
DEPARTMENT OF LABOR
Employee Benefits Security Administration
[Application No. D-11261]
Proposed Amendment to Prohibited Transaction Exemption 2002-51 (PTE 2002-51) To Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program
AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of proposed amendment to PTE 2002-51.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 2002-51 (67 FR 70623 November 25, 2002). PTE 2002-51 is a class exemption that provides relief from certain prohibited transaction restrictions imposed by section 4975 of the Internal Revenue Code (the Code) of 1986 for certain eligible transactions identified in the Department's Voluntary Fiduciary Correction (VFC) Program, which was adopted on March 28, 2002. This exemption is being proposed in conjunction with the Department's Amendment and Restatement of the VFC Program (revised VFC Program), which is being published simultaneously in this issue of the **Federal Register**. The VFC Program allows certain persons to avoid potential civil actions under the Employee Retirement Income Security Act of 1974 (ERISA) initiated by the Department and the assessment of civil penalties under section 502(l) of ERISA in connection with an investigation or civil action by the Department. If granted, the proposed amendment to PTE 2002-51 would affect plans, participants and beneficiaries of such plans and certain other persons engaging in such transactions.

DATES: Written comments and requests for a public hearing on the proposed

amendment must be received by the Department by June 6, 2005.

ADDRESSES: All written comments and requests for a public hearing (preferably three copies) concerning the proposed amendment should be sent to: U.S. Department of Labor, Employee Benefits Security Administration, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, (Attention: Amendment to the VFC Program Exemption D-11261). Comments and requests for a hearing alternatively may be sent by fax to (202) 219-0204 or submitted electronically to moffitt.betty@dol.gov by the end of the comment period. All comments received from interested persons will be available for public inspection in EBSA's Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Brian J. Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693-8545 (this is not a toll free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 2002-51. PTE 2002-51 provides relief from the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code. The proposed amendment would expand the relief under the exemption to additional transactions included in the revised VFC Program. The Department is proposing to amend PTE 2002-51 on its own motion pursuant to 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).¹

Executive Order 12866 Statement

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) of the Executive Order, a "significant regulatory action" is 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. OMB has determined that this proposed amendment is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, an assessment of the potential costs and benefits under section 6(a)(3) of that order is not required. In order to better inform the public, the Department has, however, included a brief analysis of the applicable costs and benefits of the proposed amendment.

PTE 2002-51 provides relief from the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code. In general, the exemption enhances the benefits of participation in the VFC Program by granting relief from excise taxes under section 4975 for breaches of fiduciary duty that are prohibited transactions. The class exemption will have positive economic effects by eliminating such excise taxes and promoting increased participation in the VFC Program. The purpose of the VFC Program is to encourage the correction of breaches of fiduciary duty, resulting in the recovery of lost earnings or profits for the benefit of plan participants and beneficiaries.

The Department has assumed that not all Plan Officials that apply to the VFC Program will necessarily take advantage of the excise tax relief provided under the exemption, either by choice or because the corrected transaction is not an eligible transaction to which this exemption applies. The Department has assumed that as many as one half of all applicants who take the opportunity to voluntarily correct a violation under the Program, or 350 Plan Officials annually, will choose to avail themselves of the opportunity for excise tax relief.

This amendment to PTE 2002-51 is proposed in connection with the Amendment and Restatement of the VFC Program (revised VFC Program), which is published in this issue of the

¹ Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, 5 U.S.C. App. 1 [1996]) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code of the Secretary of Labor.

Federal Register. This proposed amendment would expand the relief under the exemption to an additional transaction included in the revised VFC Program. As described in detail below, the additional eligible transaction generally includes the purchase of an asset by a plan where the asset has been determined to be illiquid as described in the revised VFC Program, and the sale of the illiquid asset by the plan to a party in interest.

The proposed addition of this eligible transaction may increase participation in the VFC Program, and utilization of the exemption. However, the Department is unable to estimate the impact of these changes because participation in the Program has steadily increased without any revisions to the Program such as those adopted today. Due to a lack of information regarding the substantial increases, it is not possible to identify factors that influence the decision to participate or to make use of the exemption, or to predict how this proposed amendment would influence future participation.

Applicants must meet all of the applicable requirements of the revised VFC Program and must have received a no action letter from EBSA with respect to the eligible transaction at issue. Additional costs will accrue to applicants seeking relief under the VFC Program and this exemption because of the notice requirements. The cost of preparing and distributing such notices is estimated to be about \$31,000 per year based on the projected use of the exemption by 350 applicants. This estimate does not take into account any increase related to the additional eligible transaction. This cost is accounted for in burden estimates submitted to and approved by OMB pursuant to the Paperwork Reduction Act (PRA).

Paperwork Reduction Act

The Amended and Restated Voluntary Fiduciary Correction Program includes a revision to its information collection provisions. Accordingly, the revisions have been submitted to OMB for review and approval under the PRA. Because the exemption is used in connection with the Program, and for ease of public review, the burden of the Information Collection Request (ICR) in the VFC Program is combined with the burden of the information collection provisions of the exemption for purposes of accounting for burden under the PRA. These information collection provisions are currently approved under OMB control number 1210-0118. That approval is scheduled to expire on December 31, 2006. Because the

information collection provisions of this proposed exemption are unchanged from those of existing PTE 2002-51, no submission is made to OMB in connection with these proposed amendments.

Background

Title I of ERISA, which establishes certain standards of conduct for fiduciaries of employee benefit plans covered by ERISA, includes provisions prohibiting fiduciaries from causing a plan to engage in certain classes of transactions with persons defined as parties in interest. Similarly, Title II of ERISA prohibits plans described in section 4975(e)(1) of the Code from engaging in certain classes of transactions with persons defined under the Code as disqualified persons. Generally, such transactions are subject to taxation under section 4975 of the Code.

The VFC Program was adopted by the Department on a permanent basis in March 2002.² Under the VFC Program, persons who are potentially liable for a breach can avoid the possibility of civil investigations and/or civil actions initiated by the Department for that breach and the imposition of civil penalties under section 502(l) of ERISA if they satisfy the conditions for correcting the breach as described in the VFC Program. The VFC Program was based on the Department's experience with the Pension Payback Program, 61 FR 9203 (March 7, 1996), and continued public interest in such correction programs. In response to comments received on the VFC Program requesting that the Department provide relief from the excise taxes imposed by section 4975 of the Code for prohibited transactions, the Department proposed a class exemption for four of the eligible transactions described in the VFC Program. A final exemption, PTE 2002-51, was published in the **Federal Register** on November 25, 2002. The four eligible transactions described in the exemption are as follows:

(A) The failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulations at 29 CFR 2510.3-102 and/or the failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer.

² 67 FR 15062 (March 28, 2002). Prior to adoption in March 2002, the VFC Program was made available on an interim basis during which the Department invited and considered public comments on the Program. (See 65 FR 14164, March 15, 2000).

(B) The making of a loan by a plan at a fair market interest rate to a party in interest³ with respect to the plan.

(C) The purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value.

(D) The sale of real property to a plan by the employer and leaseback of such property to the employer, at fair market value and fair market rental value, respectively.

Based on growing public utilization and over two years experience in administering the original VFC Program, EBSA has decided to amend the Program, effective immediately upon publication of a notice which is being published simultaneously in this issue of the **Federal Register**. The Department is amending the VFC Program, in part, to expand the categories of eligible transactions. Specifically, the revised VFC Program will, in part, include relief under Title I of ERISA for the purchase of an asset by a plan where the asset was determined to be illiquid as described under the revised VFC Program, either from a party in interest at no greater than fair market value at that time or from an unrelated third party, and the subsequent sale of such asset to a party in interest, provided the plan receives the correction amount as described in Section 5 of the revised VFC Program.

To the extent that the original purchase of an asset by a plan where the asset was determined to be illiquid as described under the revised VFC Program was from a person defined as a party in interest under section 3(14) of ERISA and a disqualified person under section 4975(e)(2) of the Code, the transactions would violate the prohibited transaction rules under both Title I of ERISA and section 4975 of the Code. Moreover, as distinguished from the eligible transactions covered in the VFC Program⁴ and PTE 2002-51, correction as specified in the revised VFC Program in the case of an asset that was illiquid, as described under the revised VFC Program, while owned by the plan will in most instances involve an additional prohibited transaction. In

³ The Department notes that the term "party in interest" was used in the description of the eligible transactions covered under PTE 2002-51 although that exemption provided, and this proposed amendment will provide, relief only from the sanctions imposed under section 4975 of the Code, which prohibits certain transactions between a plan and a disqualified person. For purposes of clarity, references in the exemption to a party in interest will be changed to disqualified person in the final exemption.

⁴ Under the VFC Program prior to the current revision, correction could not be achieved by engaging in a new prohibited transaction. See VFC Program, 67 FR 15073 (March 28, 2002) Section 2(d).

this regard, correction under the revised VFC Program would permit the plan to dispose of the illiquid asset in a sale to a party in interest. If the party in interest that purchases the illiquid asset from the plan pursuant to the terms of the revised VFC Program is also a disqualified person under section 4975(e)(2) of the Code, then the correction permitted for holding the illiquid asset would violate the prohibited transaction rules under section 4975 of the Code.

The revised VFC Program provides relief for both the original acquisition of the asset by the plan that was determined to be illiquid under the revised VFC Program, as well as the correction involving the sale of such asset to a party in interest, provided all of the requirements of the revised VFC Program are met. The Department has determined that it would be appropriate to amend PTE 2002-51 to provide additional exemptive relief from the sanctions imposed under section 4975 of the Code in conjunction with the revision of the VFC Program.

Proposed Amendment

PTE 2002-51 provided limited exemptive relief from the excise taxes imposed under section 4975 of the Code for certain eligible transactions identified in the VFC Program. The proposed amendment to PTE 2002-51 will provide limited relief for an additional eligible transaction identified in the revised VFC Program. Specifically, the proposed amendment to PTE 2002-51 will cover the purchase of an asset by a plan where the asset has been determined to be illiquid as described in the revised VFC Program (including real property) from a party in interest at no greater than fair market value at that time, and/or the subsequent sale of such asset to a party in interest provided the plan receives the correction amount as described in Section 5 of the revised VFC Program.

The Department notes that all the safeguards already embodied in PTE 2002-51 must be met under the amended class exemption. With respect to the additional eligible transaction identified above, the amendment includes a requirement that the plan pay no brokerage fees or commissions in connection with the sale of the asset to the party in interest.

The additional eligible transaction may be illustrated by the following example:

Example: Corporation D sponsors a pension plan for its employees. Corporation D's plan has total assets of \$1,000,000. In June 1999, the plan purchases undeveloped real property

from a party in interest/disqualified person with respect to the plan for \$60,000 (which is the fair market value of the property at the time). In April 2004, Plan Officials determine that the property is an illiquid asset in accordance with the revised VFC Program. A qualified independent appraiser appraises the property at a current fair market value of \$20,000. To correct the transaction under the revised VFC Program, the plan sponsor purchases the property from the plan for the Principal Amount as described in section 5(b)(2) of the revised VFC Program (\$60,000), plus Lost Earnings as described in section 5(b)(6) of the revised VFC Program. Provided that all other requirements of the revised VFC Program are met and proper application is made to the appropriate EBSA Regional Office, the plan sponsor receives a no action letter with respect to the breaches involved in the original purchase by the plan of the asset and the subsequent sale of the illiquid asset to a party in interest. Upon compliance with the terms of PTE 2002-51, as amended, the original purchase by the plan of the asset and the subsequent sale of the illiquid asset to the plan sponsor will be exempt from the excise taxes imposed under section 4975 of the Code for prohibited transactions. For the sake of convenience and clarity, the Department is restating the entire text of PTE 2002-51 in this notice of proposed amendment.

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 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply, the requirement that all assets of an employee benefit plan be held in trust by one or more trustees, and the general fiduciary responsibility provisions of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; 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) The proposed amendment, if granted, will not extend to transactions

prohibited under section 4975(c)(1)(F) of the Code.

(3) Before this amendment may be granted under section 4975(c)(2) of the Code, the Department must find that the amendment is administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plans.

(4) The proposed amendment, if granted, will be supplemental to, and not in derogation of 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.

(5) If granted, the proposed amendment will be applicable to a transaction only if the conditions specified in the class exemption are satisfied.

Written Comments and Hearing Requests

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

Proposed Amendment

Under 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), the Department proposes to amend Sections I and II of PTE 2002-51 as set forth below.

Section I: Eligible Transactions

The sanctions resulting from the application of 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 the following eligible transactions described in section 7 of the Voluntary Fiduciary Correction (VFC) Program, as amended and restated, published simultaneously in this issue of the **Federal Register**, provided that the applicable conditions set forth in Sections II, III and IV are met:

A. Failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulation at 29 CFR section 2510.3-102. (See VFC Program, section 7.A.1.), and/or the failure to transmit participant loan repayments to

a pension plan within a reasonable time after withholding or receipt by the employer.

B. Loan at a fair market interest rate to a party in interest with respect to a plan. (See VFC Program, section 7.B.1.).

C. Purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value. (See VFC Program, sections 7.D.1. and 7.D.2.).

D. Sale of real property to a plan by the employer and the leaseback of the property to the employer, at fair market value and fair market rental value, respectively. (See VFC Program, section 7.D.3.).

E. Purchase of an asset by a plan where the asset has been determined to be illiquid (including real property) as described under the revised VFC Program from a party in interest at no greater than fair market value at that time, and/or the subsequent sale of such asset to a party in interest, provided the plan receives the correction amount as described in section 5(b) of the Program. (See VFC Program, as amended, section 7.D.6.).

Section II: Conditions

A. With respect to a transaction involving participant contributions or loan repayments to pension plans described in Section I.A., the contributions or repayments were transmitted to the pension plan not more than 180 calendar days from the date the amounts were received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date the amounts otherwise would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

B. With respect to the transactions described in Sections I.B., I.C., I.D., or I.E., the plan assets involved in the transaction, or series of related transactions, did not, in the aggregate, exceed 10 percent of the fair market value of all the assets of the plan at the time of the transaction.

C. The fair market value of any plan asset involved in a transaction described in Sections I.C., I.D., or I.E. was determined in accordance with section 5 of the VFC Program.

D. The terms of a transaction described in Sections I.B., I.C., I.D., or I.E., were at least as favorable to the plan as the terms generally available in arm's-length transactions between unrelated parties.

E. With respect to any transaction described in Section I, the transaction was not part of an agreement,

arrangement or understanding designed to benefit a party in interest.

F. (1) With respect to any transaction described in Section I, the applicant has not taken advantage of the relief provided by the VFC Program and this exemption for a similar type of transaction(s) identified in the current application during the period which is three years prior to submission of the current application.

(2) Notwithstanding the foregoing, Section II.F.(1) shall not apply to an applicant provided that:

(a) The applicant was a broker-dealer registered under the Securities Exchange Act of 1934, a bank supervised by the United States or a State thereof, a broker-dealer or bank subject to foreign government regulation, an insurance company qualified to do business in a State, or an affiliate thereof;

(b) The applicant was a party in interest (including a fiduciary) solely by reason of providing services to the plan or solely by reason of a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of ERISA (and/or the corresponding provisions of section 4975 of the Code);

(c) Neither the applicant nor any affiliate (i) was a fiduciary (within the meaning of section 3(21)(A) of ERISA) with respect to the assets of the plan involved in the transaction and (ii) used its discretion to cause the plan to engage in the transaction;

(d) Individuals acting on behalf of the applicant had no actual knowledge or reason to know that the transaction was not exempt pursuant to a statutory or administrative exemption under ERISA and/or the Code; and

(e) Prior to the transaction, the applicant established written policies and procedures that were reasonably designed to ensure compliance with the prohibited transaction rules and the applicant engaged in periodic monitoring for compliance.

G. With respect to a transaction involving a sale of an illiquid asset under the VFC Program by the plan to a party in interest described in Section I.E., the plan paid no brokerage fees, or commissions in connection with the sale of the asset.

Section III: Compliance With the Revised VFC Program

A. The applicant has met all of the applicable requirements of the revised VFC Program.

B. EBSA has issued a no action letter to the applicant pursuant to the revised VFC Program with respect to a transaction described in Section I.

Section IV: Notice

A. Written notice of the transaction(s) for which the applicant is seeking relief pursuant to the revised VFC Program, and this exemption, and the method of correcting the transaction, was provided to interested persons within 60 calendar days following the date of the submission of an application under the revised VFC Program. A copy of the notice was provided to the appropriate Regional Office of the United States Department of Labor, Employee Benefits Security Administration within the same 60-day period, and the applicant indicated the date upon which notice was distributed to interested persons. Plan assets were not used to pay for the notice. The notice included an objective description of the transaction and the steps taken to correct it, written in a manner reasonably calculated to be understood by the average Plan participant or beneficiary. The notice provided for a period of 30 calendar days, beginning on the date the notice was distributed, for interested persons to provide comments to the appropriate Regional Office. The notice included the address and telephone number of such Regional Office.

B. Notice was given in a manner that was reasonably calculated, taking into consideration the particular circumstances of the plan, to result in the receipt of such notice by interested persons, including but not limited to posting, regular mail, or electronic mail, or any combination thereof. The notice informed interested persons of the applicant's participation in the revised VFC Program as amended and intention of availing itself of relief under the exemption.

Signed at Washington, DC, this 30th day of March, 2005.

Ivan L. Strasfeld,

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

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