is also generally required to notify the Secretary of Labor before issuing a notice of intent to disqualify a plan for violation of the exclusive benefit rule.

Fiduciary rules and prohibited transactions

The Department of Labor has primary authority with respect to the fiduciary rules. Under the ERISA Reorganization Plan, the Department of Labor has the authority to grant prohibited transaction exemptions with respect to the prohibited transaction rules of both the Code and the labor law provisions of ERISA. Thus, the Department of Labor has significant administrative authority with respect to such provisions. This authority does not, however, affect the authority of the Treasury Department with respect to the excise taxes on prohibited transactions. Thus, the Treasury Department also has responsibility for prohibited transaction issues.

Reporting and disclosure

The Department of Labor has primary responsibility for the enforcement of the Title I reporting and disclosure rules.

B. Agencies Within the Department of Labor

Pension and Welfare Benefits Administration

The Pension and Welfare Benefits Administration (PWBA) is an agency within the Department of Labor. The PWBA is responsible for enforcement of the provisions of Title I of ERISA, including the fiduciary rules and the reporting and disclosure rules. The activities of the PWBA largely involve civil cases. If voluntary compliance is not appropriate, civil cases are referred to the Solicitor of Labor's office. Criminal cases are referred to the United States Attorney's Office for prosecution.

Pension Benefit Guaranty Corporation

The Pension Benefit Guaranty Corporation (PBGC), a corporation within the Department of Labor, was established by ERISA to carry out the termination insurance provisions of Title IV of ERISA. The board of directors of the PBGC consists of the Secretary of Labor (chairman), the Secretary of the Treasury, and the Secretary of Commerce. Among its other powers, the PBGC has the authority to bring suit to enforce the termination insurance provisions.

Office of Inspector General

The Inspector General Act of 1978 established Offices of Inspector General (OIG) within various parts of the executive branch, including the Department of Labor. As stated in the Inspector General Act, the general purpose of the OIG within each named establishment is (1) to conduct and supervise audits and investigations relating to programs and operations of the affected agency, (2) to provide leadership and coordination and recommend polices for activities designed to promote economy, efficiency, and effectiveness of the administration of, and to prevent and detect fraud and abuse in, such programs and operations, and (3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action. The proper scope of authority of the OIG has recently been the subject of dispute. In particular, the OIG has indicated interest in pursuing criminal actions for violations of ERISA, while the Department of Justice has taken the position that such actions are generally outside the scope of the OIG's authority.

C. Recent Department of Labor Enforcement Activity

General enforcement action

There has been significant recent attention on the adequacy of the present-law ERISA enforcement structure and the Department of Labor enforcement action. In part, this attention has been due to recent reports and testimony before Congressional committees by the Office of the Inspector General (OIG). The Inspector General has likened the vulnerabilities that could exist undetected in the private pension system to the problems in the savings and loan industry. His concerns are due in part to the lack of sufficient auditing of employee benefit plans. While indicating that a crisis in the pension system is not current, the Acting Inspector General has continued to hold the view that similarities between the two situations do exist and should be addressed. This position has been criticized by some as inaccurate and misleading.

In the Semiannual Report for the period April 1 - September 30, 1989, the OIG suggested specific legislative recommendations to address concerns regarding the inadequacy of plan audits. In particular, the OIG recommended that Congress (1) repeal the limited scope audit that effectively removes certain assets from the audit of the plan by an independent public accountant, and (2) require the audit to cover compliance with ERISA.

In subsequent reports, the OIG has indicated concerns over health insurance fraud. Given today's health insurance costs and markets, the OIG has found that small employers may have difficulty purchasing health insurance. Self-funded arrangements contributed to by a number of employers, referred to as multiple employer welfare arrangements (MEWAs) have grown to address this market problem. The OIG has indicated that the current market environment has attracted a number of fraudulent MEWAs and that civil enforcement is not sufficient to address the growing problem. (See Semiannual Report of the Office of Inspector General for the period October 1, 1989 - March 31, 1990.)

The Department of Labor has responded to such concerns by developing a list of legislative proposals in the enforcement area.[8] Specifically, the Department has recommended (1) repealing the limited scope audit, and (2) requiring independent public accountants to obtain a peer review every 3 years as a condition of qualification to conduct audits required by ERISA. To date, the Department has not recommended that audits include compliance testing. Instead, the Department and the OIG have recommended that the American Institute of Certified Public Accountants revise its guidelines to address compliance issues. If this voluntary approach does not reach the desired result, the Department may recommend legislative action.

The Department of Labor has also recommended the following actions designed to create incentives for private actions to enforce ERISA: (1) require the award of expert witness and attorney fees to successful plaintiffs in private ERISA actions; (2) allow the Secretary of Labor to award a portion of the civil penalties assessed for a fiduciary violation of ERISA to the individual who brought the action to the attention of the Department of Labor; (3) increase the present-law excise tax and civil penalties on prohibited transactions from 5 percent to 10 percent; (4) require de novo judicial review in benefits claims cases where conflicts of interest exist; (5) require certain multi-employer trust arrangements (such as MEWAs) to file registration statements with the Department of Labor; and (6) require plan fiduciaries to disclose records regarding proxy voting of stock held by the fiduciary.

Purchase of annuities by pension plans[9]

There has also been recent concern regarding the solvency of insurance companies from which commercial annuities are purchased by retirement plans. Such annuities may be purchased by a plan in a number of situations, for example, as a plan investment, upon the retirement of a plan participant, or upon plan termination. Commercial annuities have typically been regarded as a participant protection; however, recent concerns over the solvency of some insurance companies have placed this view in question. While the choice of an insurance company is a fiduciary decision under ERISA subject to the rules governing such decisions, ERISA does not contain specific guidelines regarding the purchase of such annuities. The PWBA and the PBGC have indicated that

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[8] See, e.g., Letter from Deputy Secretary of Labor to the Honorable Tom Lantos, Chairman, Subcommittee on Employment and Housing, Committee on Government Operations, U.S. House of Representatives (dated March 20, 1990).

[9] For a more complete discussion of this issue, see Joint Committee on Taxation, Present Law and Issues Relating to Pension Benefit Guaranty Corporation Guarantees of Retirement Annuities Paid by Insurance Companies (JCX-10-90), April 4, 1990.

they intend to take appropriate action to address this issue.

IV. ISSUES RELATING TO THE ENFORCEMENT AND ADMINISTRATION OF ERISA

In general

The Code and labor law provisions of ERISA were enacted to provide protections to American workers so that pension and other employee benefits promised by employers are paid when due and to ensure that the significant tax benefits for such plans are targeted so as to provide benefits to a broad group of employees. The enforcement provisions of ERISA are designed to assure that these goals are in fact achieved. Among the enforcement provisions of ERISA are the following:

(1) Extensive reporting and disclosure requirements imposed upon plan administrators;
(2) Standards of conduct for fiduciaries in managing and investing plan assets;
(3) Designation of the Secretary of Labor to act on behalf of plan participants and to administer and enforce the fiduciary standards, prohibited transaction rules, and reporting requirements;
(4) A requirement that plan administrators engage an independent public accountant (IPA) to audit annually those plans with more than 100 participants; and
(5) The IRS determination letter and audit procedures.

The effectiveness of the enforcement and administration of the Federal laws relating to employer-provided pension and employee benefit plans is dependent on a number of factors, including the following: (1) the extent to which plan participants are able to enforce their rights, (2) the interaction of the various Federal agencies involved in the enforcement of ERISA, (3) the staffing of enforcement activity within the appropriate Federal agencies, (4) the willingness of Federal administrators to assess civil or criminal penalties or tax-law penalties in appropriate situations, and (5) the extent to which self policing of the Federal laws should be expanded through use of independent public accountants.

Enforcement by plan participants

An issue that may be raised with respect to the pension and employee benefit laws under ERISA is the extent to which they can be effectively enforced by plan participants. This depends on a variety of factors, including the adequacy of the present-law disclosure rules in providing information necessary to identify problems that could lead to the loss of benefits, the ability of the average plan participant to understand or interpret the information (financial or otherwise) supplied, and the ability of plan participants to bear the financial burdens of law suits or other actions necessary to enforce their rights.

The ability of plan participants to enforce the pension and employee benefit laws may also depend on the nature of the violation involved. For example, the ability of participants to detect and enforce the applicable rules may vary depending on whether the violation is the wrongful exclusion of a particular person from the plan or the miscalculation of a particular person's benefits, improper use of plan assets by fiduciaries, or serious underfunding that may affect the future solvency of the plan.

Some would argue that the disclosure rules under present law provide adequate information for the average plan participant and that the role of protecting participant rights more properly should lie with the Department of Labor, which has the personnel knowledgeable in the substantive law and, therefore, is capable of analyzing plan data and identifying compliance problems. Similarly, some would argue, as has been suggested by the Inspector General, that experts such as independent auditors should be relied upon to identify problems.

<u>Interaction of Federal agencies</u>

The enforcement of the Federal laws relating to employer-provided pension plans is dependent, to a great degree, on the cooperation and interaction of the various Federal agencies charged with such enforcement. It is possible that the necessary interaction does not always exist.

A significant problem in the cooperation of Federal agencies may be the differing goals of the various agencies. For example, the Internal Revenue Service has the principal goal of collection of Federal taxes. In the case of employer-provided pension plans, tax incentives have been used to induce certain behavior by employers that is desirable from a retirement policy perspective. However, the goals of the Internal Revenue Service may not be consistent with the goals of retirement policy. If the Internal Revenue Service discovers that a pension plan has not been operated in accordance with the tax laws, the Service's role as tax collector carries with it an incentive to disqualify the plan and collect the additional taxes due, which may lead the employer to terminate the plan. Retirement policy, on the other hand, argues for a sanction that will not result in plan termination because such a sanction will reduce the delivery of retirement benefits to participants.

Similar conflicts can arise for any Federal agency in the administration of ERISA and particular problems may arise in the coordination of administration among the various agencies.

Staffing of enforcement activity

The growth in the Federal budget deficit in the last decade has created numerous problems for the Federal agencies whose budgets are frozen or cut. An issue that is appropriately considered with respect to the enforcement of ERISA is whether the budget problems of the Internal Revenue Service and the Department of Labor have driven these agencies to devote inadequate resources to the identification and remedy of compliance problems. An additional problem that has arisen in recent years to exacerbate these staffing issues is the rapid pace of changes in the Federal laws governing employer-provided pension and employee benefit plans. For example, the Internal Revenue Service has been forced to devote significant resources to the development of regulations and other guidance for employers with respect to the changes in Federal laws and to the education of IRS employees with respect to these changes. This allocation of resources necessarily takes Federal employees away from their work of identifying plans that do not comply with the law.

Adequacy of penalties

In some cases, questions have arisen concerning the reluctance of Federal agencies to apply vigorously the sanctions that ERISA allows for failures to satisfy the ERISA standards. The Inspector General has charged, for example, that the Department of Labor pursues a flawed enforcement strategy that relies too heavily on civil remedies at the expense of criminal sanctions. In addition, the Inspector General has suggested that this enforcement strategy has put the retirement benefits of millions of workers at risk.

Role of the independent public accountant

The Inspector General has proposed an expanded role for the independent public account (IPA) as a means of improving the self policing of employer-provided pension plans. In recent reports, the Inspector General has argued that the IPA audits under present law (1) are too limited in scope, and (2) fail in many cases to meet Generally Accepted Auditing Standards. In addition, the Inspector General has found that many plan disclosure statements do not satisfy the ERISA requirements and the subsequent IPA audits did not disclose these failures. Particularly in the case of investment issues, plan participants may not be in the best position to identify possible violations of ERISA. Thus, the identification of issues by an expert would be particularly helpful.