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## In-Kind Contributions to Defined Benefit Plans — An Introduction

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The market turmoil of recent years has had a significant impact on the financial health of employer-sponsored defined benefit pension plans (referred to in this article as “plans”). Plans have endured a perfect storm of adverse events. Investment returns have experienced significant volatility, causing the value of plans’ investment portfolios to fluctuate widely. At the same time, the present value of plans’ liabilities has risen precipitously due to a historically low interest rate environment. The practical effect of these low interest rates has been to increase the extent to which many plans are underfunded. According to recent industry surveys, the plan funding ratio for many plans remains less than 80%.<sup>1</sup>

Congress has repeatedly considered reforming the pension plan funding rules, including through a wholesale revision of the defined benefit plan funding rules as set forth in the Pension Protection Act of

<sup>1</sup> According to news reports, in August 2012, BlackRock reported that the funded status of a typical corporate defined benefit plan in July 2012 fell to 74%. BNY Mellon (68%), Mercer (70%), and Milliman (70.9%) also reported funding levels at or near record lows as of July 2012.

2006.<sup>2</sup> However, due to the historically low interest rate environment, many plans have continued to slip further below their funding goals. Although recent legislation has reduced the adverse impact of the current interest rate environment, plan funding concerns will continue.<sup>3</sup>

The consequences of plan underfunding are not limited simply to requiring higher minimum contributions, though higher contribution obligations have a material impact on corporate decision-making. Under the Pension Protection Act of 2006, certain benefit restrictions are imposed on those plans with a funding level below 80%; these restrictions are tightened if a plan’s funding level falls below 60%.<sup>4</sup> In certain cases, a sponsor of one or more underfunded pension plans may be precluded from funding their nonqualified deferred compensation arrangements.<sup>5</sup> Further, a plan sponsor’s ability to increase benefits under a plan can also be limited when a plan’s funding level falls below 80%.<sup>6</sup>

The most straightforward way for a plan sponsor to address an underfunded plan is to make the required plan contributions. ERISA imposes minimum funding requirements that are designed to recapitalize underfunded plans over a period of years. A plan sponsor also could elect to make an incremental contribution

<sup>2</sup> §§430–436 of the Internal Revenue Code of 1986, as amended (“Code”), as enacted in the Pension Protection Act of 2006, P.L. 109-280.

<sup>3</sup> See Moving Ahead for Progress in the 21st Century Act, P.L. 112-141 (“MAP-21”). MAP-21 removes the requirement that plans use the two-year average of corporate bond rates for calculating liabilities and annual pension funding obligations. Instead, plan sponsors can use a 25-year historic average of the corporate bond rates within a 10% range.

<sup>4</sup> Code §436.

<sup>5</sup> Code §409A(b)(3)(C).

<sup>6</sup> Code §436(c).

to the plan in excess of the minimum required contribution. Such a contribution would, if credited to the plan's assets, have the effect of immediately increasing a plan's funding level and, if the plan is subject to any benefit restrictions, potentially lifting those restrictions. In some cases, an incremental contribution also may send a positive signal to equity markets.

For some companies, using cash to fund an improvement in a plan's funded status is not an available option. ERISA permits companies to contribute to a plan corporate assets other than cash, subject to certain restrictions.<sup>7</sup> These contributions are referred to as "in-kind" contributions. In an in-kind contribution, the plan sponsor contributes a non-cash asset to a plan and, in exchange, receives a credit (either actual or potential, where the plan's prefunding balance may later be used as a credit against a funding obligation)<sup>8</sup> to its funding obligations to the plan. An in-kind contribution can be of employer securities (i.e., stock or marketable obligations), the most common form of in-kind contribution, or of employer real property (such as manufacturing facilities, both of which are permitted under ERISA subject to certain requirements). Subject to Department of Labor (DOL) approval of an individual prohibited transaction exemption application, in-kind contributions also can be comprised of securities or real property that do not meet the statutory ERISA §407 and §408(e) requirements described below, as well as of other assets including, for example, stock of a third-party company, other traded assets such as government debt or auction rate securities, or income streams from royalties or special purpose entities.<sup>9</sup>

## LEGAL FRAMEWORK

An in-kind contribution to a plan is considered a prohibited transaction under ERISA §406(a)(1)(A).<sup>10</sup> As such, absent a statutory or administrative exemption, such a transaction can lead to significant liability under both ERISA and the Code.<sup>11</sup> As noted above, an in-kind contribution is considered a "transaction" between the plan sponsor and the plan, irrespective of whether the plan pays cash for the property it receives. The U.S. Supreme Court, in *Comr. v. Keystone Consolidated Industries*, held that a transfer of real property to the plan by the plan sponsor to satisfy a funding obligation was a prohibited transaction under ERISA, irrespective of whether the contributed prop-

erty was encumbered.<sup>12</sup> The plan "paid" consideration because it surrendered a receivable (the cash contribution owed to the plan) in exchange for the property. The Court noted that a plan bears a number of risks in connection with a contribution of real property rather than cash, including "the risk of giving up more than it is getting in return if the property is either less valuable or more burdensome than a cash contribution would have been."<sup>13</sup> The DOL expanded on *Keystone* in Interpretive Bulletin 94-3, asserting that an in-kind contribution to a plan is a prohibited transaction under ERISA because it reduces the employer's or plan sponsor's funding obligations to the plan, including in-kind contributions intended to satisfy a current minimum required contribution and incremental in-kind contributions.<sup>14</sup> As such, absent a statutory or administrative exemption, such a contribution is not permitted.

## Statutory Exemption

ERISA §§407 and 408(e)<sup>15</sup> provide a statutory exemption to permit plans to acquire and hold employer (i.e., plan sponsor) securities and real property, provided certain conditions are met. The contributed property must constitute a "qualifying employer security" or "qualifying employer real property." A qualifying employer security includes a security issued by the employer or an affiliate, and can be publicly traded or private stock, stock listed on a non-U.S. exchange, marketable obligations (bonds, debentures, notes, certificates, or other evidence of indebtedness), or an interest in a publicly traded partnership. Also, immediately following the plan's acquisition of a qualifying employer security, the plan cannot hold more than 25% of the aggregate amount of the same class of stock issued and outstanding at the time of the acquisition, or of the aggregate amount of obligations issued in the same issue and outstanding. Additionally, at least 50% of the aggregate amount of the same class of stock issued (or of the aggregate amount of marketable obligations issued in the same issue) and outstanding at the time of the plan's acquisition must be held by persons independent of the issuer.

Qualifying employer real property includes real property and related personal property which is leased by a plan to the plan sponsor or its affiliates. There are additional requirements of numerosity (i.e., two or more parcels), geographic dispersion, and suitability for more than one use.<sup>16</sup> Whether these requirements are satisfied depends on the particular facts and circumstances of the contributed real property.

ERISA §407(a)(2) also requires that, immediately after any acquisition by a plan of qualifying employer securities or qualifying employer real property, the

<sup>7</sup> §408 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 USC §1108.

<sup>8</sup> See Code §430(f)(6)(B)(i).

<sup>9</sup> See discussion under Individual Prohibited Transaction Exemptions, below, for further examples of types of in-kind contributions.

<sup>10</sup> 29 USC §1106(a)(1)(A); and Code §4975(c)(1)(A).

<sup>11</sup> Entering into such a transaction without an appropriate exemption can lead to significant liability under ERISA §409 (29 USC §1109) and Code §4975.

<sup>12</sup> 508 U.S. 152 (1993).

<sup>13</sup> *Id.* at 160.

<sup>14</sup> 29 CFR §2509.94-3(b).

<sup>15</sup> 29 USC §§1107 and 1108(e).

<sup>16</sup> ERISA §407(d)(4) (29 USC §1107(d)(4)).

fair market value of all qualifying employer securities and qualifying employer real property held by the plan (including that which was just acquired) cannot exceed 10% of the fair market value of all plan assets.<sup>17</sup> This 10% limit is tested *only* immediately following an acquisition, and is not tripped if the value of the contributed property subsequently appreciates to more than 10% of plan assets.

ERISA §408(e) provides a statutory exemption from the ERISA §406 prohibited transaction rules for the acquisition or sale by a plan of employer securities or employer real property, subject to the requirements of ERISA §407 and certain additional requirements. The transaction must be for adequate consideration, and no commission may be charged with respect to the transaction. “Adequate consideration” is generally defined as the prevailing market price on a registered national securities exchange or, if the security is not traded on a registered national securities exchange, a price no less favorable to the plan than the offering price established by current bid and ask prices quoted by persons independent of the issuer or any party in interest. For assets other than securities, such as real property, for which there is no generally recognized market, adequate consideration is the fair market value as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan, typically with the assistance of a qualified appraiser.<sup>18</sup>

## Individual Exemption

If a plan’s acquisition of employer securities or employer real property does not satisfy the requirements of ERISA §§407 and 408, the plan still may be able to acquire the securities or property. As noted above, the DOL regularly considers individual prohibited transaction exemptions to permit a plan to acquire and hold assets, including employer securities and employer real property. A discussion of individual exemptions as they pertain to in-kind contributions is set forth below.

## CONSIDERATIONS IN MAKING AN IN-KIND CONTRIBUTION

The decision to make an in-kind rather than a cash contribution turns on a number of considerations. These considerations can be divided broadly into considerations that are corporate in nature and those that are fiduciary in nature.

### Corporate Considerations

From a corporate perspective, the most likely factors influencing the decision to pursue an in-kind contribution often are ones of cash utilization and/or cash availability. Company management may have limited

available cash, or may see more efficient uses for available cash than plan contributions. In uncertain times, the company may wish to preserve cash to weather uncertainty. Similarly, available cash can be used to fuel expansion. In other cases, cash may be needed to meet financial covenants or even to fund daily operations.

Another corporate consideration is the potential reaction of the market to an in-kind contribution. For many publicly traded companies, the stock price and the overall market for the stock can be impacted by obligations to the companies’ defined benefit plans. An incremental contribution to a plan can mitigate a number of corporate finance-related challenges. Reducing plan funding obligations — particularly in an economic environment in which these obligations can fluctuate from year to year — can eliminate a significant financial risk to a company, while also reducing earnings volatility stemming from capital market fluctuations that impact plan liabilities. Moreover, if an incremental contribution is in-kind rather than in cash, the company may enjoy increased future financial flexibility by retaining cash for other uses. This flexibility is enhanced by a reduction in the financial uncertainty attendant to significant plan funding obligations.

A company must determine what assets it wishes to contribute to a plan. The assets contributed often are a function of what non-cash assets are available for an in-kind contribution, and whether utilizing such assets presents a viable option, both for the company and for the plan. Employer securities (typically employer stock) are the most common form of in-kind contribution. However, employer stock may not always be the preferred form of in-kind contribution. Other forms of contributed employer assets include (consistent with ERISA §§407 and 408) employer real property. If the company intends to seek a prohibited transaction exemption, many other types of assets owned by the employer could potentially be used for an in-kind contribution. Previous DOL exemptions have permitted contributions of a wide variety of assets in addition to employer securities or employer real property not meeting the requirements of §407, including contributions of stock in third-party companies, government debt, and rights to royalty streams.<sup>19</sup>

An in-kind contribution can be in lieu of a minimum required contribution, or can be incremental, meaning it is in addition to a minimum required contribution. As discussed in more detail below, the purpose of the contribution — including the manner in which a contribution is allocated between a minimum required contribution and an incremental increase in plan assets — can have a material impact on the fiduciary evaluation of a contribution.

Additional considerations come into play for in-kind contributions of employer securities. A key corporate consideration could be the company’s view of

<sup>17</sup> 29 USC §1107(a)(2).

<sup>18</sup> ERISA §3(18) (29 USC §1002(18)); 53 Fed. Reg. 17632 (5/17/88); DOL Prop. Regs. (29 CFR) §2510.3-18.

<sup>19</sup> See discussion under Individual Prohibited Transaction Exemptions, below, for further examples of types of in-kind contributions.

the future performance of the employer stock. If a company views its stock price as artificially depressed, an in-kind contribution of employer stock could provide an attractive opportunity for the plan to share in the appreciation of the stock price. Timing also can play a significant role in a decision to contribute employer stock. An in-kind contribution of employer stock that satisfies the requirements of the statutory exemptions of ERISA §§407 and 408 typically can be completed faster than other forms of in-kind contributions. Another consideration is the dilutive effect of an in-kind contribution of employer securities on other shareholders. If a company makes a sizeable contribution (relative to outstanding securities) of newly-issued stock, it could have a dilutive effect on the other shareholders, as well as an impact on the share price. However, there typically is little to no dilutive impact on share price from an in-kind contribution of employer securities; it may also be the case that any dilutive impact is offset by an increase in stock price resulting from the market's recognition of a company's taking proactive steps to address plan underfunding.

## Fiduciary Considerations

Whereas corporate considerations drive a plan sponsor's decision to make an in-kind contribution to a plan, whether and on what terms a plan accepts an in-kind contribution requires fiduciary judgments.

### Accepting a Contribution

The fiduciary decision whether to accept an in-kind contribution to a plan is a function of two primary considerations. One, is the contribution prudent and in the interests of the plan's participants and beneficiaries? Two, is the plan paying more than fair market value for the asset? In reviewing these considerations, it is important to note that, except for in-kind contributions meeting the statutory exemption outlined above, the acceptance of an in-kind contribution is subject to the grant of an individual prohibited transaction exemption from the DOL. In all such instances, the DOL must be satisfied with regard to prudence and adequate consideration. Irrespective of the determinations of the plan's fiduciary (be it internal or an independent third party), the DOL may impose additional conditions on an in-kind contribution requiring exemptive relief.

### Prudence

An initial fiduciary consideration is whether to vest the fiduciary responsibility for accepting an in-kind contribution with the plan's trustee or an internal plan committee, or to delegate this responsibility to an independent fiduciary. There is no requirement under ERISA to retain an independent fiduciary in connection with an in-kind contribution (outside of any requirements in connection with determining adequate consideration), unless mandated as part of a DOL prohibited transaction exemption. However, at times, the decision whether to accept an in-kind contribution from a plan sponsor may lead plan fiduciaries to decide to retain an independent fiduciary.

Under ERISA §404, a fiduciary must act prudently and solely in the interest of plan participants and beneficiaries. A number of considerations may be relevant to a determination of prudence, depending on the facts and circumstances of a proposed contribution.

A key fiduciary consideration relating to the prudence of an in-kind contribution is whether the contribution is incremental to the plan or is made in lieu of a minimum required contribution. If a contribution is incremental to a plan, determining the prudence of accepting the contribution is more straightforward, as the plan is receiving an asset to which it is not otherwise entitled at that time. Although a current, incremental contribution could still be used at a future date to offset future required contributions (a point noted in the DOL's Interpretive Bulletin 94-3), a plan nonetheless would receive today an asset to which it is not otherwise entitled.

If a company proposes to satisfy a minimum required contribution with an in-kind contribution, determining whether it is prudent for the plan to accept the contribution may be a more complex matter. A minimum required contribution is, by definition, an obligation by the plan sponsor/employer to the plan. Although neither ERISA nor the Code requires that minimum required contributions be made in cash, it is axiomatic that it is prudent to accept a cash contribution. However, although a plan would always prefer that a minimum required contribution be made in cash due to its liquidity, a cash contribution may not be on the table. If a proposed contribution is to be made in lieu of a minimum required contribution, a fiduciary may seek an economic inducement on behalf of the plan. The most common form of this "sweetener" is an in-kind contribution in excess of a minimum required contribution. Alternatively, an in-kind contribution could be combined with a cash contribution. In either case, the fiduciary is given an economic inducement to accept the contribution. The appropriate amount of the inducement is a facts-and-circumstances fiduciary determination.

Additional considerations are relevant for in-kind contributions of illiquid assets, which typically would include assets other than qualifying employer securities. One, what impact would the in-kind contribution have on the plan's ability to meet its future liquidity needs? In *Keystone*, the Supreme Court highlighted the difficulty and cost of disposing of illiquid real property as "potential harmful effects" of a contribution of such property to a plan.<sup>20</sup> Two, how will the proposed in-kind contribution impact the plan's asset allocation? An in-kind contribution may run contrary to a plan's stated investment policy, significantly alter a plan's investment mix, or lead to a plan holding assets not specified under the policy. *Keystone* noted the importance of maintaining a plan's independent investment policy.<sup>21</sup> However, if the amount of the contribution is sufficiently in excess of the amount owed, these issues may easily be addressed.

<sup>20</sup> 508 U.S. at 160.

<sup>21</sup> *Id.*

### *Adequate Consideration*

Other than prudence, another key fiduciary consideration is consistent with adequate consideration requirements. Put another way, is the plan paying more than a fair price for the contribution? As discussed above, the “price” the plan pays in connection with an in-kind contribution is the credit that the company receives for the contribution.<sup>22</sup>

“Adequate consideration,” as defined by ERISA, depends on the asset at issue. For a security traded on a national exchange, adequate consideration is the market price; if the security is not traded on a national exchange, adequate consideration is a price established by the current bid/ask prices quoted by independent parties.<sup>23</sup> For other assets that are more illiquid, adequate consideration is the fair market value of the asset as determined in good faith by the trustee or named fiduciary. The DOL has issued proposed regulations elaborating on the determination of fair market value.<sup>24</sup> Under this proposed definition, fair market value is the price at which an asset would change hands between a willing buyer and a willing seller, where the former is under no compulsion to sell and the latter is under no compulsion to buy, and both parties are able and willing to trade and are well informed about the asset and the market for the asset.<sup>25</sup> Importantly, the fiduciary making this determination must consider all relevant facts and circumstances, and must either (1) be independent of all parties to the transaction, other than the plan; or (2) rely on the report of an independent appraiser.

The liquidity of an asset plays a key role in determining adequate consideration. As noted in *Keystone*, when a plan accepts an in-kind contribution (in that case, of real property), there is a risk that the plan will end up having surrendered an account receivable (the minimum required contribution owed to the plan) for property that may be less valuable than cash would have been.<sup>26</sup> The property at issue in *Keystone*, while described by the court as neither overvalued nor encumbered, was “neither easy nor costless” to sell.<sup>27</sup> Among other things, the sale took 3½ years from the time the plan first listed the property for sale, and the plan’s listing agreements to sell the properties call for sales commissions. This scenario illustrates a risk borne by a plan of accepting an in-kind contribution, when compared to cash. Cash can be immediately liquidated for face value without a discount. Immediately liquidating non-cash assets, however, typically requires a discount from face value. For this and other reasons, it is important that the liquidity of an asset be considered in determining the asset’s value.

For a contribution of relatively liquid assets such as publicly traded securities, the assets typically can be

immediately liquidated. However, depending on the size of the holding of securities, the liquidation may only be achievable at a discount from the face value of the securities. Accordingly, in some cases, it may be appropriate that a discount from face value be considered in determining the amount of a credit the company receives for contributing securities to a plan. Determining the amount of this discount is ordinarily based on the particular facts and circumstances of a contribution, and is a matter of judgment for the fiduciary. The value of illiquid assets typically is arrived at with the assistance of a specialized appraisal expert. In arriving at a determination of fair market value, an appraisal expert considers, among other things, the liquidity (i.e., the marketability) of the asset.

### **After an In-Kind Contribution Is Accepted**

Additional fiduciary considerations focusing on the management and disposition of the contributed assets apply after the contribution is completed. If an in-kind contribution requires a DOL prohibited transaction exemption, the DOL may require as a condition of the exemption that an independent fiduciary manage the contributed assets. The DOL also may place restrictions on the holding and disposition of the assets. These requirements may require ongoing fiduciary diligence and process to ensure that the terms of the DOL prohibited transaction exemption are satisfied.

Alternatively, if an in-kind contribution meets the requirements for a statutory exemption under ERISA §408(e), the plan fiduciaries may decide to retain an independent fiduciary to oversee the management (and potential disposition) of the contributed asset. A number of potential conflicts may lead to the retention of an independent third party to manage the asset after contribution. One is that an in-house manager could find themselves conflicted in their duty to act in the interests of a plan. For example, a fiduciary determination by such a manager that continuing to hold a contributed asset is not in a plan’s interests could put the manager at odds with the company’s interests. Fiduciaries with connections to a plan sponsor also may face potential conflicts arising from access to material non-public information about the company and its business plans.

## **INDIVIDUAL PROHIBITED TRANSACTION EXEMPTIONS**

If a contribution does not qualify for a statutory exemption, a company will need to seek an individual prohibited transaction exemption from the DOL. In addition to the time required to obtain such an exemption (the process can take more than a year to complete), the DOL may condition an exemption on the parties’ satisfying additional requirements.

The DOL has promulgated detailed rules<sup>28</sup> that govern the individual prohibited transaction exemp-

<sup>22</sup> See *id.* at 157–61.

<sup>23</sup> ERISA §3(18) (29 USC §1002(18)).

<sup>24</sup> DOL Prop. Regs. (29 CFR) §2510.3-18.

<sup>25</sup> DOL Prop. Regs. §2510.3-18(b)(2).

<sup>26</sup> 508 U.S. at 160.

<sup>27</sup> *Id.* at 161.

<sup>28</sup> Prohibited Transaction Exemption Procedures; Employee Benefit Plans, RIN 1210-AB49, 76 Fed. Reg. 66637 (10/27/11), 29 CFR §§2570.30 through .52 (“PTE Procedures”).

tion process. Although these rules do not specifically address in-kind contributions, they do provide some insight into the DOL's expectations in connection with such an exemption application. For example, the DOL typically will require that an independent fiduciary represent the plan in connection with the contribution. Moreover, if the transaction is continuing in nature (which may typically be the case, because the plan would hold the contributed assets for some period of time after their contribution to the plan), the DOL also will usually require that the independent fiduciary monitor the transaction on behalf of the plan on a continuing basis. This ongoing monitoring includes not only ensuring that holding the asset remains in the interests of the plan and, if it is not, taking appropriate action, but also enforcing compliance with the conditions imposed by the exemption.<sup>29</sup> In the case of in-kind contributions, this is commonly seen in sale-leaseback transactions.

In addition to these requirements that are applicable to exemptions generally, an examination of the DOL's practice over the years provides insight into certain common themes, as well as additional requirements that the DOL may impose in granting an exemption. These examples illustrate the variety of tools the DOL has available to satisfy itself that a proposed in-kind contribution is in the best interests of a plan and the plan's participants and beneficiaries.<sup>30</sup>

- *Size of contribution.* The size of the contribution relative to the plan's assets is usually small, and almost always amounts to less than 25% of plan assets.
- *Determination of the value of the contribution.* The value of the contribution is established either by a public market price or by an independent appraisal.
- *"Put" option.* The DOL may require, as a means to further protect a plan for the risks of accepting an in-kind contribution that may not be marketable, that the company give the plan a right to sell the contributed assets back to the company, typically at a predetermined price or based on a predetermined formula,
- *Guarantee of value to the plan.* An exemption may be conditioned on a guarantee by the company of the value of a contribution, either as an alternative to or in addition to a put option. This

guarantee could be structured, for example, as a commitment to true up (by means of an incremental cash contribution) any difference between the assets' face value at the time of contribution and the proceeds eventually realized upon the plan's sale of the assets, a guaranteed minimum rate of return, or a commitment to ensure (through incremental cash contributions) that, after the assets are liquidated by the plan, the plan will achieve a certain AFTAP (Adjusted Funding Target Attainment Percentage).

- *Delayed recognition of a contribution.* The DOL may require that, until the sale of contributed assets by a plan, the assets not be either credited by the company as a contribution to the plan or counted as a plan asset for funding purposes.
- *Limit on value recognized for plan funding purposes.* The DOL has previously limited the amount of a contribution for funding purposes to the lesser of the proceeds from the sale of the assets or the value of the assets on the date of contribution.

In addition to the above conditions that the DOL may place on a grant of an exemption, parties considering seeking an individual exemption may also wish to consider common reasons cited by the DOL in denying exemption applications for in-kind contributions.

- *No independent fiduciary/independent safeguards to protect a plan's interests.* As noted above, the DOL typically requires that an independent fiduciary represent a plan to ensure that an independent party is protecting the plan's interests. Such an independent safeguard also reduces the DOL's concerns about conflicts of interest among the parties to a transaction and helps minimize the potential for abuse.
- *Lack of diversification of plan assets.* The DOL has expressed concern that a proposed contribution would lead to a plan's assets not being sufficiently diversified. This concern is mirrored in the above general limitation that the contribution not exceed 25% of plan assets.

## CONCLUSION

In-kind contributions to defined benefit plans raise a number of complex considerations. They also typically invoke the need for careful fiduciary decision-making. When properly structured, however, they can serve as valuable tools not only in helping plan sponsors meet their plan funding obligations, but also in addressing plan underfunding.

<sup>29</sup> *Id.* at 66648.

<sup>30</sup> See Wade and Loebel, Individual Prohibited Transaction Exemptions, in *ERISA Fiduciary Law* 629 (2d ed. 2006) ("Common Law of Exemptions") (discussing the "common law" of the DOL's exemptions practice, and providing an overview of common themes in different categories of DOL individual prohibited transaction exemptions). Much of the discussion in this section of this article is derived from this chapter.