

4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B) and (D) of the Code, for the following transactions effective January 1, 1975: (1) The release by the plan of a legal or equitable claim against a party in interest in exchange for consideration in settlement of litigation; and (2) an extension of credit by a plan to a party in interest in connection with a settlement whereby the party in interest agrees to repay, in installments, an amount owed to the plan.

*a. Conditions Applicable to All Transactions*

Both the retroactive and prospective parts of the proposed exemption are conditioned upon the existence of a genuine controversy involving the plan. The Department believes that this condition is necessary to prevent the plan and parties in interest from engaging in a sham transaction purporting to fall within this class exemption, thus shielding a transaction, such as an extension of credit, that would otherwise be prohibited. The existence of a genuine controversy must be determined by an attorney retained to advise the plan. That attorney must be independent of the other parties to the litigation.

The terms and conditions of the settlement must be negotiated by a fiduciary that has no relationship to, or interest in, the other parties involved in the litigation, other than the plan, that might affect its best judgment as a fiduciary. The Department intends a flexible standard for fiduciary independence, recognizing that the exemption will encompass a wide range of situations, both in terms of the type of litigation and the cost of pursuing such litigation. For example, in some instances where there are complex issues and significant amounts of money involved, it may be appropriate to hire an independent fiduciary having no prior relationship to the plan, its trustee, any parties in interest, or any other parties to the litigation. In other instances, the plan's current trustee, assuming that the trustee's conduct is not at issue, may be an appropriate fiduciary to make the decision on behalf of the plan as to whether to settle the litigation.

The proposed exemption also provides that the settlement must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. The intent of this condition is not to deny direct benefits to other parties to a transaction but, rather, to exclude transactions that are part of a broader overall agreement,

arrangement or understanding designed to benefit parties in interest.

*b. Conditions Applicable to Retroactive Transactions*

In addition to the conditions applicable to all transactions, if the transactions addressed in this class exemption occurred between January 1, 1975 and the date of publication of the final exemption, the retroactive exemption with respect to any extensions of credit is conditioned upon those extensions of credit bearing a reasonable interest rate taking into account all the facts and circumstances of the settlement.

*c. Conditions Applicable to Prospective Transactions*

In addition to the conditions applicable to all transactions, the prospective exemption is conditioned upon all terms of the settlement being specifically described in a written agreement or consent decree. Further, the plan must participate in the settlement on a basis no less favorable to the plan than the participation of similarly situated persons that are not plans. As discussed below, in some instances the plan may be able to negotiate a more favorable resolution of the issues than the other parties, given the additional causes of action available under ERISA.

The exemption is conditioned upon the settlement being reasonable, given the likelihood of full recovery and the risk of litigation. Settlement must be in the best interests of the participants and beneficiaries of the plan. The Department notes that, under ERISA, the plan may have additional causes of action not available to the other plaintiffs in the same case. For example, where shareholders have brought a class action securities fraud case against the Company and its officers, the Company's employee benefit plan may be named as a member of the class because it holds employer securities. Such a plan may also have ERISA claims against the Company and some or all of its officers, as well as against other parties. Before entering into a settlement, the plan fiduciary should consider the value of these additional claims. The plan fiduciaries may also be able to pursue claims against defendants not named in the securities fraud case, including knowing participants in the breach. Under certain circumstances, the plan will have additional sources of recovery, including fiduciary liability insurance, the plan's fidelity bond, and the personal assets of the defendants,

including their own employee benefit plan accounts.<sup>8</sup>

Where a settlement includes an extension of credit to a party in interest for purposes of repaying an amount owed in settlement of litigation, the prospective exemption requires that the credit terms, including the interest rate, be reasonable, but in no case may the rate be less than the underpayment rate defined in section 6621(a)(2) of the Code.

**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 the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his 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 the Act; 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) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of plans;

(3) If granted, the proposed class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules.

<sup>8</sup> Section 206(d)(4) of the Act permits a plan to offset the benefits of a participant under an employee pension plan against an amount that the participant is ordered or required to pay, if the order or requirement to pay arises under a judgment or conviction of a crime involving the plan, a civil judgment, including a consent order or decree, entered into by a court, or where there is a settlement agreement between the participant and the Secretary of Labor or the PBGC in connection with a violation of Part IV of ERISA.