



FIELD ASSISTANCE BULLETIN NO. 2008-04

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MEMORANDUM FOR: VIRGINIA C. SMITH
DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
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SUBJECT: GUIDANCE REGARDING ERISA FIDELITY BONDING
REQUIREMENTS

BACKGROUND

ERISA section 412 and related regulations (29 C.F.R. § 2550.412-1 and 29 C.F.R. Part 2580) generally require that every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan shall be bonded. ERISA's bonding requirements are intended to protect employee benefit plans from risk of loss due to fraud or dishonesty on the part of persons who "handle" plan funds or other property. ERISA refers to persons who handle funds or other property of an employee benefit plan as "plan officials." A plan official must be bonded for at least 10% of the amount of funds he or she handles, subject to a minimum bond amount of \$1,000 per plan with respect to which the plan official has handling functions. In most instances, the maximum bond amount that can be required under ERISA with respect to any one plan official is \$500,000 per plan. Effective for plan years beginning on or after January 1, 2007, however, the maximum required bond amount is \$1,000,000 for plan officials of plans that hold employer securities.¹

Since enactment of ERISA, the Agency has provided various forms of guidance concerning the application of ERISA's bonding requirements. Over the past several years, however, a number of questions have been raised by our Regional Offices and

¹ Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).

others concerning the bonding rules. In addition, amendments to section 412 that were enacted in the Pension Protection Act of 2006 (PPA) have presented questions concerning the application of those changes to plan fiduciaries and other persons handling plan funds or other property. This Bulletin provides guidance, in a question and answer format, for our Regional Offices concerning the application of ERISA's bonding requirements and the PPA changes thereto. This Bulletin is not intended to address any civil or criminal liability that may result from losses to a plan caused by acts of fraud or dishonesty or violations of ERISA's fiduciary provisions.

QUESTIONS AND ANSWERS

ERISA FIDELITY BONDS

Q-1. What losses must an ERISA bond cover?

A-1. An ERISA section 412 bond (sometimes referred to as an ERISA fidelity bond) must protect the plan against loss by reason of acts of fraud or dishonesty on the part of persons required to be bonded, whether the person acts directly or through connivance with others. ERISA § 412; 29 C.F.R. § 2580.412-1. The term "fraud or dishonesty" for this purpose encompasses risks of loss that might arise through dishonest or fraudulent acts in handling plan funds or other property. This includes, but is not limited to, larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication, and other acts where losses result through any act or arrangement prohibited by 18 U.S.C. § 1954. The bond must provide recovery for loss occasioned by such acts even though no personal gain accrues to the person committing the act and the act is not subject to punishment as a crime or misdemeanor, provided that within the law of the state in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. 29 C.F.R. § 2580.412-9. Deductibles or other similar features that transfer risk to the plan are prohibited. 29 C.F.R. § 2580.412-11. [See also BOND TERMS AND PROVISIONS, Q-26 through Q-30.]

Q-2. Is an ERISA fidelity bond the same thing as fiduciary liability insurance?

A-2. No. The fidelity bond required under section 412 of ERISA specifically insures a plan against losses due to fraud or dishonesty (e.g., theft) on the part of persons (including, but not limited to, plan fiduciaries) who handle plan funds or other property. Fiduciary liability insurance, on the other hand, generally insures the plan against losses caused by breaches of fiduciary responsibilities.

Fiduciary liability insurance is neither required by nor subject to section 412 of ERISA. Whether a plan purchases fiduciary liability insurance is subject, generally, to ERISA's fiduciary standards, including section 410 of ERISA. ERISA section 410 allows, but does not require, a plan to purchase insurance for its fiduciaries or for itself covering losses occurring from acts or omissions of a fiduciary. Any such policy paid for by the plan must, however, permit recourse by the insurer against the fiduciary in the case of a fiduciary breach. In some cases, the fiduciary may purchase, at his or her expense, protection against the insurer's recourse rights.

Q-3. Who are the parties to an ERISA fidelity bond?

A-3. In a typical bond, the plan is the named insured and a surety company is the party that provides the bond. The persons "covered" by the bond are the persons who "handle" funds or other property of the plan (i.e., plan officials). As the insured party, the plan can make a claim on the bond if a plan official causes a loss to the plan due to fraud or dishonesty. [See also BOND TERMS AND PROVISIONS, Q-31 and Q-32.]

Q-4. Can I get an ERISA bond from any bonding or insurance company?

A-4. No. Bonds must be placed with a surety or reinsurer that is named on the Department of the Treasury's Listing of Approved Sureties, Department Circular 570 (available at fms.treas.gov/c570/c570.html). 29 C.F.R. § 2580.412-21, § 2580.412-23, § 2580.412-24. Under certain conditions, bonds may also be placed with the Underwriters at Lloyds of London. 29 C.F.R. § 2580.412-25, § 2580.412.26. In addition, neither the plan nor a party-in-interest with respect to the plan may have any control or significant financial interest, whether direct or indirect, in the surety, or reinsurer, or in an agent or broker through which the bond is obtained. ERISA § 412(c); 29 C.F.R. § 2580.412-22 and §§ 2580.412-33 to 2580.412.36. If a surety becomes insolvent, is placed in receivership, or has its authority to act as an acceptable surety revoked, the administrator of any plan insured by the surety is responsible, upon learning of such facts, for securing a new bond with an acceptable surety. 29 C.F.R. § 2580.412-21(b).

Q-5. Who must be bonded?

A-5. Every person who "*handles funds or other property*" of an employee benefit plan within the meaning of 29 C.F.R. § 2580.412-6 (i.e., a plan official) is required to be bonded unless covered under one of the exemptions in section 412 for certain banks, insurance companies, and registered brokers and dealers, or by one of the regulatory exemptions granted by the Department in its regulations. [See EXEMPTIONS FROM THE BONDING REQUIREMENTS, Q-12 through Q-15, FUNDS OR OTHER PROPERTY, Q-17, and HANDLING FUNDS OR OTHER PROPERTY, Q-18 through Q-21.] Plan officials will usually include the plan administrator and those officers and employees of the plan or plan sponsor who handle plan funds by virtue of their duties relating to the receipt,

safekeeping and disbursement of funds. Plan officials may also include other persons, such as service providers, whose duties and functions involve access to plan funds or decision-making authority that can give rise to a risk of loss through fraud or dishonesty. Where a plan administrator, service provider, or other plan official is an entity, such as a corporation or association, ERISA's bonding requirements apply to the natural persons who perform "handling" functions on behalf of the entity. *See* 29 C.F.R. § 2550.412-1(c), § 2580.412-3 and § 2580.412-6.

Q-6. Who is responsible for making sure that plan officials are properly bonded?

A-6. The responsibility for ensuring that plan officials are bonded may fall upon a number of individuals simultaneously. In addition to a plan official being directly responsible for complying with the bonding requirements in section 412(a) of ERISA, section 412(b) specifically states that it is unlawful for any plan official to permit any other plan official to receive, handle, disburse, or otherwise exercise custody or control over plan funds or other property without first being properly bonded in accordance with section 412. In addition, section 412(b) makes it unlawful for "any other person having authority to direct the performance of such functions" to permit a plan official to perform such functions without being bonded. Thus, by way of example, if a named fiduciary hires a trustee for a plan, the named fiduciary must ensure that the trustee is either subject to an exemption or properly bonded in accordance with section 412, even if the named fiduciary is not himself or herself required to be bonded because he or she does not handle plan funds or other property.

Q-7. Must all fiduciaries be bonded?

A-7. No. Fiduciaries must be bonded only if they "handle" funds or other property of an employee benefit plan and do not fall within one of the exemptions in section 412 or the regulations. [See also EXEMPTIONS FROM THE BONDING REQUIREMENTS, Q-12 through Q-15, and HANDLING FUNDS OR OTHER PROPERTY, Q-18 through Q-21.]

Q-8. Must service providers to the plan be bonded?

A-8. As noted above, only those persons who "handle" funds or other property of an employee benefit plan are required to be bonded under section 412. Therefore, a service provider, such as a third-party administrator or investment advisor, will be subject to bonding under section 412 only if that service provider "handles" funds or other property of an employee benefit plan. *See* 29 C.F.R. § 2580.412-3(d), § 2580.412-4, § 2580.412-5 and § 2580.412-6. [See also FUNDS OR OTHER PROPERTY, Q-17, and HANDLING FUNDS OR OTHER PROPERTY, Q-18.]

Q-9. Must a person who renders investment advice to a plan be bonded *solely* by reason of rendering such investment advice?

A-9. No. A person who provides investment advice, but who does not exercise or have the right to exercise discretionary authority with respect to purchasing or selling securities or other property for the plan, is not required to be bonded solely by reason of providing such investment advice. If, however, in addition to rendering such investment advice, such person performs any additional functions that constitute “handling” plan funds or other property within the meaning of 29 C.F.R. § 2580.412-6, then that person must be bonded in accordance with section 412. [See also HANDLING FUNDS OR OTHER PROPERTY, Q-18 through Q-21.]

Q-10. If a service provider is required to be bonded, must the plan purchase the bond?

A-10. No. A service provider can purchase its own separate bond insuring the plan, and nothing in ERISA specifically requires the plan to pay for that bond. If, on the other hand, a plan chooses to add a service provider to the plan’s existing bond, that decision is within the discretion of the plan fiduciaries. Regardless of who pays for the bond, section 412 provides that if a service provider to the plan is required to be bonded, the plan fiduciaries who are responsible for retaining and monitoring the service provider, and any plan officials who have authority to permit the service provider to perform handling functions, are responsible for ensuring that such service provider is properly bonded before he or she handles plan funds. ERISA § 412(b). [See also Q-6, above, and FORM AND SCOPE OF BOND, Q-22 and Q-25.]

Q-11. If the plan purchases a bond to meet section 412’s requirements, may the plan pay for the bond out of plan assets?

A-11. Yes. Because the purpose of ERISA’s bonding requirements is to protect employee benefit plans, and because such bonds do not benefit plan officials or relieve them from their obligations to the plan, a plan’s purchase of a proper section 412 bond will not contravene ERISA’s fiduciary provisions in sections 406(a) and 406(b). See 29 C.F.R. § 2509.75-5, FR-9.

EXEMPTIONS FROM THE BONDING REQUIREMENTS

Q-12. Do ERISA’s bonding requirements apply to all employee benefit plans?

A-12. No. The bonding requirements under ERISA section 412 do not apply to employee benefit plans that are completely unfunded or that are not subject to Title I of ERISA. ERISA § 412(a)(1); 29 C.F.R. § 2580.412-1, § 2580.412-2.

Q-13. What plans are considered “unfunded” so as to be exempt from ERISA’s bonding requirements?

A-13. An unfunded plan is one that pays benefits only from the general assets of a union or employer. The assets used to pay the benefits must remain in, and not be segregated in any way from, the employer’s or union’s general assets until the benefits are distributed. Thus, a plan will not be exempt from ERISA’s bonding requirements as “unfunded” if:

- i. any benefits under the plan are provided or underwritten by an insurance carrier or service or other organization;
- ii. there is a trust or other separate entity to which contributions are made or out of which benefits are paid;
- iii. contributions to the plan are made by the employees, either through withholding or otherwise, or from any source other than the employer or union involved; or
- iv. there is a separately maintained bank account or separately maintained books and records for the plan or other evidence of the existence of a segregated or separately maintained or administered fund out of which plan benefits are to be provided.

As a general rule, however, the presence of special ledger accounts or accounting entries for plan funds as an integral part of the general books and records of an employer or union will not, in and of itself, be deemed sufficient evidence of segregation of plan funds to take a plan out of the exempt category, but shall be considered along with the other factors and criteria discussed above in determining whether the exemption applies. 29 C.F.R. § 2580.412-1, § 2580.412-2.

As noted above, an employee benefit plan that receives employee contributions is generally not considered to be unfunded. Nevertheless, the Department treats an employee welfare benefit plan that is associated with a fringe benefit plan under Internal Revenue Code section 125 as unfunded, for annual reporting purposes, if it meets the requirements of DOL Technical Release 92-01², even though it includes employee contributions. As an enforcement policy, the Department will treat plans that meet such requirements as unfunded for bonding purposes as well.

Q-14. Are fully-insured plans “unfunded” for purposes of ERISA’s bonding requirements?

A-14. No. As noted above, a plan is considered “unfunded” for bonding purposes only if all benefits are paid directly out of an employer’s or union’s general assets. 29 C.F.R.

² 57 Fed. Reg. 23272 (June 2, 1992) and 58 Fed. Reg. 45359 (August 27, 1993).

§ 2580.412-2. Thus, insured plan arrangements are not considered “unfunded” and are not exempt from the bonding requirements in section 412 of ERISA. The insurance company that insures benefits provided under the plan may, however, fall within a separate exemption from ERISA’s bonding requirements. See ERISA § 412; 29 C.F.R. § 2580.412-31, § 2580.412-32. In addition, if no one “handles” funds or other property of the insured plan, no bond will be required under section 412. For example, as described in 29 C.F.R. § 2580.412-6(b)(7), in many cases contributions made by employers or employee organizations or by withholding from employees’ salaries are not segregated from the general assets of the employer or employee organization until paid out to purchase benefits from an insurance carrier, insurance service or other similar organization. No bonding is required with respect to the payment of premiums, or other payments made to purchase such benefits, directly from general assets, nor with respect to the bare existence of the contract obligation to pay benefits. Such insured arrangements would not normally be subject to bonding except to the extent that monies returned by way of benefit payments, cash surrender, dividends, credits or otherwise, and which by the terms of the plan belong to the plan (rather than to the employer, employee organization, or insurance carrier), were subject to “handling” by a plan official. [See also 29 C.F.R. § 2580.412-5(b)(2); Q-15, below; and HANDLING FUNDS OR OTHER PROPERTY, Q-18.]

Q-15. Are there any other exemptions from ERISA’s bonding provisions for persons who handle funds or other property of employee benefit plans?

A-15. Yes. Both section 412 and the regulations found in 29 C.F.R. Part 2580 contain exemptions from ERISA’s bonding requirements. Section 412 specifically excludes any fiduciary (or any director, officer, or employee of such fiduciary) that is a bank or insurance company and which, among other criteria, is organized and doing business under state or federal law, is subject to state or federal supervision or examination, and meets certain capitalization requirements. ERISA § 412(a)(3). Section 412 also excludes from its requirements any entity which is registered as a broker or a dealer under section 15(b) of the Securities Exchange Act of 1934 (SEA), 15 U.S.C. 78o(b), if the broker or dealer is subject to the fidelity bond requirements of a “self regulatory organization” within the meaning of SEA section 3(a)(26), 15 U.S.C. 78c(a)(26). ERISA § 412(a)(2). As with section 412’s other statutory and regulatory exemptions, this exemption for brokers and dealers applies to both the broker-dealer entity *and* its officers, directors and employees.

In addition to the exemptions outlined in section 412, the Secretary has issued regulatory exemptions from the bonding requirements. These include an exemption for banking institutions and trust companies that are subject to regulation and examination by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation. 29 C.F.R. § 2580.412-27, § 2580.412-28. Unlike the exemption in section 412 for banks and trust companies, this

regulatory exemption applies to banking institutions even if they are not fiduciaries to the plan, but it does not apply if the bank or trust company is subject only to state regulation.

The Department's regulations also exempt any insurance carrier (or service or similar organization) that provides or underwrites welfare or pension benefits in accordance with state law. This exemption applies only with respect to employee benefit plans that are maintained for the benefit of persons *other than* the insurance carrier or organization's own employees. 29 C.F.R. § 2580.412-31, § 2580.412-32. Unlike the exemption in section 412 for insurance companies, this regulatory exemption applies to insurance carriers even if they are not plan fiduciaries, but it does not apply to plans that are for the benefit of the insurance company's own employees.

In addition to the exemptions described above, the Secretary has issued specific regulatory exemptions for certain savings and loan associations when they are the administrators of plans for the benefit of their own employees. 29 C.F.R. § 2580.412-29, § 2580.412-30.

Q-16. Are SEPs and SIMPLE IRAs subject to ERISA's bonding requirements?

A-16. There is no specific exemption in section 412 for SEP (IRC § 408(k)) or SIMPLE IRA (IRC § 408(p)) retirement plans. Such plans are generally structured in such a way, however, that if any person does "handle" funds or other property of such plans that person will fall under one of ERISA's financial institution exemptions. ERISA § 412; 29 C.F.R. § 2580.412-27, § 2580.412-28.

FUNDS OR OTHER PROPERTY

Q-17. What constitutes "funds or other property" of the plan?

A-17. The term "funds or other property" generally refers to all funds or property that the plan uses or may use as a source for the payment of benefits to plan participants or beneficiaries. 29 C.F.R. § 2580.412-4. Thus, plan "funds or other property" include contributions from any source, including employers, employees, and employee organizations, that are received by the plan, or segregated from an employer or employee organization's general assets, or otherwise paid out or used for plan purposes. 29 C.F.R. § 2580.412-5(b)(2). Plan "funds or other property" also include all items in the nature of quick assets, such as cash, checks and other negotiable instruments, government obligations, marketable securities, and all other property or items that are convertible into cash or have a cash value that are held or acquired for the ultimate purpose of distribution to plan participants or beneficiaries.

Plan “funds or other property” include all plan investments, even those that are not in the nature of quick assets, such as land and buildings, mortgages, and securities in closely-held corporations, although permanent assets that are used in operating the plan, such as land and buildings, furniture and fixtures, or office and delivery equipment used in the operation of the plan, are generally not considered to be “funds or other property” of the plan for bonding purposes. 29 C.F.R. § 2580.412-4. It is important to note, however, that ERISA’s bonding requirements apply only to persons who “handle” plan “funds or other property.” Whether a person is “handling” any given plan “funds or other property” so as to require bonding will depend on whether that person’s relationship to the property is such that there is a risk that the person, acting alone or in connivance with others, could cause a loss of such funds or other property through fraud or dishonesty. [See HANDLING FUNDS OR OTHER PROPERTY, Q-18.]

HANDLING FUNDS OR OTHER PROPERTY

Q-18. What does it mean to “handle” funds or other property of an employee benefit plan so as to require bonding under section 412?

A-18. The term “handling” carries a broader meaning than actual physical contact with “funds or other property” of the plan. A person is deemed to be “handling” funds or other property of a plan so as to require bonding whenever his duties or activities with respect to given funds or other property are such that there is a risk that such funds or other property could be lost in the event of fraud or dishonesty on the part of such person, whether acting alone or in collusion with others. Subject to this basic standard, the general criteria for determining “handling” include, but are not limited to:

- i. physical contact (or power to exercise physical contact or control) with cash, checks or similar property;
- ii. power to transfer funds or other property from the plan to oneself or to a third party, or to negotiate such property for value (e.g., mortgages, title to land and buildings, or securities);
- iii. disbursement authority or authority to direct disbursement;
- iv. authority to sign checks or other negotiable instruments; or
- v. supervisory or decision-making responsibility over activities that require bonding.

29 C.F.R. 2580.412-6(b). [See also FUNDS OR OTHER PROPERTY, Q-17.]

“Handling” does not occur, on the other hand, and bonding is not required, under circumstances where the risk of loss to the plan through fraud or dishonesty is negligible. This may be the case where the risk of mishandling is precluded by the nature of the “funds or other property” at issue (e.g., checks, securities, or title papers that *cannot* be negotiated by the persons performing duties with respect to them), or

where physical contact is merely clerical in nature and subject to close supervision and control. 29 C.F.R. § 2580.412-6(a)(2), § 2580.412-6(b)(1). In the case of persons with supervisory or decision-making responsibility, the mere fact of general supervision would not, necessarily, in and of itself, mean that such persons are “handling” funds so as to require bonding. Factors to be accorded weight are the system of fiscal controls, the closeness and continuity of supervision, and who is in fact charged with or actually exercising final responsibility for determining whether specific disbursements, investments, contracts, or benefit claims are bona fide and made in accordance with the applicable trust or other plan documents. 29 C.F.R. § 2580.412-6(b)(6). Again, the general standard for determining whether a person is “handling” plan funds or other property is whether the person’s relationship with respect those funds is such that he or she can cause a loss to the plan through fraud or dishonesty.

Q-19. If the plan provides that a plan committee has the authority to direct a corporate trustee, who has custody of plan funds, to pay benefits to plan participants, are the committee members “handling” plan funds or property?

A-19. Yes, if the committee’s decision to pay benefits is final and not subject to approval by someone else, the committee members are “handling” plan funds within the meaning of 29 C.F.R. § 2580.412-6, and each committee member must be bonded.

Q-20. If the committee makes investment decisions for the plan, are the committee members “handling” plan funds or other property?

A-20. Yes, if the committee’s investment decisions are final and not subject to approval by someone else, the committee members are “handling” within the meaning of 29 C.F.R. § 2580.412-6, and each committee member must be bonded.

Q-21. Are the committee members considered to be “handling” funds if the committee only recommends investments?

A-21. No, not if someone else is responsible for final approval of the committee’s recommendations. 29 C.F.R. § 2580.412-6.

FORM AND SCOPE OF BOND

Q-22. Do the regulations require that a bond take a particular form?

A-22. The Department’s regulations allow substantial flexibility regarding bond forms, as long as the bond terms meet the substantive requirements of section 412 and the regulations for the persons and plans involved. Examples of bond forms include: individual; name schedule (covering a number of named individuals); position schedule (covering each of the occupants of positions listed in the schedule); and

blanket (covering the insured's officers and employees without a specific list or schedule of those being covered). A combination of such forms may also be used. 29 C.F.R. § 2580.412-10.

A plan may be insured on its own bond or it can be added as a named insured to an existing employer bond or insurance policy (such as a "commercial crime policy"), so long as the existing bond is adequate to meet the requirements of section 412 and the regulations, or is made adequate through rider, modification or separate agreement between the parties. For example, if an employee benefit plan is insured on an employer's crime bond, that bond might require an "ERISA rider" to ensure that the plan's bonding coverage complies with section 412 and the Department's regulations. Service providers may also obtain their own bonds, on which they name their plan clients as insureds, or they may be added to a plan's bond by way of an "Agents Rider." Choosing an appropriate bonding arrangement that meets the requirements of ERISA and the regulations is a fiduciary responsibility. *See* 29 C.F.R. § 2580.412-10 and § 2580.412-20. [See also ERISA FIDELITY BONDS, Q-3, Q-4, Q-10, and BOND TERMS AND PROVISIONS, Q-26 through Q-34.]

Q-23. Can a bond insure more than one plan?

A-23. Yes. ERISA does not prohibit more than one plan from being named as an insured under the same bond. Any such bond must, however, allow for a recovery by each plan in an amount at least equal to that which would have been required for each plan under separate bonds. Thus, if a person covered under a bond has handling functions in more than one plan insured under that bond, the amount of the bond must be sufficient to cover such person for at least ten percent of the total amount that person handles in all the plans insured under the bond, up to the maximum required amount for each plan. 29 C.F.R. § 2580.412-16(c), § 2580.412-20. [See also AMOUNT OF BOND, Q-35 through Q-42.]

Example: X is the administrator of two welfare plans run by the same employer and he "handled" \$100,000 in the preceding reporting year for Plan A and \$500,000 for Plan B. If both plans are insured under the same bond, the amount of the bond with respect to X must be at least \$60,000, or ten percent of the total funds handled by X for both plans insured under the bond (\$10,000 for Plan A plus \$50,000 for Plan B).

Example: Y is covered under a bond that insures two separate plans, Plan A and Plan B. Both plans hold employer securities. Y handles \$12,000,000 in funds for Plan A and \$400,000 for Plan B. Accordingly, Plan A must be able to recover under the bond up to a maximum of \$1,000,000 for losses caused by Y, and Plan B must be able to recover under the bond up to a maximum of \$40,000 for losses caused by Y.

Q-24. If the bond insures more than one plan, can a claim by one plan reduce the amount of coverage available to other plans insured on the bond?

A-24. No. As noted above, when a bond insures more than one plan, the bond's limit of liability must be sufficient to insure each plan as though such plan were bonded separately. 29 C.F.R. § 2580.412-16(c). Further, in order to meet the requirement that each plan insured on a multi-plan bond be protected, the bonding arrangement must ensure that payment of a loss sustained by one plan will not reduce the amount of required coverage available to other plans insured under the bond. This can be achieved either by the terms of the bond or rider to the bond, or by separate agreement among the parties concerned that payment of a loss sustained by one of the insureds shall not work to the detriment of any other plan insured under the bond with respect to the amount for which that plan is required to be insured. 29 C.F.R. § 2580.412-16(d), § 2580.412-18.

Q-25. Can a plan or service provider obtain bonds from more than one bonding company insuring the same plan or plans?

A-25. Yes. Nothing in ERISA prohibits a plan from using more than one surety to obtain the necessary bonding, so long as the surety is an approved surety. 29 C.F.R. § 2580.412-21. Persons required to be bonded may be bonded separately or under the same bond, and any given plans may be insured separately or under the same bond. A bond may be underwritten by a single surety company or more than one surety company, either separately or on a co-surety basis. 29 C.F.R. § 2580.412-20. [See also ERISA FIDELITY BONDS, Q-4.]

BOND TERMS AND PROVISIONS

Q-26. Can a bond provide that the one-year "discovery period" required under section 412 will terminate upon the effective date of a replacement bond?

A-26. Yes, but only if the replacement bond provides the statutorily-required coverage that would otherwise have been provided under the prior bond's one-year discovery period. If the replacement bond does not provide such coverage, the bonding arrangement does not meet the requirements of section 412.

ERISA requires that a plan have a one year period after termination of a bond to discover losses that occurred during the term of the bond. 29 C.F.R. § 2580.412-19(b). Some bonds, such as those written on a "loss sustained" basis, may contain a clause providing for such discovery period. Other bonds, such as those written on a "discovery basis," may not contain such a clause, but may give the plan the right to purchase a one-year discovery period following termination or cancellation of the bond. In some instances, a prior bond and a replacement bond may work in conjunction to

give the plan the required one-year discovery period. The surety industry has drafted standard bond forms that are intended to work together to provide the required coverage. Thus, both the terminating bond and the replacement bond should be examined to assure that the plan is properly insured against losses that were incurred during the term of the terminating bond, but not discovered until after it terminated.

Q-27. Can a bond exclude coverage for situations where an employer or plan sponsor “knew or should have known” that a theft was likely?

A-27. No. This exclusion is unacceptable in an ERISA fidelity bond because the plan is the insured party, not the employer or plan sponsor.

Q-28. My plan cannot obtain a bond covering a certain plan official who allegedly committed an act of fraud or dishonesty in the past. What should the plan do?

A-28. Many bonds contain provisions that exclude from coverage any persons known to have engaged in fraudulent or dishonest acts. A bond may also contain a provision that cancels coverage for any person who a plan official knows has engaged in any acts of dishonesty. In such cases, the plan must exclude any such person from handling plan funds or other property if he cannot obtain bonding coverage.

Q-29. If an employee benefit plan is added as a named insured to a company’s existing crime bond, which covers employees but specifically excludes the company owner, does the plan’s coverage under the crime bond satisfy the requirements of section 412?

A-29. If the crime bond excludes the company owner, and the owner handles plan funds, then the company bond does not fully protect the plan as required by ERISA section 412 and the Department's regulations. The company owner would then need to be covered under a separate bond or, alternatively, if the crime bond has an ERISA rider, that rider must ensure that the company owner is not excluded from coverage with respect to the plan.

Q-30. Can the bond have a deductible?

A-30. No. Section 412 requires that the bond insure the plan from the first dollar of loss up to the maximum amount for which the person causing the loss is required to be bonded. Therefore, bonds cannot have deductibles or similar features whereby a portion of the risk required to be covered by the bond is assumed by the plan or transferred to a party that is not an acceptable surety on ERISA bonds. 29 C.F.R. § 2580.412-11. However, nothing in ERISA prohibits application of a deductible to coverage in excess of the maximum amount required under ERISA.

Q-31. Must the plan be named as an insured on the bond for the bond to satisfy ERISA's requirements?

A-31. Yes. The plan whose funds are being handled must be specifically named or otherwise identified on the bond in such a way as to enable the plan's representatives to make a claim under the bond in the event of a loss due to fraud or dishonesty. 29 C.F.R. § 2580.412-18.

Q-32. Can bonds use an "omnibus clause" to name plans as insureds?

A-32. Yes. An "omnibus clause" is sometimes used as an alternative way to identify multiple plans as insureds on one bond, rather than specifically naming on the bond each individual plan in a group of plans. By way of example, an omnibus clause might name as insured "all employee benefit plans sponsored by ABC company." ERISA does not prohibit using an omnibus clause to name plans insured on a bond, as long as the omnibus clause clearly identifies the insured plans in a way that would enable the insured plans' representatives to make a claim under the bond.

If an omnibus clause is used to name plans insured on a bond, the person responsible for obtaining the bond must ensure that the bond terms and limits of liability are sufficient to provide the appropriate amount of required coverage for each insured plan. [See AMOUNT OF BOND Q-35 through Q-42.]

Q-33. May a bond be written for a period longer than one year?

A-33. Yes. Bonds may be for periods longer than one year, so long as the bond insures the plan for the statutorily-required amount. At the beginning of each plan year, the plan administrator or other appropriate fiduciary must assure that the bond continues to insure the plan for at least the required amount, that the surety continues to satisfy the requirements for being an approved surety, and that all plan officials are bonded. If necessary, the fiduciary may need to obtain appropriate adjustments or additional protection to assure that the bond will be in compliance for the new plan year. 29 C.F.R. § 2580.412-11, § 2580.412-19, § 2580.412-21.

Q-34. If a bond is issued for more than one year, is it acceptable to use an ERISA "inflation guard" provision with regard to the amount of the bond?

A-34. Yes. Nothing in section 412 or the regulations prohibits using an "inflation guard" provision in a bond to automatically increase the amount of coverage under a bond to equal the amount required under ERISA at the time a plan discovers a loss.

AMOUNT OF BOND

Q-35. How much coverage must the bond provide?

A-35. Generally, each plan official must be bonded in an amount equal to at least 10% of the amount of funds he or she handled in the preceding year. The bond amount cannot, however, be less than \$1,000, and the Department cannot require a plan official to be bonded for more than \$500,000 (\$1,000,000 for plans that hold employer securities) unless the Secretary of Labor (after a hearing) requires a larger bond. These amounts apply for each plan named on a bond in which a plan official has handling functions. ERISA § 412; 29 C.F.R. §§ 2580.412-11 through 2580.412-13, § 2580.412-16, § 2580.412-17. [See also FUNDS OR OTHER PROPERTY, Q-17 and HANDLING FUNDS OR OTHER PROPERTY, Q-18 through Q-21.]

Q-36. Can a bond be for an amount greater than \$500,000, or \$1,000,000 for plans that hold employer securities?

A-36. Yes. The Department's regulations provide that bonds covering more than one plan may be required to be over \$500,000 in order to meet the requirements of section 412 because persons covered by such a bond may have handling functions in more than one plan. The \$500,000/\$1,000,000 limitations for such persons apply only with respect to each separate plan in which those persons have such functions. 29 C.F.R. § 2580.412-16(e). The regulations also provide that the Secretary may prescribe a higher maximum amount for a bond, not exceeding 10 per cent of funds handled, but only after due notice and an opportunity for a hearing to all interested parties. 29 C.F.R. § 2580.412-11, § 2580.412-17. Further, although ERISA cannot *require* a plan to obtain a bond in excess of the statutory maximums (absent action by the Secretary, as noted above), nothing in section 412 *precludes* the plan from purchasing a bond for a higher amount. Whether a plan should purchase a bond in an amount greater than that required by section 412 is a fiduciary decision subject to ERISA's prudence standards. 29 C.F.R. § 2580.412-20.

In addition to the general rule described above, if a plan's fidelity bond is intended to meet both the bonding requirements under section 412 and the enhanced bond requirement under the Department's small plan audit waiver regulation, 29 C.F.R. § 2520.104-46, that bond must meet the additional requirements under the audit waiver regulation. Pursuant to the audit waiver regulation, in order for a small plan to be exempt from ERISA's requirement that plans be audited each year by an independent qualified public accountant, any person who handles "non-qualifying plan assets" within the meaning of 29 C.F.R. § 2520.104-46 must be bonded in an amount at least equal to 100% of the value of those non-qualifying assets if such assets constitute more than 5% of total plan assets. For more information on the audit waiver requirements under 29 C.F.R. § 2520.104-46, go to "Frequently Asked Questions On The Small

Pension Plan Audit Waiver Regulation” at www.dol.gov/ebsa/faqs/faq_auditwaiver.html.

Q-37. If a person handles only \$5,000 in one plan, so that 10% of the funds he handles is only \$500, can the bond be in the amount of \$500?

A-37. No. The minimum amount of a bond is \$1,000, even if 10% of the amount of funds handled is less than \$1,000. ERISA § 412; 29 C.F.R. 2580.412-11.

Q-38. Is every plan whose investments include employer securities subject to the increased maximum bond amount of \$1,000,000?

A-38. No. Section 412(a), as amended by section 622 of the Pension Protection Act of 2006, provides that “[i]n the case of a plan that holds employer securities (within the meaning of section 407(d)(1)), this subsection shall be applied by substituting ‘\$1,000,000’ for ‘\$500,000’ each place it appears.” The Staff Report of the Joint Committee on Taxation contains a technical explanation of this provision, which states that “[a] plan would not be considered to hold employer securities within the meaning of this section where the only securities held by the plan are part of a broadly diversified fund of assets, such as mutual or index funds.”³ Accordingly, it is the Department's view that a plan is not considered to be holding employer securities, for purposes of the increased bonding requirement, merely because the plan invests in a broadly-diversified common or pooled investment vehicle that holds employer securities, but which is independent of the employer and any of its affiliates.

Q-39. Must a bond state a specific dollar amount of coverage?

A-39. No. There is no requirement in the regulations that a bond state a specific dollar amount of coverage, so long as the bond provides the required statutory amount per plan of at least 10% of funds handled, with minimum coverage of \$1,000, for each plan official covered under the bond. For example, assume that X is the administrator of a welfare benefit plan for which he handled \$600,000 in the preceding year. The bond may state that X is covered under the bond for the greater of \$1,000 or 10% of funds handled, up to \$500,000.

Q-40. My company’s plan has funds totaling \$1,000,000, and nine employees of the plan sponsor each handle all of those funds. If all nine employees are covered under the same bond, for what amount must the bond be written?

A-40. ERISA requires that each of the nine plan officials handling the \$1,000,000 be bonded for at least 10% of the amount of funds he or she handles, or \$100,000, to protect

³ Joint Committee on Taxation, *Technical Explanation of H.R. 4, the “Pension Protection Act of 2006,” as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006* (JCX-38-06), Aug. 3, 2006.

the plan from losses caused by those plan officials, whether acting alone or in collusion with others. As noted in Q-39, bond amounts may be fixed either by referencing the statutory language of 10% of funds handled up to the required maximums, or by stating a specific dollar limit of coverage.

The bonding regulations allow flexibility in the form of bonds that can be used to insure the plan. Bond forms, such as individual, name schedule, position schedule, and blanket bonds, vary as to how persons covered under the bond are identified, how the bond amount is stated, and in the amount of recovery a plan can obtain for any single act of theft. 29 C.F.R. § 2580.412-10. For example, name schedule bonds and position schedule bonds generally cover named individuals, or occupants of positions listed in the schedule, in amounts that are set opposite such names or positions. Blanket bonds, on the other hand, generally cover all of an insured's officers and employees in a blanket penalty. The following examples illustrate how the differences between a blanket bond and a schedule bond might affect a plan's recovery:

If a plan sponsor purchases a blanket bond on which the plan is a named insured, covering all of the plan sponsor's officers and employees who handle the \$1,000,000, the stated bond amount must be at least \$100,000. That amount applies to each plan official covered under the bond. The bond terms, however, would generally specify that the \$100,000 limit is an "aggregate penalty" which applies "per occurrence." This means that if two of the bonded plan officials act together to steal \$300,000 from the plan, that loss would generally be considered one "occurrence" for which the plan could recover only \$100,000 under the bond. *See* 29 C.F.R. § 2580.412-10(d)(1).

A schedule bond, on the other hand, gives separate coverage for each plan official covered under the bond, whether that person is named individually or covered under a named position. Thus, if the plan is insured on a schedule bond, and each named individual or position listed on the schedule is covered in the amount is \$100,000, the net effect would be the same as though a separate bond were issued in the amount of \$100,000 for each plan official covered under the bond. Unlike the blanket bond described above, these types of bonds generally do not limit recovery to an aggregate amount "per occurrence." Accordingly, where, as in the above example, two plan officials act together to steal \$300,000, the plan should be able to recover \$200,000 under the schedule bond (i.e., \$100,000 for each of the two named individuals who caused the loss to the plan). *See* 29 C.F.R. § 2580.412-10(b) and (c).

Schedule bonds generally cost more than aggregate penalty blanket bonds with the same stated limits of liability (\$100,000 in the above examples) because of the potential for a higher recovery under the schedule bond. Both aggregate penalty blanket bonds and schedule bonds are permissible forms of bonds if they otherwise meet the requirements of section 412 and the Department's regulations. It is ultimately the responsibility of the plan fiduciary or plan official who is procuring the bond to ensure

that the type and amount of the bond, together with its terms, limits, and exclusions, are both appropriate for the plan and provide the amount of coverage required under section 412.

Q-41. What happens if the amount of funds handled increases during the plan year after the bond is purchased – must the bond be updated during the plan year to reflect the increase?

A-41. No. The regulations require that, with respect to each covered person, the bond amount be fixed annually. The bond must be fixed or estimated at the beginning of the plan's reporting year; that is, as soon after the date when such year begins as the necessary information from the preceding reporting year can practicably be ascertained. The amount of the bond must be based on the highest amount of funds handled by the person in the preceding plan year. ERISA § 412; 29 C.F.R. § 2580.412-11, § 2580.412-14, § 2580.412-19.

Q-42. How can the plan set the bond amount if there is no preceding plan year from which to measure the amount of funds each person handled?

A-42. If the plan does not have a complete preceding reporting year from which to determine the amounts handled, the amount handled by persons required to be covered by a bond must be estimated using the procedures described in the Department's regulation at 29 C.F.R. § 2580.412-15.

Questions concerning this guidance can be directed to the Division of Coverage, Reporting and Disclosure, Office of Regulations and Interpretations, at 202-693-8523.