

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

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

II. Discussion of the Proposed Exemption

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

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

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

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

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

prohibited transaction under Title I of the Act.⁵

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

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

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

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

III. Description of the Proposed Exemption

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

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

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

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

² 44 FR 26979 (5/8/79).

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

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