

MEMO# 15337

November 7, 2002

DOL ADVISORY OPINION PERMITS LIMITATION OF LIABILITY AND INDEMNIFICATION PROVISIONS

[15337] November 7, 2002 TO: PENSION MEMBERS No. 53-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 71-02 RE: DOL ADVISORY OPINION PERMITS LIMITATION OF LIABILITY AND INDEMNIFICATION PROVISIONS The Department of Labor recently issued Advisory Opinion 2002-08A, which clarifies that limitation of liability or indemnification provisions in a service provider contract are neither per se imprudent nor unreasonable for purposes of ERISA fiduciary requirements.¹ In the opinion, a pension fund (“Fund”) refused to renew the contract of an actuarial firm, where the service provider informed the Fund that all of its new engagement letters would contain provisions limiting the amount of damages the Fund could collect and indemnifying the firm against liabilities in excess of a certain amount in connection with the firm’s services to the Fund. Although the Fund used a different service provider who did not include such provisions in its engagement letter, the Fund requested guidance from DOL regarding fiduciary issues, noting that such limitation of liability and indemnification provisions were becoming a standard feature of many service provider contracts. The DOL found that such provisions might be permissible, provided that a plan fiduciary engages in an objective process that adequately assesses whether the service provider is qualified. The process should be designed to avoid self-dealing, conflicts of interest and other improper influence. However, the DOL states that provisions in service provider contracts that purport to limit liability or indemnify the provider in cases involving fraud or willful misconduct are void as against public policy and that a fiduciary who enters into a contract containing such a provision would not be prudent or reasonable for purposes of ERISA’s fiduciary rules. Even in situations where a limited liability or indemnification provision may be prudent and reasonable, ERISA’s fiduciary rules would require a plan fiduciary to assess the effects of the provision as part of its determination of whether or not to enter into the contract. ¹ The opinion specifically discusses the “prudent person” standard set forth in section 404 of ERISA and the statutory exemption from the prohibited transactions rules of ERISA section 406 for reasonable arrangements with a party in interest, as set forth in ERISA section 408(b). ² Lisa Robinson Assistant Counsel Attachment Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 15337, or call the ICI Library at (202) 326-8304 and request the attachment for memo 15337. Attachment (in .pdf format)

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