

**ABA TAX SECTION  
EMPLOYEE BENEFITS COMMITTEE MEETING  
May 10, 2008**

**PENSIONS FOR SALE?**

**Moderator:**

**Eleanor Banister  
King & Spalding  
1180 Peachtree Street NE  
Atlanta, GA 30309  
(404) 572 4930  
[ebanister@kslaw.com](mailto:ebanister@kslaw.com)**

**Panelists:**

**Nell Hennessy  
Fiduciary Counselors, Inc.,  
700 12th Street NW  
Suite 700  
Washington, DC 20005  
(202) 558-5141  
[nell.hennessy@fiduciarycounselors.com](mailto:nell.hennessy@fiduciarycounselors.com)**

**James Keightley  
Keightley & Ashner  
One Metro Center,  
700 12th Street N.W., Suite 700  
Washington, D.C. 20005  
(202) 558-5150  
[jimkeightley@keightleyashner.com](mailto:jimkeightley@keightleyashner.com)**

**Stuart M. Lewis  
Buchanan, Ingersoll & Rooney  
1700 K Street NW, Suite 300  
Washington, D.C. 20006-3807  
(202) 452-7933  
[stuart.lewis@bipc.com](mailto:stuart.lewis@bipc.com)**

**ABA TAX SECTION  
EMPLOYEE BENEFITS COMMITTEE MEETING  
May 10, 2008**

**PENSIONS FOR SALE?**

**Description of Hypothetical Transaction**

The following description is of a hypothetical transaction that will be the basis for the panel discussion of the Employee Benefits Committee on May 10.

1. Oldco is a large corporation with a substantial number of employees covered by a defined benefit pension plan qualified under section 401 of the Code. The plan is significantly underfunded and has been frozen so that no further benefits are accruing to participants.

2. Newco is a special-purpose entity established by a group of investors and may or may not be in the same controlled group (section 414(b) and (c) of the Code) with any of its investors. Newco's investors are likely to primarily include large financial institutions and possibly hedge funds.

3. Step 1: Pursuant to an arrangement worked out with Newco, Oldco creates a wholly owned subsidiary (Sub) for the purpose of assuming sponsorship of the plan. Sub will not own or operate any of the business operations of Oldco, nor will Sub itself employ any of the employees who participate in the plan, except, possibly, a de minimus number of employees who have administrative responsibilities in connection with the plan. Oldco may contribute cash or other assets to Sub as part of this arrangement.

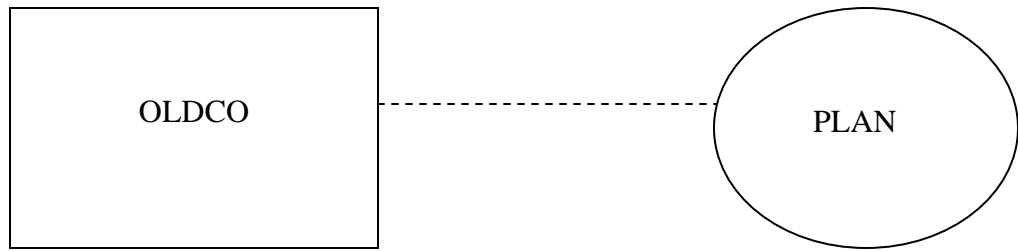
4. Step 2: Oldco transfers sponsorship of the plan to Sub, at least with respect to former employees (but, possibly, with respect to active employees too).

5. Step 3: Newco will acquire 100% of the stock (or at least more than 80% of the stock) of Sub. As a consequence, Sub will become a subsidiary of Newco and will become a member of the Newco controlled group.

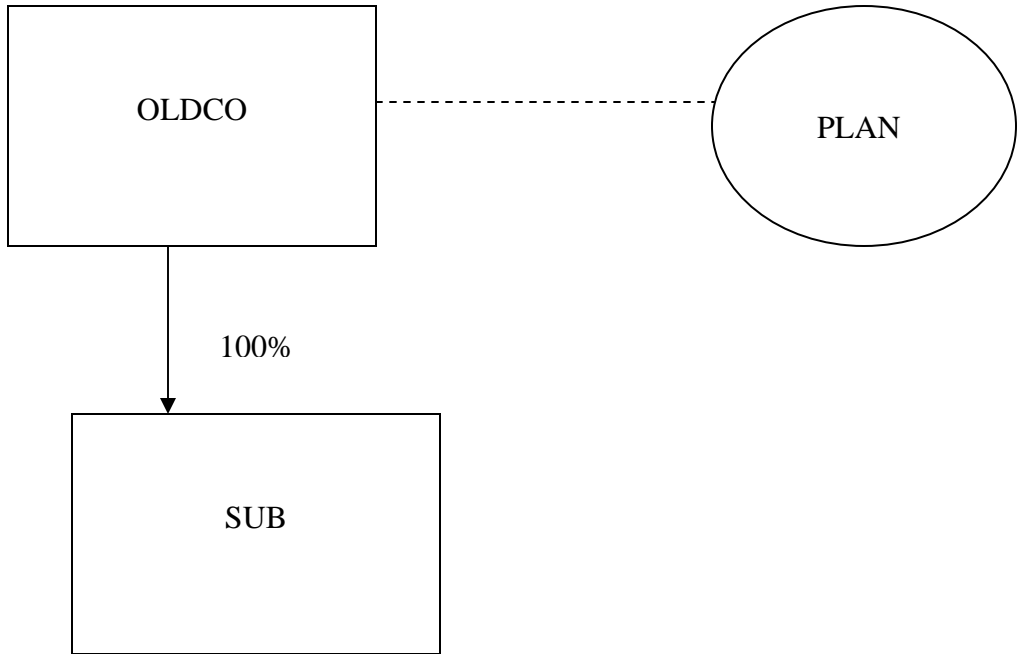
6. According to the transaction documents, Oldco no longer is a contributing employer under or sponsor of the plan and has no further liabilities or responsibilities for the plan. All responsibility for the plan was transferred to Sub and subsequently to Newco.

The foregoing can be illustrated by the following flow chart:

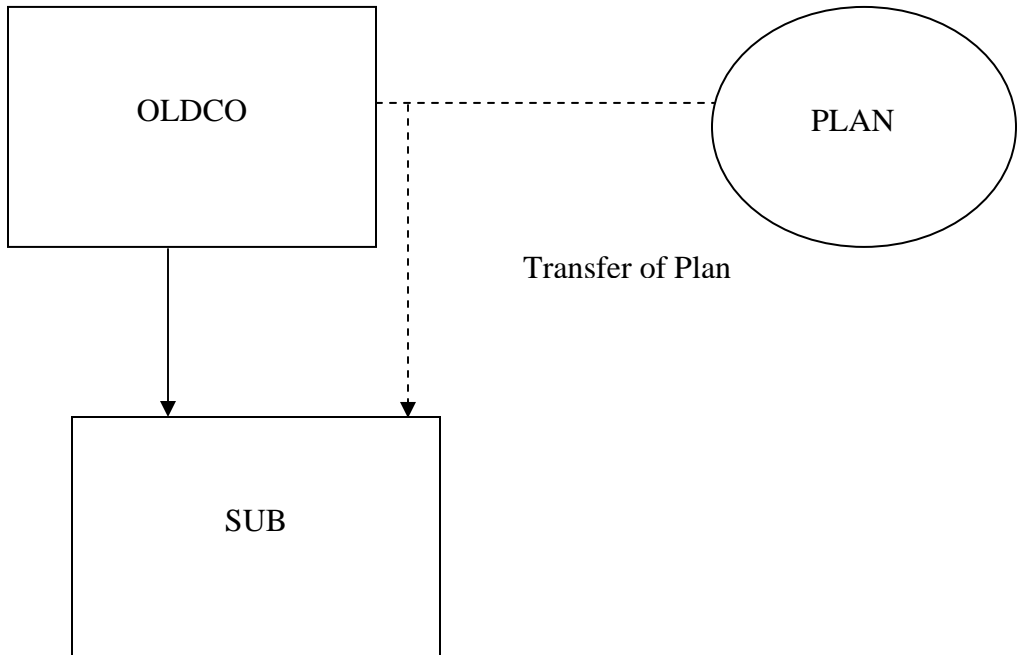
**Start**



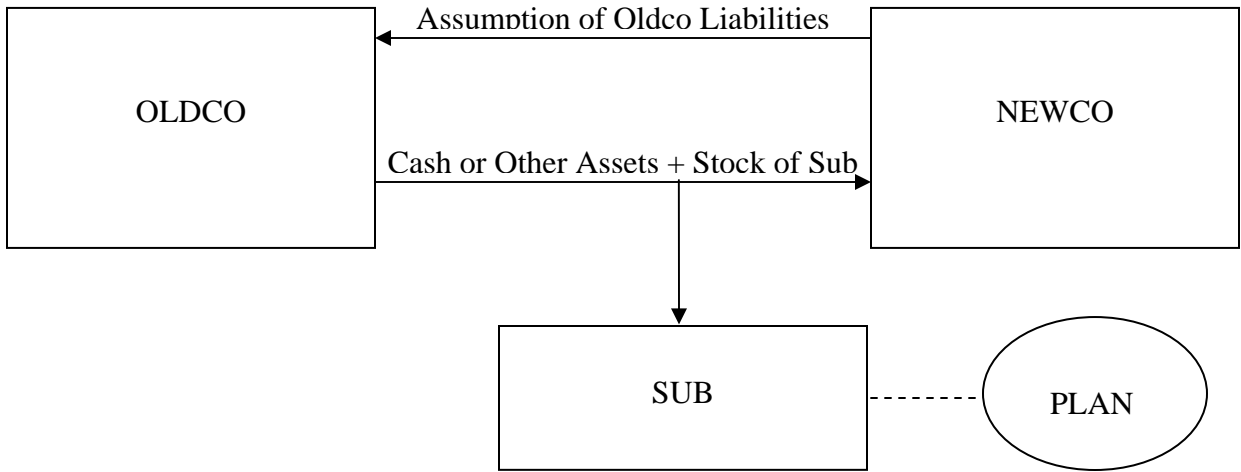
**Step 1**



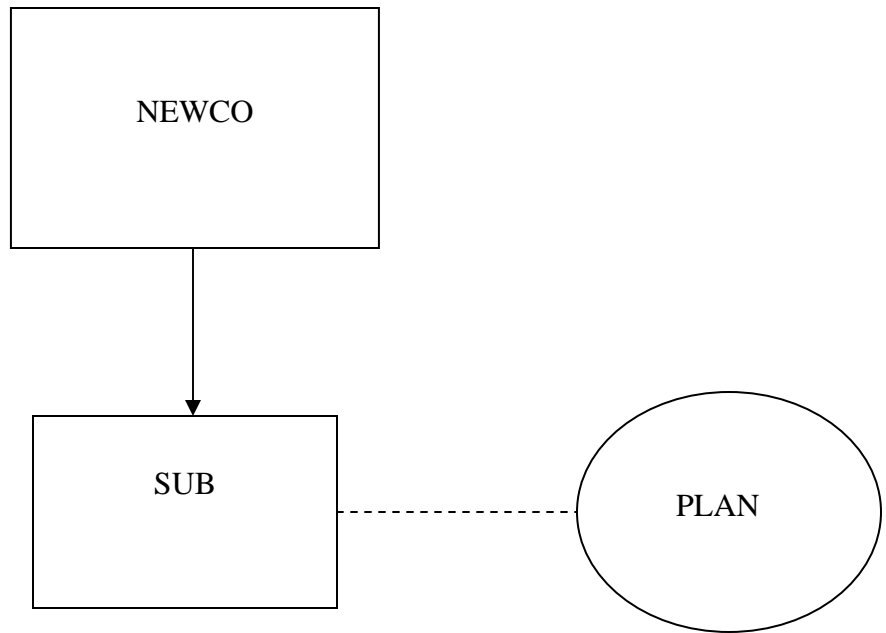
**Step 2**



**Step 3**



**Result**



**ABA TAX SECTION  
EMPLOYEE BENEFITS COMMITTEE MEETING  
May 10, 2008**

**PENSIONS FOR SALE?**

**Transferring Pension Liabilities to an Unrelated Buyer**

ERISA Title I Issues

- If the buyer never employed any of the participants, is the buyer an “employer” under ERISA § 3(5) (“any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan”)?
- If the buyer is not an “employer,” is the plan still an ERISA plan under ERISA § 3(5) (a plan “established or maintained by an employer”)?
- Is the transfer of the pension liabilities a settlor or fiduciary decision?
  - *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996)
  - *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)
- Does the plan fiduciary have any fiduciary responsibility with respect to the transaction and, if so, how does the fiduciary act for the exclusive benefit of plan participants under ERISA §404(a)(1)(A)?

Internal Revenue Code Issues

- Is the plan still qualified if the plan is sponsored by an entity that does not (and has not) employed any participants who benefit under the plan under Code § 401(a) (defining a qualified plan as “a . . . pension . . . plan of *an employer* for the exclusive benefit of *his employees* or their beneficiaries”)?
  - Rev. Rul. 70-316, 1970-1 C.B. 91, 92 (“the plan of the subsidiary that had no employees eligible to participate when the plan was adopted does not meet the requirements of section 401(a) of the Code”).
  - Treas. Reg. § 1.401-1(b)(4) (“plan covering only former employees may qualify under section 401(a)”).
- Does the transaction violate the exclusive benefit rule in Code § 401(a)(2) (forbids an employer from using trust assets for purposes other than “for the exclusive benefit of *his employees*.”)?
- Can the buyer get a deduction for future contributions under Code 404 and if so, when?
  - *David R. Webb Co. v. Comm’r*, 708 F.2d 1254 (7<sup>th</sup> Cir. 1983) (nonqualified plan payments are a capital expense, not deductible when paid)
  - GCM 39208 (Dec. 28, 1983) (“member of a controlled group . . . may not deduct contributions made to a pension plan on behalf of the employees of another member of the controlled group that does not participate in the plan”)

- GCM 39274 (Aug. 16, 1984) ("acquiring corporation may currently deduct its contribution to fund past service liability under a defined benefit plan maintained by the acquired corporation")
- Can the seller get a deduction for cash contributions to the buyer to fund future contributions to the plan? Is the result different if the seller makes contributions to a subsidiary that is transferred to the buyer?

#### ERISA Title IV Issues

- Does the transaction unreasonably increase the PBGC's risk and, if so, will the PBGC move to involuntarily terminate the plan under ERISA § 4042(a)(4) to protect the participants?
- If the plan terminates within 5 years, could the seller be liable for having engaged in an evasion transaction under ERISA 4069?
- Is the transaction a reportable event under ERISA § 4043?
  - 29 C.F.R. § 4043.29 (reporting requirements for "[c]hange in contributing sponsor or controlled group")
- If the plan is not qualified, does the PBGC guarantee still protect participants?