

Questions and Proposed Answers for the Department of Labor Staff for the
2009 Joint Committee of Employee Benefits Technical Session
Held on May 7, 2009

The following questions and answers are based on informal discussions between private sector representatives of the Joint Committee on Employee Benefits (JCEB) and Department of Labor (DoL) staff. The questions were submitted by ABA members, and the responses were given at a meeting of JCEB and government representatives. The responses reflect only unofficial, nonbinding staff views as of the time of the discussion, and do not necessarily represent the official position of the DoL. Further, this report on the discussions was prepared by JCEB representatives, based on their notes and recollections of the meeting.

Question 9: The alternative method of compliance for top hat plans set forth in 29 CFR Section 2520.104-23 permits an employer who sponsors one or more top-hat plans to satisfy the reporting and disclosure requirements of Part 1 of Title I of ERISA by filing a single statement with the Secretary of Labor that includes the name, address, and employer identification number of the employer, a declaration that the employer maintains one or more top-hat plans, the number of such plans, and the number of employees in each plan. There is no requirement that the employer file an amended statement if there is any change in the information included in the statement, nor is the employer required to specifically identify the plan or plans included in the statement. 29 CFR Section 2520.104-23(b) states: Only one statement need be filed for each employer maintaining one or more plans described in paragraph (d) of this section. If an employer

files a top-hat statement under 29 CFR Section 2520.104-23 and subsequently adopts a new top-hat plan, is the employer required to file a second top-hat statement that reflects the adoption of the new-top-hat plan?

Proposed

Answer 9: No. The top-hat statement is a one-time filing requirement for each employer that maintains one or more top-hat plans. This is clear from the literal language of the regulation that \u201conly one statement need be filed for each employer. The purpose of the statement is merely to identify those employers who maintain top-hat plans and not to identify each plan. It would be impractical to require a separate filing for each top-hat plan because of the multiplicity of arrangements that constitute top-hat plans and the frequent changes in such arrangements. Moreover, there is no policy reason to do so because, as the Department has recognized, the class of employees who participate in top hat plans \u201cgenerally have ready access to information concerning their rights and obligations and do not need the protections afforded them by Part 1 of Title I. 40 Fed. Reg. 34530 (Aug. 15, 1975).

DoL

Answer 9: Staff disagrees with the proposed answer. 29 CFR Section 2520.104-23 provides an alternative method of compliance with the reporting and disclosure requirements of part 1 of Title I of ERISA for certain pension plans maintained by an employer for a select group of management or

highly compensated employees (\u201ctop-hat\u201d plans). The regulation covers plans in existence at the time the registration statement is filed and encompassed within the registration statement\u2019s content.

Thus, if a new top-hat plan is established subsequent to filing a registration statement with the Department for a separate plan, a new registration statement must be filed within 120 days after the new top-hat plan becomes subject to Title I to satisfy the alternative method of compliance. On the other hand, if, rather than establishing a new top hat plan, the original plan is amended, such as to include a separate class of participants, the amended plan would not need to be re-filed. Whether a new arrangement is a separate plan or simply an expansion of an existing plan is determined under all of the facts and circumstances.

Staff also agrees that the registration statement does not need to specifically identify the plan or plans covered by the statement. Rather, it must include the number of plans for which the registration statement is being filed and the number of employees covered by each. A registration statement for a plan does not need to include information pertaining to plans for which a separate registration statement had been filed.

The provision in 29 CFR Section 2520.104-23(b) which states: Only one statement need be filed for each employer maintaining one or more plans described in paragraph (d) of this section was intended to serve primarily as a transition rule under which one registration statement could be filed to cover multiple top hat plans that were established prior to the effective date of the regulation. However, it also allows one registration statement to be filed in the case of an employer that establishes multiple top-hat

plans at or about the same time.

The administrator of a top-hat plan that has failed to file a timely registration statement may file the registration statement under the Delinquent Filer Voluntary Compliance Program (DFVCP) in lieu of filing any past due annual reports. By properly filing the registration statement and meeting the other applicable DFVCP requirements, the administrator will be considered as having elected compliance with the alternative method of compliance prescribed in 29 CFR Section 2520.104-23 for all subsequent plan years.