	Z		
	Book	Tax	Revaluation account
Total	$151,500	$152,500	($1,000)
Net Tax Loss-Stocks 2 & 3	0	(1,333)	1,333
Closing Balance	$151,500	$151,167	$333

(4) *Aggregation as permitted by the Commissioner.* The Commissioner may, by published guidance or by letter ruling, permit:

(i) Aggregation of properties other than those described in paragraphs (e)(2) and (e)(3) of this section;

(ii) Partnerships and partners not described in paragraph (e)(3) of this section to aggregate gain and loss from qualified financial assets; and

(iii) Aggregation of qualified financial assets for purposes of making section 704(c) allocations in the same manner as that described in paragraph (e)(3) of this section.

* * * * *

§ 1.704–3T [Removed]

Par. 4. Section 1.704–3T is removed.

Dated: December 13, 1994.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved:

Leslie Samuels,

Assistant Secretary of the Treasury.

[FR Doc. 94–31435 Filed 12–27–94; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting, and Supervising Federal Prisoners: Controlling Drug Abuse by Federal Parolees

AGENCY: United States Parole Commission, Justice.

ACTION: Final rule.

SUMMARY: The U.S. Parole Commission is amending its regulations in order to implement a statutory amendment to 18 U.S.C. 4209 (1976) contained in the Violent Crime and Law Enforcement Act of 1994, Public Law 103–322 (September 13, 1994). Congress added new provisions that require mandatory drug testing for parolees and that prohibit parolees from using controlled substances. The new provisions also require confirmation of a positive drug test before parole can be revoked, and permit the Parole Commission to refrain from instituting parole revocation proceedings when a parolee fails a drug test so long as other appropriate measures, such as treatment programs, are available. These statutory provisions are not expected to require a substantial change in current Parole Commission policy and practice.

EFFECTIVE DATE: January 27, 1995.

FOR FURTHER INFORMATION CONTACT: Pamela A. Posch, Office of General Counsel, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815, Telephone (301) 492–5959.

SUPPLEMENTARY INFORMATION: In Section 20414(d) of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103–322 (September 13, 1994), Congress added new language to 18 U.S.C. § 4209(a). This language pertains exclusively to offenders who are (or will be) serving sentences for crimes committed prior to November 1, 1987. 18 U.S.C. 4209 (1976) pertains to the conditions and limitations which the Parole Commission is authorized to impose on prisoners who are released to complete their sentences on parole.

The amendment to 18 U.S.C. 4209(a) which appears in the VCCLEA reads as follows:

> In every case, the Commission shall also impose as a condition of parole that the parolee pass a drug test prior to release and refrain from any unlawful use of a controlled substance and submit to at least 2 periodic drug tests (as determined by the Commission) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the Commission for any individual parolee if it determines that there is good cause for doing so. The results of a drug test administered in accordance with the provisions of the preceding sentence shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The Commission shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 4214(f) when considering any action against a defendant who fails a drug test.

The net effect of the statutory amendment is:

(a) To require mandatory drug testing for every parolee unless the Commission finds good cause to suspend that requirement;

(b) To require the Commission to prohibit the use of controlled substances by parolees;

(c) To require confirmation of a positive drug test before parole can be revoked; and

(d) To require the Commission to institute a revocation proceeding against a parolee who fails a drug test unless (1) other appropriate measures are available, and (2) the Sentencing Commission's guidelines do not provide otherwise.

After a review of its current regulations and practices with regard to drug testing for parolees, and its parole revocation policy in the case of parolees who abuse drugs, the Commission has concluded that the VCCLEA will not require any significant changes in the way federal parolees are supervised and sanctioned for controlled substance abuse. The Parole Commission currently follows a "zero tolerance" policy that prohibits drug use, and emphasizes the need for drug-addicted parolees to modify their behavior through appropriate treatment or face revocation of parole and return to prison under 18 U.S.C. 4214. The following amendments to 28 CFR 2.40 are ordered, however, for the purpose of conforming the Commission's regulations to the requirements and language of the VCCLEA. The amended version of 28 CFR 2.40 will apply to all parolees who presently are, or will be, under parole supervision pursuant to 18 U.S.C. 4209.

Executive Order 12866 and Regulatory Flexibility Statement

The U.S. Parole Commission has determined that this rule is not a significant regulatory action for the

purposes of Executive Order 12866, and the rule has therefore not been reviewed by the Office of Management and Budget. The rule will not have a significant economic impact upon a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, probation and parole, prisoners.

The Final Rule

Accordingly, the U.S. Parole Commission makes the following amendments to 28 CFR Part 2:

PART 2—[AMENDED]

1. The authority citation for 28 CFR Part 2 continues to read as follows:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. Section 2.40 is amended by adding the following language to paragraph (R):

§ 2.40 Conditions of release.

* * * * *

(R)* * * When considering what action to take with regard to a parolee who fails a drug test, the Commission shall consider appropriate alternatives to revocation pursuant to 18 U.S.C. 4209(a). In no case shall parole be revoked upon the basis of a single, unconfirmed positive drug test that is challenged by the parolee, without other violations having been found to justify such revocation.

* * * * *

3. Section 2.40 is amended at paragraph (l)(2) by substituting the words "which shall include at least two periodic tests" for the words "which may include testing", and by adding the following language:

§ 2.40 Conditions of release.

* * * * *

(l)(1) * * *

(2) * * * A decision by the Commission not to impose this special condition shall constitute good cause for suspension of the drug testing requirements of 18 U.S.C. 4209(a). In the event such condition is imposed prior to an eligible prisoner's release from prison, any grant of parole or reparole shall be contingent upon the prisoner passing all pre-release drug tests administered by the U.S. Bureau of Prisons.

Dated: December 19, 1994.

Edward F. Reilly, Jr.,

Chairman, U.S. Parole Commission.

[FR Doc. 94–31976 Filed 12–27–94; 8:45 am]

BILLING CODE 4410–01–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2509

[Interpretive Bulletin 94–3]

Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Interpretive Bulletin.

SUMMARY: This document provides guidance on in-kind contributions to employee benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and plans under section 4975 of the Internal Revenue Code (the Code). The Supreme Court addressed certain in-kind contributions to defined benefit pensions plans in *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, ____ U.S. ____, 113 S. Ct. 2006 (1993). The Court in *Keystone* held that an employer's contribution of unencumbered real properties to a tax-qualified defined benefit pension plan in satisfaction of the employer's funding obligation is a "sale or exchange" prohibited by section 4975(c)(1)(A) of the Code Section 406(a)(1)(A) of ERISA is a parallel provision to section 4975(c)(1)(A) of the Code but applies to a different group of plans. This document sets forth the Department's view that in-kind contributions (i.e., contributions of any property other than cash) that reduce an obligation to the plan constitute prohibited transactions under section 4975(c)(1)(A) of the Code and section 406(a)(1)(A) of ERISA.

EFFECTIVE DATE: The guidance announced in this bulletin is effective January 1, 1975.

FOR FURTHER INFORMATION CONTACT: Cary L. Gilbert, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Rm N–5669, 200 Constitution Ave., N.W., Washington, D.C. 20210, telephone (202) 219–8671. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: In order to provide a concise and ready reference to its interpretation of ERISA, the Department of Labor publishes its interpretive bulletins in the Rules and Regulations sections of the **Federal Register.**

Published in this issue of **Federal Register** is ERISA Interpretive Bulletin 94–3, which provides guidance related to in-kind contributions to employee benefit plans under ERISA and plans under section 4975 of the Code. The Department is publishing this Interpretive Bulletin because it believes there is a need for further guidance on this subject.

(Sec. 505, Pub.L. 93–406, 88 Stat. 894 (29 U.S.C. 1135)).

Background

Prior to the enactment of ERISA, transactions between plans and their sponsors were governed by an "arms-length" standard of conduct. The arms-length standard required substantial enforcement efforts and resulted in sporadic and uncertain effectiveness. As the Court noted in *Keystone*, the arms-length standard permitted abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid.

Congress' response to these abuses included the enactment of section 406(a)(1)(A) of ERISA, which prohibits a fiduciary of an employee benefit plan covered by part 4 of Title I of ERISA from causing the plan to engage in any transaction that the fiduciary knows or should know constitutes a direct or indirect sale or exchange of any property between the plan and a "party in interest," including the sponsoring employer. To further discourage such transactions, Congress also enacted section 4975(c)(1)(A) of the Code. Section 4975 imposes a two-tier excise tax on "disqualified persons," including plan sponsors, who engage, *inter alia*, in any direct or indirect sale to, or exchange of any property with, a plan.[1]

In *Keystone*, the Supreme Court resolved a conflict between two federal courts of appeals as to whether in-kind contributions to a tax-qualified defined benefit pension plan are considered prohibited transactions under section 4975(c)(1)(A) of the Code. The Court held that an employer's contribution of unencumbered real properties to a tax-qualified defined benefit pension plan made to satisfy the employer's funding obligation is a "sale or exchange"

[1] The term "plan" for purposes of section 4975 of the Code, as defined in section 2975(e)(1), is essentially restricted to plans qualified under section 401(a) or described in section 403(a) of the Code or an individual retirement account or annuity described in sections 408(a) or 408(b) of the Code. ERISA section 406 applies to employee pension benefit plans as defined by section 3(2) of ERISA, as well as employee welfare benefit plans as defined by section 3(1) of ERISA. In addition, section 401(a) of ERISA, and section 4975(g) of the Code specifically exclude certain types of plans from the application of ERISA section 406 and Code section 4975, respectively.

prohibited by section 4975(c)(1)(A) of the Code.

The Court in *Keystone* did not expressly address in-knd contributions to plans other than defined benefit pension plans or in-kind contributions to defined benefit pension plans in excess of amounts necessary to reduce the sponsor's funding obligation for the year in which the in-kind contribution is made.[2] Thus, in addition to explaining the Department's view of the holding of the Court in *Keystone*, this interpretive bulletin sets forth the Department's position with regard to in-kind contributions to plans other than defined benefit pension plans and to in-kind contributions that are in excess of the statutory minimum funding obligations of section 302 of ERISA and section 412 of the Code.

Consistent with existing Departmental guidance,[3] the interpretive bulletin provides that in-kind contributions to defined contribution pension plans and to welfare benefit plans are prohibited under section 406(a)(1)(A) of ERISA (and with respect to defined contribution pension plans under section 4975(c)(1)(A) of the code) if they reduce an obligation to make a contribution that is measured in terms of cash amounts, unless a statutory or administrative exemption under section 408 of ERISA (or section 4975(c)(2) or (d) of the Code) applies. As an illustration, the interpretive bulletin provides an example of a profit sharing plan under which the employer is required to make annual contributions "in cash or in kind" equal to a given percentage of the employer's net profit for the year. In this example an in-kind contribution would constitute a prohibited transaction in the absence of an exemption because the amount of the contribution obligation is measured in terms of cash amounts (a percentage of profits) even through the terms of the plan purport to permit in-kind contributions.

Although this general rule also applies to defined benefit pension plans under both ERISA and the Code, the special nature of the funding requirements of such plans has led the Department to conclude that additional guidance would be useful especially with respect to in-kind contributions that are in excess of amounts needed to satisfy the plan's funding requirements for the plan year in which the contribution is made. The amount of an employer's contribution to a defined benefit pension plan is credited to the plan's funding standard account under section 302(b) of ERISA and section 412(b) of the Code. A credit not needed to reduce the plan's accumulated funding deficiency (as defined in section 302(a) of ERISA and section 412(a) of the Code) to zero in the plan year in which the contribution is made is carried over for use in the following year. The amount of the credit is fixed at the time of the contribution. Thus, as explained in the interpretive bulletin, it is the Department's position that because an in-kind contribution is credited to the plan's funding standard account, it would be a prohibited transaction in the absence of an applicable exemption.

Finally, the interpretive bulletin affirms that the decision whether or not to accept a contribution is a fiduciary decision subject to the fiduciary standards of section 404 of ERISA.

List of Subjects in 29 CFR Part 2509

Employment benefit plans, Pension and Welfare Plans.

For the reasons set forth in the preamble, Part 2509 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for Part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Section 2509.75–1 is also issued under 29 U.S.C. 1114. Sections 2509.75–1 and 2509.75–2 are also issued under 29 U.S.C. 1052, 1053, 1054. Secretary of Labor's Order No. 1–87 (52 FR 13139).

2. Part 2509 is amended by adding a new § 2509.94–3 to read as follows:

§ 2509.94–3 Interpretive Bulletin relating to in-kind contributions to employee benefit plans.

(a) *General.* This bulletin sets forth the views of the Department of Labor (the Department) concerning in-kind contributions (*i.e.*, contributions of property other than cash) in satisfaction of an obligation to contribute to an employee benefit plan to which part 4 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) or a plan to which section 4975 of the Internal Revenue Code (the Code) applies. (For purposes of this document the term "plan" shall refer to either or both types of such entities as appropriate). Section 406(a)(1)(A) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange of any property between a plan and a "party in interest" as defined in section 3(14) of ERISA. The Code imposes a two-tier excise tax under section 4975(c)(1)(A) an any direct or indirect sale or exchange of any property between a plan and a "disqualified person" as defined in section 4975(e)(2) of the Code. An employer or employee organization that maintains a plan is included within the definitions of "party in interest" and "disqualified person."[1]

In *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, ____ U.S. ____, 113 S. Ct. 2006 (1993), the Supreme Court held that an employer's contribution of unencumbered real property to a tax-qualified defined benefit pension plan was a sale or exchange prohibited under section 4975 of the Code where the stated fair market value of the property was credited against the employer's obligation to the defined benefit pension plan. The parties stipulated that the property was contributed to the plan free of encumbrances and the stated fair market value of the property was not challenged. 113 S. Ct. at 2009. In reaching its holding the Court construed section 4975(f)(3) of the Code (and therefore section 406(c) of ERISA), regarding transfers of encumbered property, not as a limitation but rather as extending the reach of section 4975(c)(1)(A) of the Code (and thus section 406(a)(1)(A) of ERISA) to include contributions of encumbered property that do not satisfy funding obligations. *Id.* at 2013. Accordingly, the Court concluded that the contribution of unencumbered property was prohibited under section 4975(c)(1)(A) of the Code (and thus section 406(a)(1)(A) of ERISA) as "at least both an indirect type of sale and a form of exchange, since the property is exchanged for diminution of

[2] In footnote 2 of the *Keystone* opinion, the Court posited an example of property being contributed by an employer with no outstanding funding obligation to a pension plan to reward its employees for an especially productive year of service. In the Department's view, the dicta in footnote 2 of the Court's opinion should be read as a reference to in-kind contributions to a defined contribution pension plan that is not subject to the minimum funding requirements of section 302 of ERISA or section 412 of the Code.

[3] DOL Advisory Opinion No. 90–05A (Mar. 29, 1990) (in-kind contribution to an employee stock ownership plan).

[1] Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under the prohibited transactions provisions of section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Except with respect to the types of plans covered, the prohibited transaction provisions of section 406 of ERISA generally parallel the prohibited transaction of provisions of section 4975 of the Code.

the employer's funding obligation." 113 S. Ct. at 2012.

(b) *Defined benefit plans.* Consistent with the reasoning of the Supreme Court in *Keystone,* because an employer's or plan sponsor's in-kind contribution to a defined benefit pension plan is credited to the plan's funding standard account it would constitute a transfer to reduce an obligation of the sponsor or employer to the plan. Therefore, in the absence of an applicable exemption, such a contribution would be prohibited under section 406(a)(1)(A) of ERISA and section 4975(c)(1)(A) of the Code. Such an in-kind contribution would constitute a prohibited transaction even if the value of the contribution is in excess of the sponsor's or employer's funding obligation for the plan year in which the contribution is made and thus is not used to reduce the plan's accumulated funding deficiency for that plan year because the contribution would result in a credit against funding obligations which might arise in the future.

(c) *Defined contribution and welfare plans.* In the context of defined contribution pension plans and welfare plans, it is the view of the Department that an in-kind contribution to a plan that reduces an obligation of a plan sponsor or employer to make a contribution measured in terms of cash amounts would constitute a prohibited transaction under section 406(a)(1)(A) of ERISA (and section 4975(c)(1)(A) of the Code) unless a statutory or administrative exemption under section 408 of ERISA (or sections 4975(c)(2) or (d) of the Code) applies. For example, if a profit sharing plan required the employer to make annual contributions "in cash or in kind" equal to a given percentage of the employer's net profits for the year, an in-kind contribution used to reduce this obligation would constitute a prohibited transaction in the absence of an exemption because the amount of the contribution obligation is measured in terms of cash amounts (a percentage of profits) even though the terms of the plan purport to permit in-kind contributions.

Conversely, a transfer of unencumbered property to a welfare benefit plan that does not relieve the sponsor or employer of any present or future obligation to make a contribution that is measured in terms of cash amounts would not constitute a prohibited transaction under section 406(a)(1)(A) of ERISA or section 4975(c)(1)(A) of the Code. The same principles apply to defined contribution plans that are not subject to the minimum funding requirements of section 302 of ERISA or section 412 of the Code. For example, where a profit sharing or stock bonus plan, by its terms, is funded solely at the discretion of the sponsoring employer, and the employer is not otherwise obligated to make a contribution measured in terms of cash amounts, a contribution of unencumbered real property would not be a prohibited sale or exchange between the plan and the employer. If, however, the same employer had made an enforceable promise to make a contribution measured in terms of cash amounts to the plan, a subsequent contribution of unencumbered real property made to offset such an obligation would be a prohibited sale or exchange.

(d) *Fiduciary standards.* Independent of the application of the prohibited transaction provisions, fiduciaries of plans covered by part 4 of Title I of ERISA must determine that acceptance of an in-kind contribution is consistent with ERISA's general standards of fiduciary conduct. It is the view of the Department that acceptance of an in-kind contribution is a fiduciary act subject to section 404 of ERISA. In this regard, sections 406(a)(1)(A) and (B) of ERISA require that fiduciaries discharge their duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable administrative expenses, and 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. In addition, section 406(a)(1)(C) requires generally that fiduciaries diversify plan assets so as to minimize the risk of large losses. Accordingly, the fiduciaries of a plan must act "prudently," "solely in the interest" of the plan's participants and beneficiaries and with a view to the need to diversify plan assets when deciding whether to accept in-kind contributions. If accepting an in-kind contribution is not "prudent," not "solely in the interest" of the participants and beneficiaries of the plan, or would result in an improper lack of diversification of plan assets, the responsible fiduciaries of the plan would be liable for any losses resulting from such a breach of fiduciary responsibility, even if a contribution in kind does not constitute a prohibited transaction under section 406 of ERISA. In this regard, a fiduciary should consider any liabilities appurtenant to the in-kind contribution to which the plan would be exposed as a result of acceptance of the contribution.

Signed at Washington, DC, this 21st day of December, 1994.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor

[FR Doc. 94–31845 Filed 12–27–94; 8:45 am]

BILLING CODE 4510–29–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[MS01; FRL–5082–8]

Clean Air Act Final Full Approval Of 40 CFR Part 70 Operating Permits Program; State of Mississippi

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final Full Approval.

SUMMARY: The EPA is promulgatring full approval of the Operating Permits Program submitted by the State of Mississippi for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EFFECTIVE DATE: January 27, 1995.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final full approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, NE, Atlanta, GA 30365, 3rd floor, Tower Building. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT: Scott Miller, Title V Program Development Team, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region IV Environmental Protection Agency, 345 Courtland Street, NE, Atlanta, GA 30365, (404) 347–2864.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act ("the Act")), and implementing regulations at 40 Code of Federal Regulations (CFR) Part 70 require that States develop and submit operating permits programs to EPA by