

met.⁴ In this regard, the Department notes that the relief provided by this exemption is limited to the prohibited transactions that arise where a plan trustee and an employer enter into a settlement involving the employer's failure to timely forward participant contributions to the plan as required under ERISA. Thus, nothing in this class exemption should be construed as exempting any of the prohibited transactions described in section 406(a) or 406(b) of ERISA that arise solely in connection with an employer's failure to timely forward participant contributions to a plan.⁵

This exemption does not, however, apply to transactions described in PTE 76-1, A.I. (41 FR 12740, March 26, 1976, as corrected, 41 FR 16620, April 20, 1976) relating to delinquent employer contributions to a collectively bargained multiemployer or multiple employer plan. Finally, PTE 76-1, A.I. does not extend relief to those settlement arrangements that arise from the failure of an employer to timely forward participant contributions to a multiemployer or multiple employer plan.

Section 502(d)(1) of the Act provides that "an employee benefit plan may sue or be sued under this title as an entity." This exemption covers settlement of any type of suit the plan has brought. However this exemption is not available for settlement of claims brought by a party in interest against a plan. This exemption does not cover a plan's payment of money or other things of value to a party in interest in exchange for the dropping of claims against the plan. As with exchanges made for the release of claims in favor of the plan, the Department's determination in this regard is not dispositive of whether such an exchange constitutes a prohibited transaction.

Finally, the Department notes that a settlement between a plan and a participant or beneficiary made solely to resolve claims against a plan for the recovery of benefits, by a participant or beneficiary, may not involve a prohibited transaction. If the plan makes payment to a participant who is a party in interest to settle a benefits dispute, such payment generally would be viewed by the Department as the

payment of a plan benefit that would not trigger the need for an exemption. As the Supreme Court noted in *Lockheed Corp. v. Spink*, 517 U.S. 882, 892-893 (1996), the payment of benefits is not a prohibited transaction.

B. The plan must obtain advice from an attorney representing the plan that a genuine controversy exists. Several commenters were concerned that imposing this requirement on past settlements would effectively limit the availability of the exemption. These commenters asserted that, prior to publication of the Department's proposed exemption, many fiduciaries were unaware that the settlement of litigation might be considered a prohibited transaction by the Department. Even if an attorney was retained in connection with the litigation, it is unlikely that the attorney would have opined as to whether or not there was a genuine controversy. Other commenters argued that: the filing of a lawsuit should be sufficient to find the existence of a genuine controversy; and class action settlements should not have to meet this requirement. Another commenter suggested retaining the requirement for a genuine controversy, but without requiring an attorney's determination. This commenter also suggested that the attorney review be permitted, but not required, as a safe harbor in certain situations. He explained that fiduciaries might find it prudent and in the interests of participants and beneficiaries to settle a frivolous case for a *de minimus* amount, rather than incur the cost of litigation. In this situation, such fiduciaries should be able to meet the condition of the class exemption by demonstrating that they sought and obtained advice of counsel before settling the case.

Several commenters asserted that the genuine controversy condition was unnecessary as the concern raised by the Department, the possibility of a collusive settlement, was addressed by the condition that the settlement is not an arrangement to benefit a party in interest. Another commenter suggested that independent legal advice and a written agreement or consent decree should be mandatory for all retroactive relief because, even if the fiduciary was unaware of the prohibited transaction issue, a prudent fiduciary would have obtained such written documentation before entering into a settlement.

On the basis of these comments, the Department has decided to amend the genuine controversy condition. No finding of genuine controversy will be required where the case has been certified as a class action by the court. In addition, for transactions entered into

prior to the publication of the final exemption, and the first 30 days thereafter, no attorney review will be required to determine whether the genuine controversy exists. On a prospective basis, attorney review will be required. In response to a question from one of the commenters, the Department confirms that the independent fiduciary's in-house attorneys, as well as its outside counsel, could provide the appropriate advice concerning the existence of a genuine controversy.

C. The decision-making fiduciary has no interest in any of the parties involved in the litigation that might affect the exercise of its best judgment as a fiduciary (independent fiduciary). Several commenters suggested that the Department eliminate the requirement for an independent fiduciary or, in the alternative, limit its application to prospective relief. Among the suggestions were: limit the requirement for an independent fiduciary to material claims where there are no alternative safeguards; and eliminate the independent fiduciary requirement where a judge reviews the fairness of a class action settlement. Other commenters expressed concern that the plan's directed trustee, even if not a defendant, should not be considered sufficiently independent to make decisions settling a case. They suggested that an entirely independent fiduciary be retained. Another commenter argued that relief in large cases should be conditioned upon the retention of an independent fiduciary with no prior relationship to the plan, or the defendants, and no future relationship with the plan for three years after the engagement.

Except as noted above in connection with the finding of genuine controversy, the Department does not believe that it would be appropriate to make a distinction between the requirements applicable to class action settlements and other settlements. However, in response to comments, the Department has decided to eliminate the requirement that the independent fiduciary "negotiate" the settlement. The Department realizes that many of the settlements to which this class exemption would apply are class action settlements. Where the plan is not a lead plaintiff, the plan fiduciary's role in negotiating the terms of the settlement may be limited. The Department recognizes, however, that even where negotiation does not take place between the plan and the defendant, a fiduciary will be compelled, consistent with ERISA's fiduciary responsibility provisions, to make a decision regarding

⁴ The Department notes that the relief provided by this exemption would be available for settlements involving participant or employer contributions to a single employer plan or to a non-collectively bargained multiple employer plan.

⁵ In this regard, the failure of an employer to timely remit contributions made to a plan by an employee of such employer violates ERISA sections 403(a), 403(c)(1), 404(a)(1)(A), 406(a)(1)(D), and 406(b)(1).