

Acknowledgement by a Fiduciary.

The proposed prospective exemption also requires that a fiduciary acting on behalf of the plan acknowledge in writing that it is a fiduciary with respect to the settlement of the litigation. Under the Act, a person that exercises any authority or control respecting disposition of [the plan's] assets,⁹ is considered a fiduciary. It is anticipated that the applicable plan fiduciary will incorporate this acknowledgement in the written agreement outlining the terms and conditions of its retention as a plan service provider, and already in existence, as part of usual and customary business practice. As such, a written acknowledgement is not expected to impose any measurable additional burden.

Recordkeeping. The proposed prospective exemption would require a plan to maintain for a period of six years the records necessary to enable certain persons to determine whether the conditions of the proposed exemption had been met. The six-year recordkeeping requirement is consistent with the requirements in section 107 of the Act as well as general recordkeeping requirements for tax information under the Code. The requirement is also consistent with other statutory requirements. As such, the Department has not accounted for a burden related to the recordkeeping requirement of this proposed exemption.

The proposed prospective exemption may affect all employee benefit plans, the participants and beneficiaries of those plans, and parties in interest to plans engaging in the specified transactions. It is not possible to estimate the number of respondents or frequency of response to the information collection requirements of the proposed exemption due to the wide variety of litigation involving plans, parties to that litigation, and jurisdictions in which litigation occurs. However, the lack of an ascertainable number of settlements would not impact the hour or cost burden because, as noted, no additional burden is expected to be associated with the information collection requirements of the proposed exemption.

The Department has on other occasions exempted classes of transactions involving settlement agreements under specific circumstances. Pursuant to PTE 94-71 (59 FR 51216), the Department determined that the restrictions of sections 406(a)(1)(A) through (E) and the taxes imposed by sections 4975(a) and 4975(b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,

shall not apply to a transaction or activity that is authorized by a remedial settlement agreement resulting from an investigation of an employee benefit plan conducted by the Department. Because this proposed exemption applies to settlement agreements involving plans and parties in interest, and the release of claims by the plan, the subject matter is considered to be sufficiently similar to suggest that both the public and the government would be served by combining the clearance of the information collection requests of both exemptions under one OMB control number.

Type of Review: Revision of a currently approved collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Settlement Agreements Between a Plan and Party In Interest (Prohibited Transaction Class Exemption 94-71; and Application No. D-11100).

OMB Number: 1210-0091.

Affected Public: Individuals or households; Business or other for-profit institutions; Not-for-profit institutions.

Frequency of Response: On occasion.

Total Respondents: 4 for existing ICR; no additional for proposed revision.

Total Responses: 1,080 for existing ICR; no additional for proposed revision.

Estimated Burden Hours: 40 for existing ICR; no additional for proposed revision.

Estimated Annual Costs (Operating and Maintenance): \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Written Comments

All interested persons are invited to submit written comments or requests for a public hearing on the proposed exemption to the address and within the time period set forth above. All comments will be made a part of the record. Comments and hearing requests should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection at the address set forth above.

Section I. Covered Transactions

Effective January 1, 1975, the restrictions of section 406(a)(1)(A), (B) and (D) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A), (B) and (D) of the Code, shall not apply to the following transactions, if the relevant conditions

set forth in sections II through IV below are met:

(a) The release by the plan of a legal or equitable claim against a party in interest in exchange for consideration, given by, or on behalf of, a party in interest to the plan in partial or complete settlement of the plan's claim; and

(b) 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 in settlement of a legal or equitable claim by the plan against the party in interest.

Section II. Conditions Applicable to Transactions Described in Section I

(a) An attorney or attorneys retained to advise the plan on the claim, and having no relationship to any of the parties, other than the plan, determines that there is a genuine controversy involving the plan;

(b) The terms and conditions of the transaction are negotiated at arms' length by a fiduciary who has no relationship to, or interest in, any of the parties involved in the litigation, other than the plan, that might affect the exercise of such person's best judgment as a fiduciary; and

(c) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

Section III. Retroactive Conditions for Transactions Described in Section I (b)

In addition to the conditions described in section II, the following condition applies to the transactions described in section I (b) entered into on or before the date of publication of the final exemption in the **Federal Register**

(a) Any extension of credit by the plan to a party in interest in connection with the settlement of a legal or equitable claim against the party in interest is on terms, including the interest rate, that are reasonable.

Section IV. Prospective Conditions for Transactions Described in Section I (a) and (b)

In addition to the conditions described in section II, the following conditions apply to the transactions described in section I (a) and (b) entered into after the date of publication of the final exemption in the **Federal Register**:

(a) All terms of the settlement are specifically described in a written agreement or consent decree;

(b) The plan participates in the settlement on a basis no less favorable to the plan than the participation of

⁹ [10]: Section 3(21)(A)(i) of ERISA.