

(h). These requirements are summarized as follows:

**Written Agreement.** The exemption requires that the terms of the settlement be specifically described in a written agreement or consent decree. In the exemption as granted, the Department has added that, with regard to transactions involving assets other than cash, the assets and their fair market value, including the date for such valuation, must be described in writing in the settlement agreement. Because a description and valuation of the assets involved in a settlement transaction are usually included in a settlement agreement, the requirement serves only as a clarification about assets that are not cash for the parties seeking to use the class exemption. In addition, because the Department believes that the ability to make changes with regard to a settlement allows more flexibility to the parties involved, it has also provided in the final exemption that certain adjustments, such as the right to amend the plan, are permissible if written into the agreement. These two new requirements are only operative for certain provisions and under certain conditions that may or may not be included in the settlement. Where appropriate, including the provisions in the agreement enables interested parties described in the exemption to verify that the conditions of the exemption have been met. However, neither requirement produces a measurable burden beyond that which would be considered usual business practice, and no additional burden has been accounted for in this ICR.

**Acknowledgement by a Fiduciary.** On a prospective basis, the 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," 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.** Prospectively, the exemption requires a plan to maintain for a period of six years the records necessary to enable certain persons to determine whether the conditions of the exemption had been met. The six-year recordkeeping requirement is consistent

with the requirements in section 107 of the Act as well as general record-keeping requirements for tax information under the Code. As such, the Department has not accounted for a burden related to recordkeeping for this exemption.

The exemption may affect 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 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 does not impact the hour or cost burden because no additional burden is associated with the information collection requirements of the exemption.

#### I. Discussion of Comments Received

The comments received by the Department were generally supportive of the issuance of a class exemption for the release of claims and extensions of credit in connection with litigation. However, commenters requested specific modifications to the proposal in the following areas:

**A. Whether the settlement of litigation with a party in interest is a prohibited transaction.** Several commenters argued that settling litigation is not a transaction, and, therefore, not prohibited under section 406 of the Act. Other commenters requested that the Department clarify that only a fiduciary, a participant or beneficiary, or the Secretary of Labor, may bring suit to enforce ERISA's fiduciary duties. These commenters asserted that, because the statute does not identify a plan as a party with standing to pursue ERISA litigation, an ERISA claim is not a plan asset and the release of such an asset, in exchange for consideration from a party in interest, would not be a prohibited sale or exchange of any property under section 406 of ERISA. Other commenters asserted that the settlement of litigation with a party in interest is a prohibited transaction and urged stricter conditions for the provision of retroactive relief because the Department's position on this issue was clearly articulated in its 1995 Opinion Letter, AO 95-26A (October 17, 1995).

As the Department noted in proposing this 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 exemption is being granted 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 comments have confirmed the Department's earlier conclusion that there was considerable uncertainty surrounding this issue. After considering all of the comments, the Department has determined that the exemption, as revised, appropriately balances the concerns of these commenters while allowing plan fiduciaries to properly carry out their responsibilities under ERISA.

In response to the comments that ERISA civil actions for breach of fiduciary duty may only be brought by participants, beneficiaries, fiduciaries, and the Secretary of Labor, the Department has modified the final class exemption to include the release of claims by both the plan and a plan fiduciary. As the Department noted in the preamble to the proposed exemption, many situations in which a plan settles litigation may not give rise to a prohibited transaction or may be covered by an existing statutory or administrative exemption. For example, correction of a prohibited transaction that complies with section 4975(f)(5) of the Code<sup>3</sup>; reimbursement of a plan without a release of the plan's claim; settlement with a service provider of a dispute related to the provision of services or incidental goods to the plan that is otherwise exempt under ERISA 408(b)(2) (*See*, Opinion Letter, AO 95-26A); settlements authorized by the Department pursuant to PTE 94-71 (59 FR 51216, October 7, 1994, as corrected, 59 FR 60837, November 28, 1994); and judicially approved settlements where the Labor Department or the Internal Revenue Service is a party pursuant to PTE 79-15 (44 FR 26979, May 8, 1979).

In addition, the Department notes that this class exemption would be available for settlement agreements relating to an employer's failure to timely remit participant contributions to a plan, including a collectively bargained multiemployer or multiple employer plan, to the extent the conditions contained in this final exemption are

<sup>3</sup> IRC Reg. sec. 141.4975-13 provides that for purposes of the excise taxes on prohibited transactions, the definition of the term "correction" under IRC Reg. sec. 53.4941(e)-1 (concerning excise taxes on self-dealing with foundations) is controlling.