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**DEPARTMENT OF LABOR****Employee Benefits Security  
Administration****[Application No. D-11203]****Proposed Class Exemption for the  
Establishment, Investment and  
Maintenance of Certain Individual  
Retirement Plans Pursuant to an  
Automatic Rollover of a Mandatory  
Distribution****AGENCY:** Employee Benefits Security  
Administration, Labor.**ACTION:** Notice of proposed class  
exemption.

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**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed 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). If granted, the proposed exemption would permit 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 an automatic rollover of a mandatory distribution described in section 401(a)(31)(B) of the Code. Relief is also being proposed to permit a plan

fiduciary to select a proprietary product as the initial investment for such individual retirement plan. Finally, relief is proposed 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. If granted, the proposed exemption would affect plan sponsors, plan fiduciaries, individual retirement plan providers and individual retirement plan account holders.

**DATES:** Written comments and requests for a public hearing must be received by the Department on or before April 1, 2004.

**ADDRESSES:** All written comments and request for a public hearing should be sent to: Office of Exemption Determinations, (Attention: D-11203), Employee Benefits Security Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Ave, NW., Washington, DC 20210. Comments and requests for a hearing also may be submitted to EBSA via fax at (202) 219-0204, or by e-mail to *moffitt.betty@dol.gov* by the end of the comment period. The application and comments received will be available for public inspection in EBSA's Public Documents Room, U.S. Department of Labor, Room N-1513, 200 Constitution Ave, NW., Washington, DC.

**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:** Notice is hereby given 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 Department is proposing 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).<sup>1</sup>

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<sup>1</sup> 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.

## I. 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.

The proposed prohibited transaction class exemption is being published concurrently with a proposed regulation on Fiduciary Responsibility under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor. The proposed exemption will permit 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 an automatic rollover of a mandatory distribution described in section 401(a)(31)(B) of the Code. The proposed exemption also permits plan fiduciaries to select a proprietary product as the initial investment for an individual retirement plan. Finally, the proposed 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 the mandatory distribution.

In general, the costs and benefits that may accrue to fiduciaries have been

described and quantified in connection with the economic impact of the proposed regulation describing the safe harbor for automatic rollovers of mandatory distributions also published in today’s issue of the Federal Register. 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 are included within the estimates of affected plans and separated participants presented in the proposed regulations.

Certain additional costs may accrue to plan fiduciaries that select the proprietary products of an employer or an affiliate for investment of individual retirement plans. Specifically, in connection with the acquisition of an Eligible Investment Product, section I(h) of the proposed exemption provides that plan fiduciaries are not permitted to charge a sales commission to the individual retirement plans of their separated employees. In contrast to individual retirement plans not described in section 401(a)(31)(B) of the Code, individual retirement plans that do not generate sales commissions may result in a cost to some Individual Retirement Plan Providers. Because the Department has no basis for determining 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, the Department has not estimated a cost for this provision of the proposed exemption. However, 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 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. The Department requests comments on benefits and costs that pertain specifically to the conditions of this proposed exemption.

## II. Paperwork Reduction Act

The proposed 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 an automatic rollover of a mandatory distribution described in section 401(a)(31)(B) of the Code. Relief is also being provided that would

permit a plan fiduciary to select a proprietary product as the initial investment for such an individual retirement plan. Finally, relief is proposed for the receipt of certain fees by the Individual Retirement Plan Provider and the initial investment of the mandatory distribution.

The proposed exemption includes certain 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 with respect to the automatic rollover of mandatory distributions and investments. 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 materials 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 proposed 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 proposed exemption.

The Individual Retirement Plan Provider is also required to maintain or to cause to be maintained, for a period of six years, records relating to the automatic rollover that are necessary to enable certain described persons to determine whether the conditions of the proposed exemption had been met. Because these records 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.

Because no burden is expected to arise in connection with the notice and recordkeeping requirements in the proposed exemption, the Department has not made a submission for OMB approval of an information collection request in connection with the proposed exemption. The Department requests comments on any potential impact of the notice and recordkeeping requirements of the proposed exemption.

### III. Background

Under the Code, tax-qualified retirement plans are permitted to incorporate provisions requiring an immediate distribution to a separating participant without the participant's consent if the present value of the participant's vested accrued benefit does not exceed \$5,000.<sup>2</sup> A distribution by a plan in compliance with such a provision is termed a mandatory distribution, commonly referred to as a "cash-out." Separating participants may choose to roll the cash-out, which is an eligible rollover distribution,<sup>3</sup> into an eligible retirement plan,<sup>4</sup> or they may retain the cash-out as taxable distribution. Within a reasonable period of time prior to making a mandatory distribution, plan administrators are required by section 402(f) of the Code to provide a separating participant with a written notice explaining, among other things, the following: the Code provisions under which the participant may elect to have the cash-out transferred directly to an eligible retirement plan and that if an election is not made, such cash-out is subject to the automatic rollover provisions of Code section 401(a)(31)(B); the provision requiring income tax withholding if the cash-out is not directly transferred to an eligible retirement plan; and the provisions under which the distribution will not be taxed if the participant transfers the account balance to an eligible retirement plan within 60 days of receipt.<sup>5</sup>

As part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA),<sup>6</sup> section 401(a)(31) of the Code was amended to require that, absent an affirmative election by the participant, certain mandatory distributions from a tax-qualified retirement plan be directly transferred to an individual retirement plan<sup>7</sup> of a designated trustee or issuer. Specifically, section 657(a) of EGTRRA added a new section 401(a)(31)(B)(i) to the Code to provide that, in the case of a trust that is part of an eligible plan,<sup>8</sup>

the trust will not constitute a qualified trust unless the plan of which the trust is a part provides that if a mandatory distribution of more than \$1,000 is to be made and the participant does not elect to have such distribution paid directly to an eligible retirement plan or to receive the distribution directly, the plan administrator must transfer such distribution to an individual retirement plan. Section 657(a) of EGTRRA also added a notice requirement in section 401(a)(31)(B)(i) of the Code requiring the plan administrator to notify the participant in writing, either separately or as part of the notice required under section 402(f) of the Code, that the participant may transfer the distribution to another individual retirement plan.<sup>9</sup>

Section 657(c)(2)(A) of EGTRRA directed the Department to issue regulations providing safe harbors under which (1) a plan administrator's designation of an institution to receive the automatic rollover and (2) the initial investment choice for the rolled-over funds would be deemed to satisfy the fiduciary responsibility provisions of section 404(a) of ERISA. Section 657(c)(2)(B) of EGTRRA states that the Secretaries of Labor and Treasury may provide, and shall give consideration to providing, special relief with respect to the use of low-cost individual retirement plans for purposes of Code section 401(a)(31)(B) automatic rollovers and for other uses that promote the preservation of assets for retirement income.

Where the plan administrator (or other fiduciary)<sup>10</sup> of a plan is a financial institution or an affiliate, and is an individual retirement plan provider,<sup>11</sup> the plan administrator may determine to designate itself or its affiliate as the

individual retirement plan provider. In addition, the plan administrator may determine to invest the mandatory distribution in an investment product in which it or its affiliate has an interest. In this regard, section 406(a)(1) prohibits in part, a fiduciary of a plan from causing the plan to engage in a transaction that constitutes a direct or an indirect sale, 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; furnishing of goods, services, or facilities between the plan and a party in interest; and a transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. Section 406(b)(1) and (b)(2) prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account; and from acting in his individual or in any other capacity in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Accordingly, a violation of section 406(a) and/or (b) may occur if the plan administrator or other fiduciary designates itself or an affiliate as the provider of the individual retirement plan. Also, additional violations may occur if the plan fiduciary determines to invest the mandatory distribution in an investment which it or its affiliate has an interest. Section 408(b)(2) of ERISA provides a conditional statutory exemption for the provision of services by a party in interest to a plan and the payment of reasonable compensation to the party in interest. However, section 408(b)(2) of ERISA does not provide relief from the prohibitions described in section 406(b) of ERISA.<sup>12</sup> If a plan fiduciary uses the authority, control or responsibility which makes such person a fiduciary to cause the plan to pay an additional fee to such fiduciary or to a person in which he has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary, then a violation of section 406(b) of ERISA would occur.

The Department notes that this proposed class exemption provides relief for a plan fiduciary's designation of itself or an affiliate as individual retirement plan provider to receive automatic rollovers of mandatory distributions from plans for which it or an affiliate serves as the plan sponsor.<sup>13</sup> In addition, relief is provided for the selection of the plan fiduciary's (or an

<sup>2</sup> Code sections 411(a)(11) and 417(e). See Code section 411(a)(11)(D) for circumstances where the amount of a cash-out may be greater than \$5,000, based on a participant's prior rollover contribution to the plan.

<sup>3</sup> See Code section 402(f)(2)(A).

<sup>4</sup> See Code section 402(f)(2)(B).

<sup>5</sup> Code section 402(f)(1).

<sup>6</sup> Pub. L. 107-16, June 7, 2001, 115 Stat. 38.

<sup>7</sup> Section 401(a)(31)(B)(i) of the Code requires the transfer to be made to an "individual retirement plan," which section 7701(a)(37) of the Code defines to mean an individual retirement account described in section 408(a) and an individual retirement annuity described in section 408(b).

<sup>8</sup> Section 657(a)(1)(B)(ii) of EGTRRA defines an "eligible plan" as a plan which provides for an

immediate distribution to a participant of any "nonforfeitable accrued benefit for which the present value (as determined under section 411(a) of the Code) does not exceed \$5,000." The Treasury and the IRS have advised the Department that the requirements of Code section 401(a)(31)(B) apply to a broad range of retirement plans including plans established under Code sections 401(a), 401(k), 403(a), 403(b) and 457.

<sup>9</sup> Conforming amendments to Code sections 401(a)(31) and 402(f)(1) were also made by section 657 of EGTRRA.

<sup>10</sup> Although the provisions of section 401(a)(31)(B) of the Code state that the "plan administrator" will make the transfer to an individual retirement plan, the Department has determined to provide relief for any plan fiduciary affiliated with the plan sponsor who makes the decisions described herein with respect to the automatic rollover.

<sup>11</sup> The Department uses the term individual retirement plan provider, defined in section IV(d), to refer to the entity that is providing the rollover individual retirement plan. For purposes of this exemption, the individual retirement plan provider will either be the plan fiduciary that is the sponsor of the plan from which the rollover was made, or an affiliate.

<sup>12</sup> See 29 CFR 2550.408b-2(e).

<sup>13</sup> See ERISA section 3(16)(B).

affiliate's) proprietary investment products as the initial investment designation for the mandatory distributions of its plan participants. The proposed exemption does not cover any subsequent investment decisions made by the individual retirement plan provider on behalf of the individual retirement plan account holder.<sup>14</sup> Additionally, the Department anticipates that, where a plan fiduciary which is unrelated to the plan sponsor recommends itself as individual retirement plan provider, and recommends its own proprietary investments as the initial investment of the mandatory distribution, such determinations will ultimately be subject to the independent approval of the plan sponsor and, therefore, may not result in prohibited transactions.<sup>15</sup>

#### *Discussion of the Proposed Exemption*

Section I of the proposal 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 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 proposal, 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 rollover 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 section 401(a)(31)(B) 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 2550.401a-2, which is proposed 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 automatic rollover of the mandatory distribution is made, or an affiliate.

Under the proposal, 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 proposed 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.<sup>18</sup>

The proposal 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 for distributions not described in section 401(a)(31)(B) of the Code.

Under the proposed 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 must seek to maintain a stable dollar value 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.<sup>19</sup> 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 Department requests comments as to whether an annuity provider described in section 408(b) of the Code currently offers Eligible Investment Products as defined herein.

The exemption would not apply to the initial investment transaction entered into by an individual retirement plan unless the Eligible Investment Product is provided 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 guarantee associations; or an investment company registered under the Investment Company Act of 1940.

The Department expects that a Regulated Financial Institution whose investment product is selected by the plan fiduciary on behalf of the individual retirement plan will be a solvent institution capable of honoring its ultimate financial obligation to the account holder.

In addition, the proposal requires that the rate of return or the investment performance of the individual retirement plan investment(s) be no less

<sup>14</sup> The Department notes that where a distribution constitutes the entire benefit rights of a participant, the participant will cease to be a participant covered under the plan within the meaning of 29 CFR 2510.3-3(d)(2)(ii)(B), and the distributed assets will cease to be plan assets within the meaning of 29 CFR 2510.3-101 for purposes of Title I of ERISA. Nevertheless, if the assets are rolled over into an individual retirement plan, the prohibitions of section 4975 of the Code will continue to apply. See 29 CFR 2510.3-101(a)(1).

<sup>15</sup> To the extent that an independent plan fiduciary provides investment advice to a plan within the meaning of regulation 29 CFR 2510.3-21(c)(1)(ii)(B), and recommends an investment in its own proprietary investment product, the presence of an unrelated second fiduciary (*e.g.*, plan sponsor) acting on the investment advisor's recommendations on behalf of the plan is not sufficient to insulate the advisor from fiduciary liability under section 406(b) of ERISA. See Advisory Opinions 84-03A and 84-04A issued by the Department on January 4, 1984.

<sup>18</sup> See 29 CFR 2510.3-2(d).

<sup>19</sup> The investment of plan assets in bank deposits may be covered by ERISA section 408(b)(4) and Code section 4975(d)(4).

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 for distributions not described in section 401(a)(31)(B) of the Code.

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

Under the proposed 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.

The proposal limits the fees that may be paid by the individual retirement plan, as follows: (i) 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 eligible rollover distributions that are not subject to the automatic rollover provisions of section 401(a)(31)(B) of the Code; (ii) 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 (iii) the fees and expenses shall not exceed reasonable compensation within the meaning of section 4975(d)(2) of the Code. Accordingly, establishment fees for the individual retirement plan may be paid out of the principal of the mandatory distribution, provided that such fees do not exceed the fees charged to comparable individual retirement plans containing rollover distributions not described in section 401(a)(31)(B) of the Code.

The proposed exemption applies only to the automatic rollover of a mandatory

distribution described in section 401(a)(31)(B) of the Code. At present, such distributions are limited to nonforfeitable accrued benefits, the present value of which is in excess of \$1,000, but is less than or equal to \$5,000. For purposes of determining the present value of such benefits, section 401(a)(31)(B) references Code section 411(a)(11). Section 411(a)(11)(A) of the Code provides that, in general, if the present value of any nonforfeitable accrued benefit exceeds \$5,000, such benefit may not be immediately distributed without the consent of the participant. Section 411(a)(11)(D) of the Code also provides a special rule that permits plans to disregard that portion of a nonforfeitable accrued benefit that is attributable to amounts rolled over from other plans (and earnings thereon) in determining the \$5,000 limit. Inasmuch as section 401(a)(31)(B) of the Code requires the automatic rollover of mandatory distributions, as determined under section 411(a)(11), which would include prior rollover contributions, the proposed exemption, if granted, would provide relief in the case of automatic rollovers of mandatory distributions containing such prior rollover contributions.

Lastly, the proposal 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) Before an exemption may be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find 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 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. 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 proposed exemption, if granted, will not extend to transactions

prohibited under section 406(b)(3) of ERISA and section 4975(c)(1)(F) of the Code; and

(4) If granted, the pending class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption.

#### *Written Comments*

All interested persons are invited to submit written comments or requests for a hearing on the proposed exemption to the address and within the time period set forth above. All comments and requests for a hearing will be made a part of the record. Comments and requests for a hearing 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.

#### *Proposed Exemption*

The Department has under consideration the granting of the following class exemption, 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 2570, subpart B (55 FR 32836, 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 the automatic rollover of a mandatory distribution described in section 401(a)(31)(B) of the Code, (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 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 automatic rollover of 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 for distributions not described in 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 for distributions not described in 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 eligible rollover distributions that are not subject to the automatic rollover provisions of 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 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 automatic rollover 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 must seek to maintain a stable dollar value 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 guarantee 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.

Signed at Washington, DC, this 5th day of February.

**Ivan L. Strasfeld,**

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

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