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A legal update from Dechert's Employee Benefits and Executive Compensation and Financial Services Groups

## Proposed Bill Amends ERISA Plan Asset Rule

On June 30, 2005, the House Committee on Education and the Workforce approved the Pension Protection Act of 2005 (H.R. 2830) (the "Bill"), which, if enacted, would amend the Employee Retirement Income Security Act of 1974 ("ERISA"). An amendment was included in the Bill that would, among other things,<sup>1</sup> address some of the concerns that private funds have regarding the United States Department of Labor's "Plan Asset Regulation."

The Bill must be approved by the House Ways and Means Committee before it can be acted upon by the full House. A similar bill has not yet been introduced in the Senate, although it is expected that one will be introduced.

### Current Law

Under the Plan Asset Regulation, there are a number of circumstances in which an entity's assets will not be treated as plan assets when a plan invests in that entity. These circumstances include where equity participation in the entity by "benefit plan investors" is not "significant." Currently, a private fund's assets are treated as ERISA plan assets if "benefit plan investors" own 25% or more of any class of equity interests in the fund.

The determination of whether "benefit plan investor" ownership is "significant" (i.e., 25% or greater) is made on a class-by-class basis, and if any class reaches or exceeds the 25% threshold, the entire fund (not just the class of

interests) is treated as a plan assets fund and a "benefit plan investor."

If that fund in turn invests in another fund, all of its assets (not just the percentage of its assets that are held by plans) are treated as benefit plan investor assets (i.e., the rule as applied is "all or nothing"). "Benefit plan investor" is currently defined broadly to include many plans that are not subject to either ERISA or Section 4975 of the Code (the Code prohibited transaction rules), including non-U.S. plans and governmental plans.

### Proposed Legislation

The Bill would amend ERISA as follows:

- Increase the participation by employee benefit plan investors that constitutes "significant" benefit plan participation from 25% to 50%
- Change the definition of "benefit plan investor" to mean an employee benefit plan that is subject to Title I of ERISA or a plan to which Code Section 4975 applies; this definition would exclude from the benefit plan investor percentage calculation interests in an entity held by non-U.S. benefit plans, state, local and other governmental plans, and any other plans that are not subject to either ERISA or the prohibited transaction provisions of the Code
- Eliminate class-by-class testing and apply the significant benefit plan investor participation test on the basis of the total value of all classes of equity interests in the entity

<sup>1</sup> The Bill also would make a number of changes to the ERISA-prohibited transaction rules, and would except certain broker-dealers and investment advisers from the ERISA bonding requirement.

- If benefit plan investor participation in an entity reaches or exceeds 50%, the entity will be considered to hold only the percentage of plan assets equal to the percentage of equity interests held by benefit plan investors (as defined in the second bullet above); benefit plan investor participation is determined at the time of acquisition of any equity interest in the entity

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## IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice

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