
DEPARTMENT OF LABOR**Employee Benefits Security Administration****[Application No. D-11100]****Proposed Class Exemption For Release of Claims and Extensions of Credit in Connection With Litigation****AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Notice of proposed class exemption.

SUMMARY: This document contains a notice of a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986, as amended (the Code). The proposed class exemption would apply to transactions engaged in by a plan in connection with the settlement of litigation. This exemption is being proposed in response to concerns raised by the pension community regarding the impact of ERISA's prohibited transaction provisions on the settlement of litigation by employee benefit plans with parties in interest. The proposed exemption, if granted, would affect all employee benefit plans, the participants and beneficiaries of such plans, and parties in interest with respect to those plans engaging in the described transactions.

DATES: Written comments and requests for a public hearing shall be submitted to the Department before March 28, 2003.

ADDRESSES: All written comments and requests for a public hearing (preferably 3 copies) should be sent to: U. S. Department of Labor, Employee Benefits Security Administration, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Plan Settlement Class Exemption Proposal.

Comments may be sent by fax to (202) 219-0204 or by e-mail to moffittb@pwba.dol.gov. The application for exemption (Application Number D-11100), as well as all comments received, will be available for public inspection in the Public Documents Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:

Andrea W. Selvaggio, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington DC 20210 (202) 693-8540 (not a toll-free number).

SUPPLEMENTARY INFORMATION: This document contains a notice that the Department is proposing a class exemption from the restrictions of section 406(a)(1)(A), (B) and (D) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (B) and (D) of the Code. The exemption described herein is being proposed by the Department on its own motion pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).¹

I. General Background

Questions have been raised regarding whether a fiduciary that agrees to settle litigation or threatened litigation by releasing the plan's claims against a party in interest in exchange for consideration has engaged in a prohibited transaction. In this regard, the prohibited transaction provisions of the Act generally prohibit transactions between a plan and a party in interest (including a fiduciary) with respect to such plan. Specifically, section 406(a)(1)(A), (B) and (D) of the Act states that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) Sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) Lending of money or other extension of credit between the plan and a party in interest; or

¹ Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(D) Transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

As noted in the General Information section of the Preamble of this proposed class exemption, the fact that a transaction is subject to an administrative exemption is not dispositive of whether the transaction is in fact a prohibited transaction. Rather, the proposed exemption is being published in response to uncertainty expressed on the part of plan fiduciaries charged with the responsibility under ERISA for determining whether it is in the interests of a plan's participants and beneficiaries to enter into a settlement agreement with a party in interest. The Department believes that this exemption will remove the uncertainty surrounding this issue and allow plan fiduciaries to properly carry out their responsibilities under ERISA.

II. Discussion of the Proposed Exemption

The Department is proposing this class exemption on its own motion in order to facilitate settlement of litigation by plans. Currently, two class exemptions provide limited relief for prohibited transactions that may arise as a result of the remedy proposed by the parties and/or the court in settlement of litigation or potential litigation where the Department or the Internal Revenue Service (the Service) is involved (the remedial transactions). PTE 79-15² exempts certain remedial transactions or activities specifically authorized or required by a judicial order or a judicially approved settlement decree where the Department or the Service is a party to the litigation. PTE 79-15 requires, among other things, that the transaction or activity be approved by the court prior to its occurrence. Similarly, PTE 94-71³ exempts certain remedial transactions authorized, prior to the occurrence of such transactions, by the Department. PTE 94-71 is available only to settle issues arising out of a Department of Labor investigation of a plan. No relief is provided for the transactions originally cited as violations by the Department. Under PTE 94-71, relief is conditioned, among other things, on approval by the Department, a written settlement agreement and notice to affected participants and beneficiaries.

PTEs 79-15 and 94-71 recognize that, in some situations, the most appropriate resolution for certain ERISA violations may be a remedy that would otherwise

be prohibited. For example, a plan may have purchased property from a party in interest in violation of section 406(a)(1)(A) of the Act. In attempting to resolve this prohibited transaction, the parties may find that another party in interest is the only person willing and able to purchase the property from the plan. However, without an exemption, this remedial transaction would also violate section 406(a)(1)(A) of the Act. It is this second transaction, the remedial transaction, that is the subject of relief under PTEs 79-15 and 94-71, not the original transaction that led to the controversy.

The current proposed class exemption is more limited than PTEs 79-15 and 94-71. It covers the transaction that occurs when the plan exchanges or releases its cause of action in exchange for consideration from parties in interest⁴ in settlement of litigation or threatened litigation. It also covers certain limited extensions of credit incident to the settlement. Unlike PTEs 79-15 and 94-71, this proposed exemption does not provide relief for any remedial prohibited transactions that the parties or the court may consider in an effort to achieve a settlement. In the Department's view, it would not be sufficiently protective of the interests of participants and beneficiaries to permit such remedial prohibited transactions without any involvement by either the Department or the Service. Therefore, absent an applicable statutory, class, or individual exemption, remedial prohibited transactions may not be entered into as part of a settlement pursuant to this proposed exemption. However, the proposed exemption does cover the receipt of cash by a plan in exchange for the release by the plan of a claim against a party in interest in partial or complete settlement of such claim.

The Department notes that many situations in which a plan settles litigation involve no question of a prohibited transaction triggering the need for an exemption. For example, if the parties in interest alleged to have committed prohibited transactions agreed to correct these transactions and this correction complies with section 4975 of the Code, the Department has taken the position that the correction itself will not result in a separate

prohibited transaction under Title I of the Act.⁵

Similarly, if a party in interest is willing to reimburse the plan for its losses without requiring a release of the plan's claims, no question of a prohibited transaction would arise because the plan, having not given up its claim, has not engaged in a transaction with a party in interest prohibited under section 406 of the Act. This may occur, for example, where the plan sponsor, concerned that it might be sued for breach of fiduciary duty, decides to make the plan whole for losses.⁶

The Service recently confirmed its position that such a payment may be "a restoration payment" not a contribution.⁷

Finally, the Department noted in AO 95-26A (October 17, 1995) that, where a service provider and the plan are settling a dispute related to the provision of services or incidental goods to the plan, the statutory exemption found in section 408(b)(2) of the Act may apply.

The Department has recently received a number of informal inquiries regarding the settlement of class-action securities fraud cases where the plan and/or its participants are shareholders. In many securities fraud cases, the plan may also have a cause of action against some of the same parties, based on ERISA violations. The defendants in the ERISA case are likely to overlap with the defendants in the securities fraud litigation. Given the rise in the number of cases in which plans are involved, either as individual litigants or members of the class action, the Department has determined that it would be appropriate to provide an exemption for parties in interest in order to facilitate the settlement of litigation with plans.

III. Description of the Proposed Exemption

The Department is proposing a retroactive and prospective exemption from the restrictions of section 406(a)(1)(A), (B) and (D) of the Act and from the taxes imposed by section

⁵ It should be noted that the Department has no jurisdiction with respect to the meaning of the term correction under section 53.4941(e)-1(c)(1) of the Foundation Excise Tax Regulations, which applies to correction of prohibited transactions under section 4975 of the Code, by reason of Temporary Pension Excise Tax Regulation section 141.4975-13.

⁶ For example, see PTE 97-32, 62 FR 31631 (6/10/97).

⁷ Rev. Rul. 2002-45, 2002-29 IRB 116 (06/26/02). For the payments to be considered restoration payments, not contributions, there must be a reasonable risk of liability for breach of fiduciary duty.

² 44 FR 26979 (5/8/79).

³ 59 FR 51216 (10/7/94), as corrected 59 FR 60837 (11/28/94).

⁴ Throughout this discussion we refer to consideration paid by or on behalf of a party in interest settling the case. This would include consideration paid by a third party, such as an insurance company, on behalf of the party in interest. It would also include consideration paid by another party in interest, including a fiduciary.

4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B) and (D) of the Code, for the following transactions effective January 1, 1975: (1) The release by the plan of a legal or equitable claim against a party in interest in exchange for consideration in settlement of litigation; and (2) an extension of credit by a plan to a party in interest in connection with a settlement whereby the party in interest agrees to repay, in installments, an amount owed to the plan.

a. Conditions Applicable to All Transactions

Both the retroactive and prospective parts of the proposed exemption are conditioned upon the existence of a genuine controversy involving the plan. The Department believes that this condition is necessary to prevent the plan and parties in interest from engaging in a sham transaction purporting to fall within this class exemption, thus shielding a transaction, such as an extension of credit, that would otherwise be prohibited. The existence of a genuine controversy must be determined by an attorney retained to advise the plan. That attorney must be independent of the other parties to the litigation.

The terms and conditions of the settlement must be negotiated by a fiduciary that has no relationship to, or interest in, the other parties involved in the litigation, other than the plan, that might affect its best judgment as a fiduciary. The Department intends a flexible standard for fiduciary independence, recognizing that the exemption will encompass a wide range of situations, both in terms of the type of litigation and the cost of pursuing such litigation. For example, in some instances where there are complex issues and significant amounts of money involved, it may be appropriate to hire an independent fiduciary having no prior relationship to the plan, its trustee, any parties in interest, or any other parties to the litigation. In other instances, the plan's current trustee, assuming that the trustee's conduct is not at issue, may be an appropriate fiduciary to make the decision on behalf of the plan as to whether to settle the litigation.

The proposed exemption also provides that the settlement must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. The intent of this condition is not to deny direct benefits to other parties to a transaction but, rather, to exclude transactions that are part of a broader overall agreement,

arrangement or understanding designed to benefit parties in interest.

b. Conditions Applicable to Retroactive Transactions

In addition to the conditions applicable to all transactions, if the transactions addressed in this class exemption occurred between January 1, 1975 and the date of publication of the final exemption, the retroactive exemption with respect to any extensions of credit is conditioned upon those extensions of credit bearing a reasonable interest rate taking into account all the facts and circumstances of the settlement.

c. Conditions Applicable to Prospective Transactions

In addition to the conditions applicable to all transactions, the prospective exemption is conditioned upon all terms of the settlement being specifically described in a written agreement or consent decree. Further, the plan must participate in the settlement on a basis no less favorable to the plan than the participation of similarly situated persons that are not plans. As discussed below, in some instances the plan may be able to negotiate a more favorable resolution of the issues than the other parties, given the additional causes of action available under ERISA.

The exemption is conditioned upon the settlement being reasonable, given the likelihood of full recovery and the risk of litigation. Settlement must be in the best interests of the participants and beneficiaries of the plan. The Department notes that, under ERISA, the plan may have additional causes of action not available to the other plaintiffs in the same case. For example, where shareholders have brought a class action securities fraud case against the Company and its officers, the Company's employee benefit plan may be named as a member of the class because it holds employer securities. Such a plan may also have ERISA claims against the Company and some or all of its officers, as well as against other parties. Before entering into a settlement, the plan fiduciary should consider the value of these additional claims. The plan fiduciaries may also be able to pursue claims against defendants not named in the securities fraud case, including knowing participants in the breach. Under certain circumstances, the plan will have additional sources of recovery, including fiduciary liability insurance, the plan's fidelity bond, and the personal assets of the defendants,

including their own employee benefit plan accounts.⁸

Where a settlement includes an extension of credit to a party in interest for purposes of repaying an amount owed in settlement of litigation, the prospective exemption requires that the credit terms, including the interest rate, be reasonable, but in no case may the rate be less than the underpayment rate defined in section 6621(a)(2) of the Code.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of plans;

(3) If granted, the proposed class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules.

⁸ Section 206(d)(4) of the Act permits a plan to offset the benefits of a participant under an employee pension plan against an amount that the participant is ordered or required to pay, if the order or requirement to pay arises under a judgment or conviction of a crime involving the plan, a civil judgment, including a consent order or decree, entered into by a court, or where there is a settlement agreement between the participant and the Secretary of Labor or the PBGC in connection with a violation of Part IV of ERISA.

Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it was determined that this action is "significant" under Section 3(f)(4) of the Executive Order. Accordingly, this action has been reviewed by OMB.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, EBSA is soliciting comments concerning the information collection request (ICR) included in this Notice of Proposed Class Exemption For Release of Claims and Extensions of Credit in Connection with Litigation. Address requests for copies of the ICR to Joseph S. Piacentini, Office of Policy

and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N-5718, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers.

The Department has submitted a copy of the proposed revision of a currently approved information collection to OMB in accordance with 44 U.S.C. 3507(d) for review. The Department and OMB are particularly interested in comments that:

Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

Enhance the quality, utility, and clarity of the information to be collected; and

Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration.

Although comments may be submitted through April 14, 2003 OMB requests that comments be received within 30 days of publication of the Notice of Class Exemption For Release of Claims and Extensions of Credit in Connection with Litigation to ensure their consideration.

The proposed class exemption would cover certain transactions engaged in by a plan in connection with litigation. If adopted, the class exemption would make clear that, under specified conditions, plans may settle litigation by: (1) Releasing their claims against parties in interest in exchange for payment by or on behalf of a party in interest; and (2) entering into agreements with parties in interest for payments of agreed-upon amounts in settlement of claims in installments. Without this exemption, for reasons described in detail in the General Background section of this notice, questions may be raised regarding whether a fiduciary or party in interest

that agrees to a settlement on behalf of the plan has engaged in a prohibited transaction under sections 406(a)(1)(A), (B), or (D) of the Act, which state, in pertinent part, that a fiduciary shall not cause a plan to engage in a transaction that constitutes a direct or indirect:

Sale or exchange, or leasing, of any property between the plan and a party in interest;

Lending of money or other extension of credit between the plan and a party in interest; or

Transfer to, or use by or for the benefit of, a party in interest, or any assets of the plan.

The Department recognizes that in certain instances it may be advantageous to the plan that is or potentially may be a party to litigation for the plan fiduciary to settle the litigation and release its claims. Settling a cause of action may be of greater benefit to a plan than engaging in lengthy and possibly costly litigation, or pursuing claims that defendants are unlikely to be capable of satisfying, even where a settlement does not fully satisfy amounts at issue. However, questions have been raised with the Department as to whether such a settlement and release of claims, as well as certain arrangements that may be made for payment in satisfaction of a settlement, would result in a prohibited transaction between the plan and the party in interest. Accordingly, the Department is proposing this class exemption in order to facilitate the settlement of litigation with plans.

In order to grant an exemption pursuant to section 408(a) of the Act, the Department must, among other things, make a finding that the terms of the exemption are protective of the rights of participants and beneficiaries of a plan. To support making such a finding, the Department normally imposes certain conditions on fiduciaries and parties in interest that may make use of the exemption. The information collection provisions of the proposed exemption are among these conditions. The information collection provisions are found in sections IV (a), IV (e), and V (a). These requirements are summarized as follows:

Written Agreement. The proposed prospective exemption requires that the terms of the settlement be specifically described in a written agreement or consent decree. The Department believes that execution of a written agreement between parties to litigation is usual and customary business practice. Therefore, no additional burden for a written settlement agreement is expected to be associated with the exemption.

Acknowledgement by a Fiduciary.

The proposed prospective exemption also requires that a fiduciary acting on behalf of the plan acknowledge in writing that it is a fiduciary with respect to the settlement of the litigation. Under the Act, a person that exercises any authority or control respecting disposition of [the plan's] assets,⁹ is considered a fiduciary. It is anticipated that the applicable plan fiduciary will incorporate this acknowledgement in the written agreement outlining the terms and conditions of its retention as a plan service provider, and already in existence, as part of usual and customary business practice. As such, a written acknowledgement is not expected to impose any measurable additional burden.

Recordkeeping. The proposed prospective exemption would require a plan to maintain for a period of six years the records necessary to enable certain persons to determine whether the conditions of the proposed exemption had been met. The six-year recordkeeping requirement is consistent with the requirements in section 107 of the Act as well as general recordkeeping requirements for tax information under the Code. The requirement is also consistent with other statutory requirements. As such, the Department has not accounted for a burden related to the recordkeeping requirement of this proposed exemption.

The proposed prospective exemption may affect all employee benefit plans, the participants and beneficiaries of those plans, and parties in interest to plans engaging in the specified transactions. It is not possible to estimate the number of respondents or frequency of response to the information collection requirements of the proposed exemption due to the wide variety of litigation involving plans, parties to that litigation, and jurisdictions in which litigation occurs. However, the lack of an ascertainable number of settlements would not impact the hour or cost burden because, as noted, no additional burden is expected to be associated with the information collection requirements of the proposed exemption.

The Department has on other occasions exempted classes of transactions involving settlement agreements under specific circumstances. Pursuant to PTE 94-71 (59 FR 51216), the Department determined that the restrictions of sections 406(a)(1)(A) through (E) and the taxes imposed by sections 4975(a) and 4975(b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,

shall not apply to a transaction or activity that is authorized by a remedial settlement agreement resulting from an investigation of an employee benefit plan conducted by the Department. Because this proposed exemption applies to settlement agreements involving plans and parties in interest, and the release of claims by the plan, the subject matter is considered to be sufficiently similar to suggest that both the public and the government would be served by combining the clearance of the information collection requests of both exemptions under one OMB control number.

Type of Review: Revision of a currently approved collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Settlement Agreements Between a Plan and Party In Interest (Prohibited Transaction Class Exemption 94-71; and Application No. D-11100).

OMB Number: 1210-0091.

Affected Public: Individuals or households; Business or other for-profit institutions; Not-for-profit institutions.

Frequency of Response: On occasion.

Total Respondents: 4 for existing ICR; no additional for proposed revision.

Total Responses: 1,080 for existing ICR; no additional for proposed revision.

Estimated Burden Hours: 40 for existing ICR; no additional for proposed revision.

Estimated Annual Costs (Operating and Maintenance): \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Written Comments

All interested persons are invited to submit written comments or requests for a public hearing on the proposed exemption to the address and within the time period set forth above. All comments will be made a part of the record. Comments and hearing requests should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection at the address set forth above.

Section I. Covered Transactions

Effective January 1, 1975, the restrictions of section 406(a)(1)(A), (B) and (D) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A), (B) and (D) of the Code, shall not apply to the following transactions, if the relevant conditions

set forth in sections II through IV below are met:

(a) The release by the plan of a legal or equitable claim against a party in interest in exchange for consideration, given by, or on behalf of, a party in interest to the plan in partial or complete settlement of the plan's claim; and

(b) An extension of credit by a plan to a party in interest in connection with a settlement whereby the party in interest agrees to repay, in installments, an amount owed to the plan in settlement of a legal or equitable claim by the plan against the party in interest.

Section II. Conditions Applicable to Transactions Described in Section I

(a) An attorney or attorneys retained to advise the plan on the claim, and having no relationship to any of the parties, other than the plan, determines that there is a genuine controversy involving the plan;

(b) The terms and conditions of the transaction are negotiated at arms' length by a fiduciary who has no relationship to, or interest in, any of the parties involved in the litigation, other than the plan, that might affect the exercise of such person's best judgment as a fiduciary; and

(c) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

Section III. Retroactive Conditions for Transactions Described in Section I (b)

In addition to the conditions described in section II, the following condition applies to the transactions described in section I (b) entered into on or before the date of publication of the final exemption in the **Federal Register**

(a) Any extension of credit by the plan to a party in interest in connection with the settlement of a legal or equitable claim against the party in interest is on terms, including the interest rate, that are reasonable.

Section IV. Prospective Conditions for Transactions Described in Section I (a) and (b)

In addition to the conditions described in section II, the following conditions apply to the transactions described in section I (a) and (b) entered into after the date of publication of the final exemption in the **Federal Register**:

(a) All terms of the settlement are specifically described in a written agreement or consent decree;

(b) The plan participates in the settlement on a basis no less favorable to the plan than the participation of

⁹ [10]: Section 3(21)(A)(i) of ERISA.

similarly situated persons that are not plans;

(c) Assets other than cash may be received by the plan from a party in interest in connection with a settlement only to the extent necessary to rescind a transaction that is the subject of the litigation. Such assets must be valued at their fair market value, as of the date of the settlement;

(d) The settlement is reasonable in light of the plan's likelihood of full recovery and the risks of litigation, and is in the best interest of the participants and beneficiaries of the plan;

(e) The fiduciary acting on behalf of the plan has acknowledged in writing that it is fiduciary with respect to the settlement of the litigation on behalf of the plan; and

(f) Any loan or extension of credit to a party in interest by the plan in connection with the settlement of a legal or equitable claim against the party in interest is on terms, including the interest rate, that are reasonable, but in no event is the interest rate less than the underpayment rate defined in section 6621(a)(2) of the Code.

Section V. General Conditions

In addition to the conditions described in section II and IV, the following conditions apply to all transactions described in section I entered into after the date of publication of the final exemption in the **Federal Register**:

(a) The plan maintains or causes to be maintained for a period of six years the records necessary to enable the persons described below in paragraph (b) to determine whether the conditions of this exemption have been met, including documents evidencing the steps taken to satisfy section IV (d), such as correspondence with attorneys or experts consulted in order to evaluate the plan's claims, except that:

(1) This recordkeeping condition shall not be violated if, due to circumstances beyond the control of the party responsible for recordkeeping, the records are lost or destroyed prior to the end of the six-year period,

(2) No party in interest other than the party responsible for recordkeeping shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b) (1) Except as provided below in paragraph (b)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) are unconditionally

available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(ii) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary,

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of the plan or the duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in paragraph (b)(1)(ii)–(iv) shall be authorized to examine trade secrets or commercial or financial information which is privileged or confidential.

Signed at Washington, DC this 6th day of February, 2003.

Ivan L. Strasfeld,

*Director, Office of Exemption ,
Determinations, Employee Benefits Security
Administration, Department of Labor.*

[FR Doc. 03–3393 Filed 2–10–03; 8:45 am]

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