

# ADVISORY

## SULLIVAN & WORCESTER BENEFITS ADVISORY

### Congress Modifies "Plan Asset" Rules; Makes Certain Pension Investments Easier

The new Pension Protection Act of 2006 includes sweeping changes in many pension related areas, but we wish to bring to your attention changes under the "plan asset" rules of ERISA. (The changes described will become effective for transactions occurring after the date the President signs the bill into law, which is expected shortly.)

Private equity investments by "benefit plan investors" have historically been limited by existing Department of Labor regulations that would impose fiduciary and prohibited transaction consequences with respect to the assets of an entity if benefit plan investors own 25% or more of the entity and it is not: an operating company; a venture capital operating company ("VCOC"); a real estate operating company ("REOC"); a publicly held company; or a retail mutual fund. The term benefit plan investor was very broadly defined.

Under the bill, the rules to determine whether an entity is subject to ERISA's fiduciary and prohibited transaction rules (because the underlying assets are "plan assets") have been relaxed. Specifically, the definition of benefit plan investors has been changed to exclude foreign plans, governmental plans and church plans.

Although legislation had been proposed to make changes to the 25% threshold, those changes were not included in the Pension Protection Act and the 25% threshold has not changed.

However, the bill did clarify that an entity will be deemed to hold ERISA plan assets only to the extent benefit plan investors are invested in the entity. Thus if assets of an investment fund are owned 30% by plans subject to ERISA, only 30% of that fund's investment in a second fund would be counted toward the 25% limit for the second fund.

We expect that investment vehicles that can qualify as VCOCs or REOCs will continue to strive to fit within these exceptions, but those that cannot satisfy the requirements of those exceptions will now find it easier to accommodate investments from plans subject to ERISA.

## IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

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