

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 96-62;

Application No. D-10031]

Class Exemption To Permit Certain Authorized Transactions Between

Plans and Parties in Interest

AGENCY: Pension and Welfare Benefits Administration (PWBA),

Department of Labor

ACTION: Grant of class exemption.

SUMMARY: This document contains a final exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA), the Federal Employees' Retirement System Act of 1986 (FERSA) and the Internal Revenue Code of 1986 (the Code). The exemption applies to certain prospective transactions between employee benefit plans and parties in interest where such transactions are specifically authorized by the Department and are subject to terms, conditions and representations which are substantially similar to exemptions previously granted by the Department. The exemption affects plans, participants and beneficiaries of such plans and certain persons engaging in such transactions.

DISCUSSION OF THE EXEMPTION: As part of the Department's continuing efforts to reduce regulatory burdens associated with processing individual exemptions for transactions prohibited under ERISA, this class exemption permits a plan to engage in a transaction following a demonstration to the Department that the transaction: **(1) is substantially similar to those described in two prior individual exemptions granted by the Department; and (2) presents little, if any, opportunity for abuse or risk of loss to a plan's participants and beneficiaries. Under the class exemption, a party may proceed with a transaction in as little as 78 days from the acknowledgement of receipt by the Department of a written submission filed in accordance with the terms of the class exemption.** The time-frames contained in the exemption enable the Department to fully consider the written submission for compliance with the terms of the class exemption and provide interested persons with a reasonable opportunity to comment on the proposed transaction following the receipt of notification.

EFFECTIVE DATE: July 31, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. Allison Padams, Mr. Ronald Willett, or Mr. Louis Campagna, Office of Exemption Determinations, Pension and Welfare Benefits Administration,

U. S. Department of Labor, telephone (202) 219-8971 (This is not a toll-free number.); or Mr. William Taylor, Plan Benefits Security Division, Office of Solicitor, U. S. Department of Labor (202) 219-4592. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 27, 1995, the Department of Labor (the Department) published a notice in the FEDERAL REGISTER (60 FR 58376) of the pendency 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 Internal Revenue Code (the Code), by reason of section 4975(c)(1)(A) through (E) of the Code.

The Department proposed the 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 part 2570, subpart B, (55 FR 32836, August 10, 1990).¹

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. No requests for a public hearing with respect to the proposed class exemption were received by the Department. Six public comments were received by the Department. Upon consideration of the record as a whole, the Department has determined to grant the proposed class exemption subject to certain modifications. These modifications and the comments are discussed below.

Discussion of Comments Received

One commenter urged the Department to modify the final exemption to provide relief from section 8477(c)(2) of FERSA which parallels section 406(b) of ERISA.² The commenter stated that the scope of the class exemption should be expanded to enable the Thrift Savings Plan for federal employees to take advantage of the relief provided by the exemption. The Department sees merit in this comment and believes that providing such relief is consistent with the policy and safeguards embodied in this exemption. Accordingly, the Department has modified section II of the final exemption to provide relief from section 8477(c)(2) of FERSA.

Another commenter requested that the Department clarify that the relief provided in the class exemption applies to transactions involving multiemployer plans. The Department notes that the exemption applies to transactions which are substantially similar to transactions described in at least two individual exemptions granted by the Department within the 60- month period prior to the written submission filed in accordance with the class exemption. In this regard, the conditions of the exemption do not include a requirement of substantial similarity between the type of plan involved in the proposed transaction under the class exemption and the type of plans involved in the previously granted individual exemptions (i.e., single employer or multiemployer plans).

Accordingly, it is the view of the Department that sections I(a) and II(b) will be satisfied in the case of a multiemployer plan, if such plan relies on two substantially similar individual exemptions involving single employer plans.

A commenter requested clarification regarding sections I(b) and II(b) of the exemption which require that there be little, if any, risk of abuse or loss to the plan participants and beneficiaries as a result of the transaction. The commenter expressed concern that this condition may require that the party who is to engage in the transaction guarantee that a plan never experience a loss as a result of the subject transaction. As a result, the commenter requested that the Department clarify this condition to provide that, if a transaction is prudent when entered into, the relief provided by the class exemption will not be retroactively revoked should there be some future decline in the value of the asset. It was not the intent of the Department that this condition act as a guarantee of the future performance of the transaction. The Department notes that, for purposes of determining whether a transaction poses little, if any, risk of abuse or loss to the plan, the party should examine the facts and circumstances surrounding the transaction as of the date that the transaction is to be entered into.

Two commenters requested that the Department expand the relief provided by the exemption to include relief from section 406(b)(3) of ERISA. One of the commenters noted that section 406(b)(3) relief would only be available if such relief was provided in the two substantially similar individual exemptions granted by the Department within the prior 60-month period. The Department sees merit in these comments and has modified the final exemption accordingly. In this regard, the Department notes that any of the relief from specific ERISA restrictions provided by the class exemption for a particular transaction is available only to the extent that the same relief is provided in the two substantially similar individual exemptions previously granted by the Department.

A commenter requested that the term "independent fiduciary" as used in section II be defined in the final exemption.³ Another commenter urged that the Department be flexible in determining who may serve as independent fiduciary and suggested that the sponsoring employer or other existing plan fiduciary be permitted to act in that capacity. Because of the variety and constantly evolving nature of the products and service arrangements presented to the Department for its consideration under ERISA section 408(a), the Department does not believe that it would be appropriate to adopt a definition that, in effect, would require compliance with certain enumerated standards. Rather, the Department generally has adopted a flexible approach with respect to the qualification of a party to act as an independent fiduciary in any particular situation. In this regard, individual exemptions granted by the Department have required that there be no affiliation between the independent fiduciary and the party or its affiliates seeking to engage in the transaction and that the independent fiduciary receive no more than a de minimis amount of compensation from the party seeking to engage in the subject transaction, including amounts received for services as independent fiduciary. In certain cases, such as a transaction between a plan and a party unrelated to the plan sponsor, the plan sponsor may qualify to act as independent fiduciary on behalf of the plan. In addition, as noted in the preamble to the proposed exemption, "...the independent

fiduciary should be knowledgeable and experienced with respect to the type of transaction." The Department encourages parties to consider, when retaining an independent fiduciary, any unique qualifications of the independent fiduciaries utilized in the two or more individual exemptions being relied upon.

One commenter requested that the Department delete the requirement under the proposed exemption relating to the distribution of notice to interested persons. According to the commenter, the requirement of notice and a comment period does not seem to serve a useful purpose and prolongs the approval process. The Department notes that the proposed exemption provides broad relief for various party in interest transactions that do not come within the scope of relief provided by existing statutory or class exemptions. In this regard, comments submitted to the Department by interested persons in response to the publication of a proposed individual exemption in the Federal Register may raise substantive factual, legal or policy issues which are not apparent from the information contained in the exemption application. Under the proposed class exemption, publication of notice in the Federal Register would not be required. Accordingly, the Department believes that the distribution of notice affording interested persons the opportunity to comment on a proposed transaction is an important safeguard under the class exemption. As a result, the Department has determined not to modify the exemption in this regard.

The commenter also suggested that the term "completion of distribution of the notice" contained in the definition of "comment period" under section IV(e) of the proposal should be modified to permit the party who is to engage in the transaction to make a reasonable estimate of the time necessary for completion of notice such as three days after sending notice by first-class mail. The Department notes that, under section IV(e), the comment period expires 25 days following the completion of the distribution of notice to interested persons. Accordingly, the expiration date of the comment period is necessarily dependent upon the date that distribution of the notice is completed. The Department is of the view that the requirements of the exemption relating to the comment period as defined under section IV(e) will be met if the party makes a good faith estimate of the time necessary to complete distribution of the notice. In this regard, the Department has modified section IV(e) to specifically provide that a party may assume that distribution of notice will be complete three business days following the date of first class mailing of such notice.

The commenter also suggested that the class exemption contain a requirement that the party wishing to engage in the transaction must inform interested persons of the date of the expiration of the comment period. The commenter noted that the preamble to the proposed class exemption referred to the responsibility of the party to notify interested persons of the date of the expiration of the comment period, but that such notification was not specifically included as a condition of the proposed class exemption. The commenter stated that such a requirement should appear among the terms and conditions of the class exemption. The Department sees merit in this comment and has modified section IV(b) to provide that the notice to interested persons include the date of the expiration of the comment period.

One of the commenters requested that the Department delete the 60-month requirement described in sections I(a) and II(a) of the class exemption. Sections I(a) and II(a) require that a transaction be substantially similar to transactions described in at least two individual exemptions that were granted by the Department within the 60-month period ending on the date a written submission is filed. The Department notes that the 60-month requirement was developed to ensure that the two substantially similar individual exemptions that the party compares to its proposed transaction reflect the current exemption policies of the Department. Therefore, the Department is unable to conclude that deletion of this requirement is warranted.

A commenter urged the Department to adopt a more liberal definition of the term "substantially similar." Section IV(a) defines the term "substantially similar" as alike in all material respects. The commenter suggested that the precedential exemptions be considered substantially similar where, in the Department's judgement, there presents little possibility of abuse due to the difference in facts. The Department is not persuaded by the argument submitted in favor of an expanded definition of the term "substantially similar". The proposed exemption's premise was that the Department could provide expedited consideration of a party's written submission within the timeframes delineated in the proposal only if the transaction was substantially similar, as defined under the exemption, to two other transactions previously considered by the Department. The Department believes that the commenter's suggestion for a more liberal definition of "substantially similar" is inconsistent with the underlying premise of the class exemption. For this reason, the Department has determined not to modify this definition.

One commenter requested a number of modifications to the proposal based upon its belief that the class exemption should be applicable to generic transactions that would otherwise be the subject of a class exemption. The Department notes that the preamble to the proposal indicates that the party wishing to take advantage of the exemption must demonstrate that the transaction is substantially similar to at least two individual exemptions previously granted by the Department. The Department notes that it determined to propose relief based, in part, on its observation that many of the individual applications contain nearly identical transactions, terms and conditions as those previously granted. Accordingly, because the proposal limits relief to identifiable individual transactions and the parties thereto, not generic transactions, the modifications requested by the commenter are beyond the scope of this proceeding. Lastly, the Department notes that the great majority of class exemption requests considered by the Department over the previous 20 years presented unique facts and circumstances that were not substantially similar to prior exemptions granted by the Department.

The same commenter also urged the Department to extend the relief provided by the class exemption to include transactions that have taken place prior to the submission required under part III of the exemption. Another commenter urged the Department to consider retroactive relief to the date of the written submission under the class exemption. The Department noted in the preamble to the proposal that ". . . in light of the broad scope of relief provided under the proposal, the class exemption is only available with respect to prospective transactions." It appears to the Department that providing retroactive relief

under the class exemption could result in the completed transaction not being in compliance with one or more of the requirements of the class exemption, including the requirement that the transaction be substantially similar to two previously granted exemptions. In addition, the Department continues to believe that providing interested persons with the opportunity to comment on a contemplated transaction is an important safeguard under the class exemption. Accordingly, the Department has decided not to adopt this comment.

Conditions

The exemption contains conditions, as described below, which are necessary to support a finding that the exemption meets the statutory standards of section 408(a) of ERISA.⁴

Under section I of the exemption, relief is provided for transactions, as discussed below, from certain of the restrictions described in section 406(a) of ERISA. In this regard, section I(a) requires that the transaction be substantially similar to transactions described in at least two individual exemptions that were granted by the Department, and which provided relief from the same restrictions as requested by the party, within the 60-month period ending on the date a written submission is filed. "Substantially similar" is defined in section IV(a) as alike in all material respects.

Section I(b) of the exemption requires that there be little, if any, risk of abuse or loss to the plan participants and beneficiaries as a result of the transaction. Section I(c) further provides that prior to the execution of a transaction, the authorizing requirements of section III must be satisfied (as discussed below).

Under section II of the exemption, additional relief is provided from certain of the restrictions described in sections 406(b) of ERISA and the parallel restrictions described in section 8477(c)(2) of FERSA provided that: (a) the transaction is substantially similar (as defined in section IV(a)) to transactions described in at least two individual exemptions that were granted by the Department, and which provided relief from the same restrictions or, if FERSA relief is requested, the ERISA relief provided parallels the restriction of section 8477(c)(2) of FERSA, within the 60-month period ending on the date of filing of the written submission; (b) there is little, if any, risk of abuse or loss to the plan participants and beneficiaries as a result of the transaction; and (c) prior to its execution, the transaction has met the requirements described in section III (as discussed below.)

In considering the availability of this class exemption, the party who is to engage in the transaction should carefully determine whether the contemplated transaction contains terms and conditions which closely parallel the transaction delineated in the prior exemptions granted by the Department and the material facts and representations supporting such exemptions. In particular, the Department wishes to note that the relief provided by the class exemption is available for a specific transaction only to the extent that the relief from the same restrictions has been provided in the two substantially

similar individual exemptions that were submitted to the Department by the party that wishes to engage in the transaction.

As a precondition for a grant of relief from the fiduciary self-dealing and conflict of interest restrictions of section 406(b) of ERISA, section II(d) and (e) require that prior to execution of such transaction, an independent fiduciary has reviewed the proposed transaction and determined that the transaction would be in the interests and protective of the plan and its participants and beneficiaries, and later represents the interests of the plan in the execution of the transaction. Under section II(f), for those transactions that are continuing in nature, such as leases and loans, the independent fiduciary must: (1) represent the interests of the plan for the duration of the transaction; (2) monitor the transaction on behalf of the plan; (3) enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the transaction; and (4) ensure that the transaction remains in the interests of the plan.⁵

The Department notes that any relief from section 406(b) provided under section II of the proposal required the involvement of an independent fiduciary. Section II required that the independent fiduciary review and approve the transaction and, where the transaction was continuing in nature, monitor the transaction and represent the interests of the plan throughout the duration of the transaction. However, it was brought to the attention of the Department that certain types of exemptions which provided section 406(b) relief for transactions such as sales of property by the plan to certain parties in interest or loans from the individually directed accounts of participants in plans to those participants, may not have required the involvement of an independent fiduciary. Accordingly, the Department has modified the final exemption to clarify that the involvement of an independent fiduciary as described in section II is required only if the exempted transactions described in either of the two previously granted exemptions cited by the party required the involvement of an independent fiduciary. If an independent fiduciary is required for the contemplated transaction, then the fiduciary's involvement must comply with the requirements of section II.

The Department notes that the independent fiduciary should be knowledgeable and experienced with respect to the type of transaction. In this regard, any unique qualifications of the independent fiduciaries utilized in the substantially similar individual exemptions should be considered when retaining an independent fiduciary. Further, in determining a potential fiduciary's independence from the parties to the transaction, consideration should be given to such person's relationship to the other parties involved in the contemplated transaction in terms of any affiliation between such person and the other parties to the transaction, as well as whether such person derives more than a de minimis amount of compensation from the other parties to the transaction.

Section III of the exemption contains the authorization requirements for a transaction. Section III(a)(1) requires that the party who will be engaging in such transaction file a written submission with the Department containing a specific statement to demonstrate compliance with the conditions of the class exemption. The purpose of the authorization requirements of section III is to enable the Department to examine the written submission

to determine whether the transaction, in fact, complies with the requirements of the class exemption. The written submission must clearly state that it is made pursuant to the class exemption rather than under the Department's procedures for considering individual exemptions.⁶

Section III(a)(2) requires that the submission include the same information that is required to be submitted with an individual exemption application. The Department believes this condition will assure a full and comprehensive file upon which the Department can base its conclusions concerning the availability of this class exemption. The Department's experience in considering individual exemption requests has demonstrated that it is difficult to approve an exemption for a particular transaction without the ability to examine the surrounding facts and circumstances. In a number of instances, examination of the facts and circumstances has revealed past or potential violations of the provisions of Title I of the Act or other significant issues which must be resolved prior to granting an exemption. Similarly, the Department believes that it is important to examine the supporting documentation for a transaction, such as appraisals and independent third party representations regarding the transaction. This information frequently discloses additional issues which must be addressed by the applicants and is required under the individual exemption procedures to be submitted to the Department in an individual exemption application. Rather than developing a separate set of requirements under this class exemption for the submission of relevant information, the Department believes that reference to the individual exemption procedure, already an established and familiar procedure, was a more appropriate approach. The information required by the procedure, which is published at 29 CFR 2570.34 and .35 is designed to minimize the need to subject applicants to repeated requests for additional information after the application is filed. As an additional consideration, this condition will permit the written submission to be considered under the Department's individual exemption procedures in the event that the Department is unable to conclude from the written submissions that the conditions of the class exemption would be met.

Under section III(a)(3), the party who will be engaging in the transaction must demonstrate that the proposed transaction presents little, if any, risk of abuse or loss to the plan participants and beneficiaries given the terms and conditions of the transaction. The Department interprets section III(a)(3) as requiring that the party demonstrate that the facts and circumstances surrounding the transaction at the time the transaction is entered into present little, if any, risk of abuse or loss to the plan participants and beneficiaries. It was not the intention of the Department to make the party who engaged in the transaction responsible for all unforeseen events that occur at some later date. Section III(a)(4) requires that the party compare the proposed transaction to those previously exempted transactions identified by the party as substantially similar. In this regard, any comparison must include a description of any material differences between the proposed transaction and the identified exemptions.

Section III(a)(5) requires that a complete and accurate draft of the notice which will be distributed to interested persons be submitted to the Department. The Department believes that it is necessary to review the notice prior to its distribution to interested

persons in order to assure that a completely objective summary of the proposed transaction has been prepared by the party. The purpose of the notice requirement is to afford interested persons with the opportunity to provide the Department with relevant information based upon an objective description of the transaction to assist the Department in its consideration of the proposed transaction. The term "notice" is defined in section IV(b) as a written notification to interested persons which includes an objective description of the transaction, the approximate date on which the transaction will occur, a statement that the proposed transaction has met the requirements for tentative authorization under this class exemption, a statement apprising interested persons of their right to comment, the Federal Register citations for the prior exemptions identified by the party as substantially similar to the contemplated transaction and the expiration date of the comment period. The expiration date of the comment period obviously cannot be determined as of the date of the written submission, but must be included when notice is distributed to interested persons. The notice must also contain a statement directing interested persons to submit comments to the Department for consideration. In order to simplify the submission of comments, the Department has modified the final exemption to require that the notice contain the address of the Department. The address is as follows: Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N- 5649, Washington, D.C. 20210.

With respect to a transaction described in section II of this exemption, section III(b) provides that the written submission must also contain the following additional information: (1) the identity of the independent fiduciary; (2) a description of such fiduciary's independence from the parties in interest involved in the subject transaction; (3) a statement by the independent fiduciary containing an explanation as to why the subject transaction is in the interests and protective of the participants and beneficiaries of the plan; (4) an agreement by the independent fiduciary to represent the interests of the plan; and (5) a description of the procedures for replacement of the independent fiduciary, if necessary, during the term of the transaction. As previously explained in response to a comment, the description of the independence of the fiduciary may be accomplished by a brief discussion in the written submission describing any relationship between the fiduciary and the other parties to the contemplated transaction in terms of any affiliation and the amount of any income derived by the fiduciary from the other parties.

The written submissions will be reviewed by the Department to ensure that the conditions of this class exemption are met. If the Department determines that a submission does not meet the requirements for the class exemption, the Department will notify the party and, if the party so desires, the Department will consider the submission under the Department's exemption procedure for individual exemptions.

The exemption requires, under section III(c), that the transaction meet the requirements for tentative authorization. "Tentative authorization" is defined under section IV(c) as occurring upon the earlier of: (1) the expiration of the 45-day period following acknowledgement by the Department of the receipt of the written submission with respect to the proposed transaction, unless the Department has notified the party who is to engage

in the transaction during this period that the transaction is not eligible for authorization under the terms of this class exemption, or (2) the issuance of a written determination by the Department during the 45-day period that the proposed transaction meets the requirements for tentative authorization.⁷ In view of the broad scope of relief provided under the exemption, and the need to protect the interests of the plan's participants and beneficiaries, the Department believes it necessary to retain the authority to determine, prior to the execution of the transaction, whether the transaction is substantially similar to previously exempted transactions and presents little, if any, risk of abuse or loss to the plan participants and beneficiaries. This determination will be made within 45 days from the Department's acknowledgement of the receipt of the written submission. In order to protect the interests of participants and beneficiaries, the Department believes that the 45-day period is the minimum amount of time necessary for a thorough review of the written submission, and a comparison of the facts and circumstances surrounding the transaction under consideration to the transactions contained in the two prior exemptions cited by the party as substantially similar. Although in some cases, the Department expects that it will be able to complete its review and issue a determination letter in less than 45 days, the Department believes that a shorter time limit for this process would not be workable. Starting the review period from the date of the Department's acknowledgement of receipt of the written submission assures that the Department will have the full 45-day period in which to complete its review. Under the class exemption, the party seeking to engage in the transaction will also receive quick assurance that the Department has received its submission and that the 45-day period is running.

The Department will send a letter to each party acknowledging receipt of the written submission. Generally, the acknowledgement letter will be sent within three to five days of actual receipt of the written submission by the Department. The 45-day period for tentative authorization will commence as of the date of the acknowledgement letter. In this regard, the Department notes that the party may not assume receipt of the written submission by the Department until the party receives an acknowledgement letter. Since the acknowledgement letter may be the only formal written communication between the party and the Department, the acknowledgement letter will also contain a brief summary of the requirements for tentative authorization and final authorization of the transaction, to assist the party in understanding the requirements of the class exemption.

Section III(d) provides that, following tentative authorization, the party who is to engage in the transaction provides written notice (as defined in section IV(b)) to interested persons. Tentative authorization, in effect, permits the party to begin the distribution of written notice to interested persons. The exemption does not specify the manner in which written notice must be provided to interested persons. However, section III(d) requires that notice be given in a manner that is reasonably calculated to result in the receipt of such notice by interested persons. It is the responsibility of the party who is to engage in the transaction to promptly distribute notice after tentative authorization is obtained, because the 25-day comment period, as defined under section IV(e), will not commence until the notification to all interested persons is complete. The notice must also inform interested persons of the date of expiration of the comment period in accordance with section IV(b)(5). Since the date of completion of the notification is within the control of

the party who is to engage in the transaction, the Department expects the party who provides written notice to take this into account in determining the expiration date of the comment period. It is also the responsibility of the party to inform the Department of the date upon which notification was completed and the date the comment period expires. In order to avoid unnecessary delay, the Department strongly encourages parties to notify it regarding the expiration of the comment period as soon as possible following tentative authorization, but in no event later than the expiration of the 25-day comment period.

The Department recognizes that there may be difficulties in determining the completion date for notification and, thus, the expiration of the comment period. To ease compliance with the requirements of the class exemption, the Department is of the view that distribution of notice will be deemed complete under section IV(e) on a date the party determines through a good faith estimate of the time necessary to complete distribution of notice. In the case of notification by first-class mail, the Department specifically has modified section IV(e) to provide that completion of the distribution of the notice will be deemed satisfied three business days following the date of the first class mailing to interested persons.

In addition, section III(d) requires that the party who is to engage in the transaction resolve all substantive adverse comments submitted to the Department to the satisfaction of the Department. The term "substantive adverse comments," as defined in section IV(f), means those comments submitted by interested persons to the Department within the prescribed comment period which raise significant factual, legal or policy issues regarding the transaction as determined by the Department. "Final authorization" is defined in section IV(d) as the end of the five-day period immediately following the expiration of the comment period unless the Department notifies the party within that period that the transaction is not eligible for authorization, or the expiration of a period of time extending beyond the five-day period as mutually agreed to by the Department and the party in order to resolve any substantive adverse comments submitted to the Department. The five-day period between the expiration of the comment period and final authorization is intended to allow consideration by the Department of comments received within the 25-day comment period. If mutual agreement between the Department and the party who is to engage in the transaction is not reached regarding the period of time in which such comments must be resolved, the party will be notified that the transaction fails to comply with the conditions of the class exemption, and the written submission will be considered by the Department in accordance the Department's exemption procedures at 29 CFR 2570, subpart B.

The Department will not consider a proposed transaction to satisfy the conditions of this proposed class exemption unless the material facts and representations contained in the written submission and in any materials and documents submitted in support of the written submission are true and complete. In this regard, with respect to transactions that are continuing in nature, such as a loan or a lease, any change in the material facts described in the written submission with respect to the transaction may result in the prospective unavailability of the class exemption for the transaction. In the event of any such change, the parties involved in the transaction have the option of applying for a new

exemption, either pursuant to this class exemption or under the Department's exemption procedures at 29 CFR 2570, subpart B.

The Department has determined to include in the exemption, as a new section V, an optional checklist of the information required to be submitted to the Department under section III of the exemption. The Department recognizes that, because of oversight, items required for the written submission described in section III may be accidentally omitted causing potential delay to the party who wishes to engage in the transaction. The Department believes that utilization of the checklist by the party during its preparation of the written submission will help avoid such omissions and assure that the submission is complete. However, the Department notes that use of the checklist described in section V is completely optional and need not be prepared as part of the written submission.

Examples

The application of the exemption may be illustrated by the following examples:

EXAMPLE (1): ABC Company files a written submission under the class exemption for a loan of money from a plan for which it currently provides accounting services. Because the loan would be prohibited under section 406(a), ABC needs an exemption for the loan. ABC cites in its written submission two prior exemptions for loans whose terms are substantially similar to those proposed in the ABC Company submission. However, one loan is from a plan to the plan's non-discretionary broker and the other loan is to the plan's actuary. Both loans are for twice the amount proposed in the ABC Company submission, but are for less than 25 percent of the assets of the plans involved. Provided the amount of the ABC Company loan is less than 25 percent of the assets of the plan, these distinctions would not cause the proposed transaction to fail the substantially similar test of section I(a). In addition, the substantially similar test is applied with respect to the transactions described in the two prior exemptions and not the parties involved in the transactions.

EXAMPLE (2): An exemption application is submitted to the Department by applicant X, the sponsor of plan Y, for a lease of office space by plan Y to X. The transaction proposed is similar in all material respects to four other exemptions granted by the Department within the last five years. Applicant X, however, does not make a specific declaration that the application is submitted with the intention of demonstrating compliance with the class exemption, and there is no information which otherwise complies with sections I, II and III of the class exemption. The application may be considered by the Department pursuant to individual exemption procedures unless the applicant amends its original written submission and provides the required information. At that point, the Department will acknowledge receipt of the written submission requesting expedited authorization under the class exemption.

EXAMPLE (3): In 1994, two exemptions were granted for loans by pension plans to Corporation A and Corporation B, respectively, the sponsoring employers. The loan to Corporation A was for \$50,000. The loan to Corporation B was for \$75,000. Among the

conditions and material representations contained in both exemptions were the following: the loans would be approved and monitored by an independent fiduciary; the term of the loans could extend no more than five years; regular installment payments of principal and interest had to be made during the term; the collateral consisting of real property had to be maintained at all times at a value of at least 150 percent of the outstanding balance of the loan; and no more than 25 percent of the assets of the plan would be involved in loans to the sponsoring employer. In 1996, X Corporation makes a written submission pursuant to the class exemption with respect to a proposed loan from its plan. The proposed transaction, including the terms and conditions of the loan and the creditworthiness of the borrower, is substantially similar to the exemptions granted to Corporation A and Corporation B, except that the loan is for \$400,000 and the term is seven years. X Corporation cites the previously granted exemptions in its submission and demonstrates that the 25 percent limitation on the amount of assets involved in loans to the employer would be met. These differences in dollar amounts and loan term would not cause the transaction to fail the "substantially similar" test under sections I(a) and II(a).

If, however, in addition to these differences (i.e., dollar amounts and loan term), the loan transaction proposed by X Corporation also included different repayment provisions requiring monthly payments of interest only during the loan term and a balloon payment of principal at the end of the term, the relief afforded by the class exemption would not be available because the terms of the proposed loan are not alike in all material respects within the meaning of sections I(a) and II(a) to the previous loan exemptions granted by the Department and cited by the applicant.

EXAMPLE (4): In 1994, Investment Adviser X is granted a conditional exemption which permits plans for which it provides investment management services to purchase units of a limited partnership for which X is the general partner. In 1996, the assets of X are sold to Y. Y subsequently makes a written submission pursuant to the class exemption for the same transactions which were the subject of the exemption granted to X. In addition to the exemption granted to X, Y cites in its submission one other substantially similar exemption granted by the Department within the last five years. The relief afforded by the exemption would be available because the terms and conditions of the transaction are substantially similar to previous exemptions granted by the Department.

EXAMPLE (5): Firm C makes a written submission pursuant to the class exemption for the sale of property by its plan to C. The written submission is received by the Department on April 1. On April 3, the Department sends an acknowledgement letter to C. Forty-five days elapse from April 3, the date of the acknowledgement letter, without notification from the Department that the transaction is not eligible for authorization under the terms of the class exemption. Pursuant to the exemption, C proceeds to distribute notice to interested persons by first class mail. Completion of notice is deemed to occur three days following the date of a first class mailing. On the 24th day following completion of notice, the Department receives a comment from an interested person raising significant factual concerns regarding the sale. At this point, if the comment cannot be resolved within the five-day period following the expiration of the comment

period, the Department and C can mutually agree, pursuant to section IV(d) of the exemption, to a date beyond this period, at which time the comment must be resolved to the Department's satisfaction in order for the transaction to be authorized under the terms of the exemption. If the Department and C cannot agree to an extended date, the transaction will not receive final authorization and the exemption will not be available for such transaction.

PAPERWORK REDUCTION ACT ANALYSIS

The collection of information contained in this final class exemption has been approved by the Office of Management and Budget after review under section 3507(d) of the Paperwork Reduction Act of 1995, and has been given OMB control number 1210-0098.

Comments were solicited on the Department's need for this information; an explanation of how the collection of information contained in the final class exemption was amended in response to any comments received from OMB or the public is contained in the preamble, above. This discussion includes the identification and explanation of those modifications made in the class exemption, and an explanation of why certain comments were rejected.

Persons who are to respond to this collection of information are not required to respond to the collection of information unless it displays a currently valid OMB control number. The OMB control number displayed above is valid through September 1998.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and 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 to which the exemption does not expressly apply and the general fiduciary responsibility provisions of section 404 of ERISA. Section 404 requires, in part, 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 in accordance with section 404(a)(1)(B) of ERISA. This exemption does not affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interests of plans and of their participants and beneficiaries and protective of the rights of the participants and beneficiaries.

(3) The exemption is 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.

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

Exemption

Accordingly, the following exemption is granted under the authority of section 408(a) of ERISA, section 4975(c)(2) of the Code, and section 8477(c)(3) of FERSA and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990).

Section I - General Exemption. Effective [insert date of publication in FEDERAL REGISTER of this grant of class exemption], a restriction described in section 406(a) of ERISA, and the taxes imposed by sections 4975(a) and (b) of the Code, by reason of a parallel provision described in section 4975(c)(1)(A) through (D) of the Code, shall not apply to a transaction between a plan and a party in interest with respect to such plan, provided the following conditions are met:

(a) The transaction is substantially similar (as defined in section IV(a)) to transactions described in at least two individual exemptions that were granted by the Department, and provided relief from the same restriction, within the 60-month period ending on the date of filing of the written submission referred to in section III(a);

(b) There is little, if any, risk of abuse or loss to the plan participants and beneficiaries as result of the transaction; and

(c) Prior to its execution, the transaction has met the requirements described in section III.

Section II - Specific Exemption. Effective [insert date of publication in FEDERAL REGISTER of this grant of class exemption], a restriction described in sections 406(b) of ERISA or a parallel restriction described in section 8477(c)(2) of FERSA, and the taxes imposed by sections 4975(a) and (b) of the Code, by reason of a parallel provision described in section 4975(c)(1)(E) and (F) of the Code, shall not apply to a transaction between a plan and a party in interest with respect to such plan, provided the following conditions are met:

(a) The transaction is substantially similar (as defined in section IV(a)) to transactions described in at least two individual exemptions that were granted by the Department, and provided relief from the same restriction or, if FERSA relief is requested, the ERISA relief provided parallels the restrictions of section 8477(c)(2) of FERSA, within the 60-month period ending on the date of filing of the written submission referred to in section III(a);

(b) There is little, if any, risk of abuse or loss to the plan participants and beneficiaries as a result of the transaction;

(c) Prior to its execution, the transaction has met the requirements described in section III;

(d) Where either of the previously granted exemptions identified in the written submission described in section III, required the involvement of an independent fiduciary, an independent fiduciary has reviewed the proposed transaction and determined that the transaction would be in the interests and protective of the plan and its participants and beneficiaries;

(e) The independent fiduciary described in section II(d) represents the interests of the plan in the execution of the transaction; and

(f) If the transaction is continuing in nature, the independent fiduciary described in section II(d) -

(i) represents the interests of the plan for the duration of the transaction and monitors the transaction on behalf of the plan;

(ii) enforces compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the transaction; and

(iii) ensures that the transaction remains in the interests of the plan.

Section III: Authorization Requirements. The requirements for this section are met if:

(a) A written submission is filed with the Department with respect to the transaction which contains the following information:

(1) a separate written declaration by the party who is to engage in the transaction that the written submission is made with the intention of demonstrating compliance with the conditions of this class exemption;

(2) all information required to be submitted with an individual exemption application in accordance with the procedures set forth in 29 CFR 2570 subpart B;

(3) a specific statement demonstrating that the proposed transaction poses little, if any, risk of abuse or loss to the plan participants and beneficiaries;

(4) a comparison of the proposed transaction to at least two substantially similar transactions which were the subject of individual exemptions granted by the Department within a sixty month period ending on the date of the filing of the written submission and an explanation as to why any differences should not be considered material for purposes of this exemption; and

(5) a complete and accurate draft of the notice (as defined in section IV(b)) prepared for distribution to interested persons and a description of the proposed method of distribution for such notice.

(b) With respect to transactions described in section II of this exemption, the written submission referred to in section (a) above contains the following additional information:

(1) the identity of the independent fiduciary;

(2) a description of such fiduciary's independence from the parties in interest involved in the subject transaction;

(3) a statement by the independent fiduciary containing an explanation as to why the subject transaction is in the interests and protective of the participants and beneficiaries of the plan(s) involved;

(4) an agreement by the independent fiduciary to represent the interests of the plan(s) involved in the transaction; and

(5) a description of the procedures for replacement of the independent fiduciary, if necessary, during the term of the transaction.

(c) The transaction meets the requirements for tentative authorization (as defined in section IV(c)) from the Department.

(d) Following tentative authorization, the party who is to engage in the transaction provides written notice (as defined in section IV(b)) to interested persons in a manner that is reasonably calculated to result in the receipt of such notice by interested persons, informs interested persons of the date of the expiration of the comment period, and resolves all substantive adverse comments (as defined in section IV(f)) to the satisfaction of the Department.

(e) The transaction meets the requirements for final authorization (as defined in section IV(d)).

Section IV: Definitions

(a) The term "substantially similar" means alike in all material respects as determined by the Department, in its sole discretion.

(b) The term "notice" means written notification to interested persons which includes -

(1) an objective description of the transaction, including all material terms and conditions,

(2) the approximate date on which the transaction will occur,

(3) a statement that the proposed transaction has met the requirements for tentative authorization under this exemption,

(4) a statement apprising interested persons of their right to comment to the Department on the proposed transaction at the following address: Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N-5649, Washington, D.C. 20210,

(5) the expiration date of the comment period, and

(6) the Federal Register citations for the prior exemptions identified by the party as substantially similar to the contemplated transaction.

(c) For purposes of this exemption, "tentative authorization" occurs upon the earlier of:

(1) the expiration of the 45-day period following an acknowledgement by the Department of receipt of the written submission with respect to the transaction under this exemption unless the Department has notified the party who is to engage in the transaction during that period that the transaction is not eligible for authorization under the terms of this exemption; or

(2) the issuance of a written determination by the Department during the 45-day period that the proposed transaction meets the requirements for tentative authorization.

(d) For purposes of this exemption "final authorization" occurs upon the expiration of:

(1) the five (5) day period immediately following the comment period (as defined in section IV(e)), unless the Department notifies the party that the transaction is not eligible for authorization under the terms of this exemption, and

(2) if necessary in order to resolve any substantive adverse comments received by the Department from interested persons within the comment period, a period of time extending beyond the five-day period immediately following the comment period as mutually agreed between the Department and the party.

(e) The term "comment period" means the 25-day period following the completion of distribution of the notice to interested persons by the party who is to engage in the transaction. For this purpose, distribution of notice by first class mail will be deemed complete three business days following the date of mailing to interested persons.

(f) The term "substantive adverse comments" means those comments submitted by interested persons to the Department within the prescribed comment period which raise significant factual, legal or policy issues regarding the transaction as determined by the Department.

Section V - Optional Checklist. Completion and submission of the following optional checklist to accompany the written submission described in section III(a) will assist the Department in the consideration of the transaction under the class exemption.

The written submission filed with the Department contains the following information:

☐ A separate written declaration of intent to comply with the conditions of the class exemption.

☐ All information required to be submitted with an individual exemption application under 29 CFR 2570 subpart B.

☐ A statement demonstrating that the transaction poses little, if any, risk of abuse or loss to the plan participants and beneficiaries.

☐ A comparison of the proposed transaction to at least two substantially similar transactions which were the subject of individual exemptions granted within the 60 month period ending on the date of the filing and an explanation why any differences should not be considered material.

☐ A complete and accurate draft of the notice to interested persons (as defined in section IV(b)).

☐ A description of the proposed method of distribution of for such notice.

If either of the previously granted exemptions identified in the written submission required the involvement of an independent fiduciary, the written submission must contain the following additional information:

☐ The identity of the independent fiduciary responsible for reviewing the proposed transaction, and representing the interests of the plan in the execution of the transaction. (If the transaction is continuing in nature, the independent fiduciary represents the interests of the plans for the duration of the transaction and takes all necessary action on behalf of the plan.)

☐ A description of such fiduciary's independence from the parties involved in the transaction.

☐ A statement from the independent fiduciary explaining why the transaction is in the interests and protective of the plan participants and beneficiaries.

☐ An agreement by the independent fiduciary to represent the interests of the plan.

☐ A description of the procedures for the replacement of the independent fiduciary, if necessary, during the term of the transaction.

The notice to interested persons filed with the Department includes the following information:

☐ An objective description of the transaction, including all material terms and conditions.

☐ The approximate date on which the transaction will occur.

☐ A statement that the transaction has met the requirements for tentative authorization under the exemption.

☐ A statement apprising interested persons of their right to comment on the proposed transaction at the address contained in the exemption.

☐ The expiration date of the comment period.

☐ The Federal Register citations for the two prior exemptions identified as substantially similar to the contemplated transaction.

Signed at Washington, D.C., this 26th day of July 1996.

Olena Berg,
Assistant Secretary for Pension and Welfare Benefits,

U.S. Department of Labor

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

²The Department is authorized to grant exemptive relief from the restrictions of FERSA section 8477(c)(2) pursuant to section 8477(c)(3) of FERSA. The restrictions of FERSA section 8477(c)(2) parallel section 406(b) of ERISA.

³In making a finding that an exemption is administratively feasible under section 408(a) of ERISA, in that it requires no continuing administrative burden on behalf of the Department, the Department generally has required the involvement of an independent fiduciary to represent the plan for transactions that require relief from section 406(b) of ERISA.

⁴References to sections 408(a) and 406(a) and (b) of ERISA incorporate the corresponding provisions of section 4975 of the Code.

⁵The written submission referred to section III should include specific information regarding the methods proposed by the independent fiduciary for: monitoring the

transaction; enforcing compliance with all the conditions and obligations imposed on the parties dealing with the plan; and

ensuring that the transaction remains in the interests and protective of the participants and beneficiaries of the plan.

⁶See 29 CFR part 2570, subpart B.

⁷The Department does not intend to issue written determinations of tentative authorization except in unusual situations where the Department deems it appropriate to do so.