
DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

September 22, 2004.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Darrin King on 202-693-4129 (this is not a toll-free number) or email: king.darrin@dol.gov.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Mine Safety and Health Administration (MSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202-395-7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- 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 proposed 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.

Agency: Mine Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Record of Results of Examinations of Self-Rescuers (Underground Coal Mines).

OMB Number: 1219-0044.

Frequency: Quarterly.

Type of Response: Recordkeeping.

Affected Public: Business or other for-profit.

Number of Respondents: 773.

Number of Annual Responses: 143,592.

Estimated Time Per Response: 30 minutes to certify and document that an examination was conducted and 1 minute to document why a device was taken out of service.

Total Burden Hours: 71,748.

Total Annualized capital/startup costs: \$0.

Total Annual Costs (operating/maintaining systems or purchasing services): \$0.

Description: Title 30, CFR 75.1714-3(b), (c), (d), and (e) require that self-rescuers be examined regularly at intervals not to exceed 90 days by a qualified person who certifies by date and signature that the tests were conducted. A record must be made when a self-rescue device is removed from service and when corrective action is taken as a result of the examination. The records are used as an enforcement tool to insure that the devices have been examined and are maintained in operable and usable condition.

Agency: Mine Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Escape and Evacuation Plans 30 CFR 57.11053.

OMB Number: 1219-0046.

Frequency: On occasion and semi-annually.

Type of Response: Recordkeeping and Third party disclosure.

Affected Public: Business or other for-profit.

Number of Respondents: 243.

Number of Annual Responses: 486.

Estimated Time Per Response: 8.5 hours.

Total Burden Hours: 4,131.

Total Annualized capital/startup costs: \$0.

Total Annual Costs (operating/maintaining systems or purchasing services): \$0.

Description: Title 30 CFR 57.11053 requires the development of an escape and evacuation plan specifically addressing the unique conditions of each underground metal and nonmetal mine. Section 57.11053 also requires that revisions be made as mining progresses. The plan must be available to the inspector and conspicuously posted at locations convenient to all persons on the surface and underground. The information is prepared by the mine operator for use by miners, MSHA, and persons involved in rescue operations.

Darrin A. King,

Acting Departmental Clearance Officer.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2004-16; Application No. D-11203]

Class Exemption for the Establishment, Investment and Maintenance of Certain Individual Retirement Plans Pursuant to a Mandatory Distribution

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits a fiduciary of a plan who is also the employer maintaining the plan to establish, on behalf of its separated employees, an individual retirement plan at a financial institution which is the employer or an affiliate, in connection with a Mandatory Distribution, as defined herein. Relief also is provided for a plan fiduciary to select a proprietary product as the initial investment for such individual retirement plan. Finally, relief is provided for the receipt of certain fees by the Individual Retirement Plan Provider in connection with the establishment or maintenance of the individual retirement plan and the initial investment of the Mandatory Distribution. The class exemption affects plan sponsors, plan fiduciaries, Individual Retirement Plan Providers and individual retirement plan account holders.

EFFECTIVE DATE: The exemption is effective for Mandatory Distributions made on or after March 28, 2005.

FOR FURTHER INFORMATION CONTACT: Allison Padams Lavigne or Karen Lloyd, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, at (202) 693-8540 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On March 2, 2004, the Department published a notice in the **Federal Register** (69 FR 9846¹) of the pendency before the Department of a proposed class exemption from the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of ERISA and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code. The proposed exemption was published concurrently with the proposed Fiduciary Responsibility under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor to be promulgated at 29 CFR 2550.404a-2 (defined herein as "Automatic Rollover Regulation"), which also was published on March 2, 2004 (69 FR 9899).

The Department proposed this class exemption on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set

forth in 29 CFR 2570, Subpart B (55 FR 32836, August 10, 1990).² The notice gave interested persons an opportunity to comment or request a public hearing on the proposed exemption. Four comments were received by the Department regarding the proposed class exemption. No requests for a public hearing were received. Upon consideration of the comments received, the Department has determined to grant the proposed exemption subject to certain modifications. These modifications and the comments are discussed below.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the 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 has been determined that this action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). Accordingly, this action has been reviewed by OMB.

This final prohibited transaction class exemption is being published concurrently with a final regulation titled "Fiduciary Responsibility under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor." The exemption permits plan fiduciaries that are also employers maintaining a pension plan to establish, for separated employees, individual retirement plans at financial institutions

that are the employer or an affiliate, in connection with a Mandatory Distribution as that term is defined in this exemption. The exemption also permits plan fiduciaries to select a proprietary product as the initial investment for an individual retirement plan. Finally, the exemption provides relief from what would otherwise be a prohibited transaction for the receipt of certain fees by Individual Retirement Plan Providers in connection with the establishment or maintenance of the individual retirement plan and the initial investment of a Mandatory Distribution.

The modifications made to the exemption following the Department's consideration of comments received on both the proposed exemption and the proposed Automatic Rollover Regulation are described in detail in the discussion that follows this summary of costs and benefits. An overview of the economic impacts of those modifications is presented in this section.

In general, the costs and benefits that may accrue to fiduciaries have been described and quantified in connection with the economic impact of the final regulation describing the safe harbor for automatic rollovers of mandatory distributions also published in today's issue of the **Federal Register**. Although they are not separately identified, the fiduciaries of pension plans who are also employers maintaining the plan who would establish these individual retirement plans at a financial institution which is the employer or affiliate pursuant to this exemption are included within the estimates of affected plans and separated employees presented in the final regulation.

The estimates presented in the final regulation have been revised from the proposal to reflect the provision of the final rule with respect to the applicability of the safe harbor to mandatory distributions of \$1,000 or less described in section 411(a)(11) of the Code, provided there is no affirmative distribution election by the participant and the fiduciary makes a rollover distribution into an individual retirement plan in accordance with the other conditions of the regulation, without regard to the fact that such a rollover is not described in section 401(a)(31) of the Code.

When the Department originally estimated the costs and benefits of the proposed regulation, which included the potential impact on the plans of financial institutions and affiliates that might make use of this exemption, the conditions of both the proposed regulation and the proposed exemption

² Section 102 of Reorganization Plan No. 4 of 1978 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.

¹ As corrected at 69 FR 11043 (March 9, 2004).

provided that fees and expenses attendant to the individual retirement plan, other than establishment fees, could be charged only against the income earned by the individual retirement plan. This condition has not been modified in the final exemption. Although the condition has been revised in the final regulation, the change has no impact on the total estimated fees and expenses attendant to these individual retirement plans, regardless of whether they are established in accordance with the conditions of the regulation or exemption. This difference between the regulation and exemption with respect to this condition is expected to result in a difference in only the way in which fees and expenses are allocated between the individual retirement plan and the Individual Retirement Plan Provider. It is likely that the fees and expenses attendant to the individual retirement plan offered by the plan fiduciary or an affiliate will be allocated at least in part to the Individual Retirement Plan Provider due to the limitation on the amount that can be charged to the individual retirement plan. The likelihood of the provider incurring such a limit on the recovery of its cost is greater when rates of return are low.

Certain other costs may be allocated in connection with the conditions of the exemption to plan fiduciaries that select the proprietary products of an employer or an affiliate for investment of individual retirement plans, that would not be allocated to plan fiduciaries absent the prohibited transaction that would otherwise occur. Specifically, in connection with the acquisition of an Eligible Investment Product, section I(h) of the exemption provides that plan fiduciaries are not permitted to charge a sales commission to the individual retirement plans of their separated employees. Foregone sales commissions may result in costs in the form of a reduction in profit margin or an operating loss to some Individual Retirement Plan Providers.

The Department has no basis for estimating a wide array of factors that would affect costs, such as the amount of fees or expenses that might not be fully charged to the individual retirement plans, the extent to which plan fiduciaries will use one or more proprietary products, the number of accounts that could be rolled over into such products, or the lost income, if any, that may result from unpaid sales commissions. Therefore, the Department has not estimated a cost for these provisions of the exemption. However, fiduciaries are in no event required to make use of individual retirement plans

offered by the plan fiduciary or an affiliate. In addition, many of the proprietary products permitted under the exemption generally do not charge a sales commission in connection with an initial purchase. In any case, it is likely that a plan fiduciary will use the individual retirement plans of itself or an affiliate, or a proprietary product for these individual retirement plans only if it is financially beneficial to do so, for example, as a way to retain deposits and increase earnings.

Paperwork Reduction Act

The final exemption permits a fiduciary of a pension plan that is also the employer maintaining the plan to establish, on behalf of its separated employees, an individual retirement plan at a financial institution that is the employer or an affiliate, in connection with a Mandatory Distribution. Relief is also being provided for a plan fiduciary to select a proprietary product as the initial investment for such an individual retirement plan. Finally, relief is provided for the receipt of certain fees by the Individual Retirement Plan Provider.

The exemption includes notice and recordkeeping requirements that are meant to inform separated employees and allow for verification by interested persons that the terms of the exemption have been met. Specifically, prior to an automatic rollover of a Mandatory Distribution, a plan fiduciary is required to notify a participant that the distribution may be rolled over into a proprietary investment selected by the plan fiduciary. Notification that a proprietary investment may be selected is to be provided in connection with a written explanation required under section 402(f) of the Code or in the plan's summary plan description or summary of material modifications thereto.

In the Department's view, neither alternative will result in a measurable burden. The additional information required to be included to meet this condition, though important, would require only a minor alteration to an existing disclosure. The fiduciary would also retain flexibility under the exemption as to the most efficient method of conveying the required information. As such, no burden for plan fiduciaries is expected to arise from the notice requirement in the exemption.

Similarly, because the records required to be maintained to enable verification of adherence to the conditions of the exemption would customarily be maintained as a part of usual business practices, this condition

is not expected to impose a burden on Individual Retirement Plan Providers.

Accordingly, the Department has made no submission to OMB for approval of an information collection request in connection with the proposed or final exemption. Although the Department requested comments on any potential impact within the terms of the Paperwork Reduction Act of the notice and recordkeeping requirements of the exemption, no comments were received.

Discussion of Comments Received

The Department received four comments in response to the notice of proposed exemption. Additionally, the Department received a number of comments in connection with the proposed Automatic Rollover Regulation. Interested persons should refer to the final Automatic Rollover Regulation, published in this issue of the **Federal Register**, for discussion of these comments.

With respect to the proposed exemption, one commenter stated that the definition of Eligible Investment Product should not be limited to money market funds because such investments might not keep pace with inflation. The commenter asserted that a better safe harbor investment would be any diversified fund that invests in a substantial number of stocks and/or bonds. Another commenter asked that the definition of Eligible Investment Product be revised to include alternative default portfolio allocations for the assets, similar to what is permitted by the Internal Revenue Service (IRS) for automatic enrollments (*i.e.*, balanced funds). The same commenter suggested that the individual retirement plans should replicate the asset allocation that workers selected while in active employment. Upon consideration of the comments, the Department believes that given the nature and the amount of the automatic rollover, investments should be designed to minimize risk, preserve assets for retirement and maintain liquidity. Further, the Department does not believe that an investment strategy adopted by a participant while in a defined contribution plan would necessarily continue to be the appropriate strategy for the participant in the context of an automatic rollover, particularly given the small account balances covered under this exemption. Accordingly, the Department has determined not to modify the definition of "Eligible Investment Product."

One commenter on the proposed exemption requested that the dollar limit on accounts affected by the exemption be raised from \$5,000 to \$10,000, and that the \$1,000 floor be

eliminated. The Department has determined to eliminate the \$1,000 floor but retain the \$5,000 limit.³ In this regard, the Department has added a new section IV(i) to the exemption to define the term, "Mandatory Distribution," which includes both an automatic rollover of a mandatory distribution described in section 401(a)(31)(B) of the Code and a mandatory distribution of one thousand dollars (\$1,000) or less described in section 411(a)(11) of the Code.

Finally, a commenter asked that the Department address "whether a credit union, or other 'Regulated Financial Institution' * * * can establish [individual retirement plans] at its own institution in order to satisfy the automatic rollover requirement with respect to distributions from qualified plans which it maintains for its own employees." The commenter also asked whether such credit union or "Regulated Financial Institution" could charge fees in connection with the establishment and maintenance of such individual retirement plans. The Department notes that the exemption currently permits a fiduciary of a plan to designate itself or an affiliate to provide an individual retirement plan and to receive fees in connection with the establishment and maintenance of the individual retirement plan, if the conditions of the exemption are met. Accordingly, a credit union or other "Regulated Financial Institution" may establish individual retirement plans for distributions from qualified plans it sponsors for its own employees, provided the credit union or "Regulated Financial Institution" meets the definition of Individual Retirement Plan Provider.⁴

The Department did not receive any comments on the proposed exemption regarding the amount of fees and expenses attendant to the individual retirement plan, including the investment of the assets thereof. However, the Department notes that such comments were received in connection with the parallel provisions of the proposed Automatic Rollover Regulation, and that the fee provisions of the final Automatic Rollover

Regulation were revised in response to the commenters. Unlike the Automatic Rollover Regulation, the Department has determined to retain the condition of the exemption (section II(j)(2)) that limits fees and expenses other than establishment charges to the income earned by the individual retirement plan. The Department believes that the removal or modification of this requirement would increase the potential for self dealing. This situation presents potential violations of section 406(b) of the Act for which the Department is not prepared to provide additional relief. However, in accordance with the modifications made to the Automatic Rollover Regulation, the Department has revised the language of section II(j)(1). In the proposal, this condition stated that the fees and expenses attendant to the individual retirement plan could not exceed fees and expenses charged by the Individual Retirement Plan Provider for comparable individual retirement plans established for eligible rollover distributions that are not subject to the automatic rollover provisions of section 401(a)(31)(B) of the Code. As revised, the condition requires an Individual Retirement Plan Provider to charge fees and expenses that do not exceed the fees and expenses it charges to comparable individual retirement plans established for reasons other than the receipt of a Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code. The Department has made the same revision to similar language in conditions II(e) and II(g).

Description of the Exemption

Section I of the exemption describes the transactions that are covered by the exemption. The plan fiduciary who provides the notice in section II(a) and meets the additional requirements described below would be able to be the Individual Retirement Plan Provider for its separated employees and to make an initial decision to invest the Mandatory Distribution in an investment product in which such plan fiduciary or its affiliate has an interest. Additionally, relief is provided for the receipt of fees by the Individual Retirement Plan Provider in connection with the establishment or maintenance of the individual retirement plan, and as a result of the investment of the Mandatory Distribution in an investment product in which the plan fiduciary or its affiliate has an interest.

Under the exemption, a plan fiduciary must, in connection with the written explanation provided pursuant to section 402(f) of the Code or in the plan's summary plan description or

summary of material modifications thereto, notify the participant prior to the Mandatory Distribution that, absent his or her election, the Mandatory Distribution will be rolled over to an individual retirement plan provided by the plan fiduciary or an affiliate, and that the plan fiduciary may select its own proprietary investment as the initial investment of the Mandatory Distribution. In any case, the plan's summary plan description or summary of material modifications thereto will describe the plan's rollover provisions effectuating the requirements of sections 401(a)(31)(B) and 411(a)(11) of the Code.

The plan fiduciary must comply with the requirements of the Automatic Rollover Regulation. The term "Automatic Rollover Regulation" refers to the regulation promulgated by the Department at 29 CFR 2550.404a-2, which is published elsewhere in this issue of the **Federal Register**.

The plan fiduciary must be the employer, any of whose employees are covered by the plan from which the Mandatory Distribution is made, or an affiliate.

Under the exemption, the individual retirement plan must be established and maintained for the exclusive benefit of the account holder of the individual retirement plan, his or her spouse or their beneficiaries. Under section IV(a) of the exemption, the term individual retirement plan is defined in section 7701(a)(37) of the Code. Section 7701(a)(37) defines individual retirement plan as an individual retirement account described in section 408(a) of the Code and an individual retirement annuity described in section 408(b) of the Code. For purposes of this exemption, the term individual retirement plan shall not include an individual retirement plan which is an employee benefit plan covered by Title I of ERISA. See 29 CFR 2510.3-2(d).

The exemption requires that the terms of the individual retirement plan, including the fees and expenses for establishing and maintaining the individual retirement plan, be no less favorable than those available to comparable individual retirement plans established for reasons other than the receipt of a Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code. The exemption further requires that all fees and expenses not be in excess of reasonable compensation within the meaning of section 4975(d)(2) of the Code. Corresponding service provider regulations under the Code provide guidance on the meaning of reasonable compensation under section 4975(d)(2). See 26 CFR 54.4975-6.

³ For a further discussion of this issue, refer to the preamble to the final Automatic Rollover Regulation, published in this issue of the **Federal Register**.

⁴ The Department notes that the term "Regulated Financial Institution" is defined in section IV(f) of the exemption and refers to the entity that can provide the initial investment product for the Mandatory Distribution. This term is separate from the term "Individual Retirement Plan Provider," defined at section IV(d), which refers to the entity that may provide the individual retirement plan for the Mandatory Distribution.

Under the exemption, the individual retirement plan must be invested in an "Eligible Investment Product." Section IV(e) defines the term "Eligible Investment Product" to mean an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity. For this purpose, the product must be offered by a Regulated Financial Institution and shall seek to maintain, over the term of the investment, the dollar value that is equal to the amount invested in the product by the individual retirement plan. Such term includes money market funds maintained by registered investment companies, and interest-bearing savings accounts and certificates of deposit of a bank or a similar financial institution. In addition, the term includes "stable value products" issued by a financial institution that are fully benefit-responsive to the individual retirement plan account holder, *i.e.*, that provide a liquidity guarantee by a financially responsible third party of principal and previously accrued interest for liquidations or transfers initiated by the individual retirement plan account holder exercising his or her right to withdraw or transfer funds under the terms of an arrangement that does not include substantial restrictions to the account holder's access to the assets of the individual retirement plan.

The exemption would not apply to the initial investment transaction entered into by an individual retirement plan unless the Eligible Investment Product is offered by a Regulated Financial Institution. A Regulated Financial Institution is defined under the exemption as an entity that: (i) Is subject to state or federal regulation, and (ii) is a bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation; a credit union, the member accounts of which are insured within the meaning of section 101(7) of the Federal Credit Union Act; an insurance company, the products of which are protected by state guaranty associations; or an investment company registered under the Investment Company Act of 1940.

In addition, the exemption requires that the rate of return or the investment performance of the individual retirement plan investment(s) be no less favorable than the rate of return or investment performance of an identical investment that could have been made at the same time by a comparable individual retirement plan established for reasons other than the receipt of a

Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code.

The exemption does not permit the individual retirement plan to pay a sales commission in connection with the acquisition of an Eligible Investment Product.

Under the exemption, the individual retirement plan account holder must be able to, within a reasonable time after request and without penalty to the principal amount of the investment, transfer his individual retirement plan balance to a different investment offered by the Individual Retirement Plan Provider, or transfer his or her individual retirement plan balance to another individual retirement plan sponsored at a different financial institution. The Department wants to ensure that, once the account holder discovers that an individual retirement plan has been established on his or her behalf, he or she is able to make appropriate investment decisions with respect to the assets of the individual retirement plan or to change Individual Retirement Plan Providers without penalty.

Section II(j) of the exemption limits the fees that may be paid by the individual retirement plan, as follows:

(1) The fees and expenses attendant to the individual retirement plan, including the investment of the assets of such plan, (*e.g.*, establishment charges, maintenance fees, investment expenses, termination costs, and surrender charges) shall not exceed the fees and expenses charged by the Individual Retirement Plan Provider for comparable individual retirement plans established for reasons other than the receipt of a Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code; (2) the fees and expenses, other than establishment charges, attendant to the individual retirement plan, may be charged only against the income earned by the individual retirement plan; and (3) the fees and expenses shall not exceed reasonable compensation within the meaning of section 4975(d)(2) of the Code. In this regard, an Individual Retirement Plan Provider who has not previously offered comparable individual retirement plans will not be able to satisfy condition II(j)(1) of the exemption.

Lastly, the exemption contains a recordkeeping requirement. The Individual Retirement Plan Provider must maintain records to enable certain persons to determine whether the applicable conditions of the exemption have been met. The records must be available for examination by the IRS, the Department, and account holders and

their beneficiaries for at least six years from the date of each automatic rollover.

General Information

The attention of interested persons is directed to the following:

(1) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department finds that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of such plan;

(2) The exemption is supplemental to, and not in derogation of, any other provisions of ERISA and the Code including statutory or administrative exemptions and transitional rules. 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;

(3) The exemption does not extend to transactions prohibited under section 406(b)(3) of ERISA and section 4975(c)(1)(F) of the Code; and

(4) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption.

Exemption

Accordingly, the following exemption is granted under the authority of section 408(a) of ERISA 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, 32847, August 10, 1990).

I. Transactions

The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to (i) the fiduciary of an Employee Pension Benefit Plan (plan) using its authority to designate itself or an affiliate as Individual Retirement Plan Provider to receive a Mandatory Distribution, (ii) the initial investment of the Mandatory Distribution by the plan fiduciary in an investment product in which the plan fiduciary or its affiliate has an interest, (iii) the receipt of fees by the Individual Retirement Plan Provider in connection with the establishment or maintenance of the individual retirement plan, and (iv) the receipt of investment fees by the Individual Retirement Plan Provider or an affiliate as a result of the initial investment of the Mandatory Distribution in an investment product in which the plan fiduciary or an affiliate

has an interest, provided that the conditions set forth in sections II and III are satisfied.

II. Conditions

(a) In connection with the written explanation provided to the separating participant pursuant to section 402(f) of the Code, or in the plan's summary plan description or summary of material modifications thereto, the plan fiduciary notifies the participant that, absent his or her election, the Mandatory Distribution will be rolled over to an individual retirement plan offered by the plan fiduciary or an affiliate, and that the plan fiduciary may select its own proprietary investment for the initial investment of the Mandatory Distribution.

(b) The requirements of the Automatic Rollover Regulation are met.

(c) The plan fiduciary is the employer any of whose employees are covered by the plan from which the Mandatory Distribution is made, or an affiliate.

(d) The individual retirement plan is established and maintained for the exclusive benefit of the individual retirement plan account holder, his or her spouse or their beneficiaries.

(e) The terms of the individual retirement plan, including the fees and expenses for establishing and maintaining the individual retirement plan, are no less favorable than those available to comparable individual retirement plans established for reasons other than the receipt of a Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code.

(f) The Mandatory Distribution is invested in an Eligible Investment Product(s), as defined in section IV(e).

(g) The rate of return or the investment performance of the individual retirement plan investment(s) is no less favorable than the rate of return or investment performance of an identical investment(s) that could have been made at the same time by comparable individual retirement plans established for reasons other than the receipt of a Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code.

(h) The individual retirement plan does not pay a sales commission in connection with the acquisition of an Eligible Investment Product.

(i) The individual retirement plan account holder may, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, transfer his individual retirement plan balance to a different investment offered by the Individual Retirement Plan Provider, or transfer his individual retirement plan

balance to an individual retirement plan sponsored at a different financial institution.

(j)(1) Fees and expenses attendant to the individual retirement plan, including the investment of the assets of such plan, (e.g., establishment charges, maintenance fees, investment expenses, termination costs, and surrender charges) shall not exceed the fees and expenses charged by the Individual Retirement Plan Provider for comparable individual retirement plans established for reasons other than the receipt of a Mandatory Distribution made pursuant to section 401(a)(31)(B) of the Code;

(2) Fees and expenses attendant to the individual retirement plan, with the exception of establishment charges, may be charged only against the income earned by the individual retirement plan; and

(3) Fees and expenses are not in excess of reasonable compensation within the meaning of section 4975(d)(2) of the Code.

(k) The present value of the nonforfeitable accrued benefit, as determined under section 411(a)(11) of the Code, does not exceed the maximum amount required to be rolled over under section 401(a)(31)(B) of the Code.

III. Recordkeeping

(a) The Individual Retirement Plan Provider maintains or causes to be maintained for a period of six (6) years from the date of each Mandatory Distribution the records necessary to enable the persons described in paragraph (b) of this section to determine whether the applicable conditions of this exemption have been met. Such records must be readily available to assure accessibility by the persons identified in paragraph (b) of this section.

(b) Notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this section are unconditionally available at their customary location for examination during normal business hours by—

(1) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service; and

(2) Any account holder of an individual retirement plan established pursuant to this exemption, or any duly authorized representative of such account holder.

(c) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Individual Retirement Plan Provider, the records are lost or

destroyed prior to the end of the six-year period, and no party in interest other than the Individual Retirement Plan Provider shall be subject to the civil penalty that may be assessed under section 502(i) of ERISA or to the taxes imposed by sections 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b).

IV. Definitions

(a) The term "individual retirement plan" means an individual retirement plan described in section 7701(a)(37) of the Code. For purposes of this exemption, the term individual retirement plan shall not include an individual retirement plan which is an employee benefit plan covered by Title I of ERISA.

(b) The term "Employee Pension Benefit Plan" refers to an employee pension benefit plan defined in ERISA section 3(2)(A).

(c) The term "Automatic Rollover Regulation" refers to the regulation promulgated by the Department at 29 CFR 2550.404a-2.

(d) The term "Individual Retirement Plan Provider" means an entity that is eligible to serve as an individual retirement account trustee under section 408(a)(2) of the Code, or for purposes of an individual retirement annuity described in section 408(b) of the Code, an insurance company which is qualified to do business under the law of the jurisdiction in which the annuity contract, or endowment contract (described in 26 CFR 1.408-3(e)), is sold.

(e) The term "Eligible Investment Product" means an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity. For this purpose, the product must be offered by a Regulated Financial Institution and shall seek to maintain, over the term of the investment, the dollar value that is equal to the amount invested in the product by the individual retirement plan. Such term includes money market funds maintained by registered investment companies, and interest-bearing savings accounts and certificates of deposit of a bank or similar financial institution. In addition, the term includes "stable value products" issued by a financial institution that are fully benefit-responsive to the individual retirement plan account holder, *i.e.*, that provide a liquidity guarantee by a financially responsible third party of principal and previously accrued interest for

liquidations or transfers initiated by the individual retirement plan account holder exercising his or her right to withdraw or transfer funds under the terms of an arrangement that does not include substantial restrictions to the account holder's access to the individual retirement plan's assets.

(f) The term "Regulated Financial Institution" means an entity that: (i) Is subject to state or federal regulation, and (ii) is a bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation; a credit union, the member accounts of which are insured within the meaning of section 101(7) of the Federal Credit Union Act; an insurance company, the products of which are protected by state guaranty associations; or an investment company registered under the Investment Company Act of 1940.

(g) An "affiliate" of a person includes:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, the person; or

(2) Any officer, director, partner or employee of the person;

(h) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(i) The term "Mandatory Distribution" means the automatic rollover of a mandatory distribution described in

section 401(a)(31)(B) of the Code, or a mandatory distribution of one thousand dollars (\$1,000) or less described in section 411(a)(11) of the Code provided there is no affirmative distribution election by the participant.

Signed at Washington, DC, this 20th day of September, 2004.

Ivan L. Strasfeld,

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

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