

the settlement on behalf of the plan, even if that decision is merely to accept or reject a proposed settlement negotiated by other class members.

As modified, the final class exemption covers settlements authorized by a fiduciary that are reasonable, in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone. Such settlements must be no less favorable to the plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties in similar circumstances. In addition, the transaction must not be part of an agreement, arrangement or understanding designed to benefit a party in interest. Thus, an independent fiduciary could satisfy the authorization requirements under the final exemption by deciding not to opt out of class action litigation if, after a review of the settlement, such fiduciary concludes that the chances of obtaining any further relief for the plan are not justified by the expense involved in pursuing such relief. Although the Department has determined to delete the requirement for negotiation as a specific condition of the class exemption, the Department notes that this modification does not diminish the fiduciary's responsibilities with respect to the settlement terms.

As noted above, several of the commenters expressed concern about the degree of independence of institutional fiduciaries, such as directed trustees, that may serve as the fiduciary contemplated by the class exemption. Without agreeing or disagreeing with this comment, the Department emphasizes that this class exemption does not provide relief from section 406(b) of the Act. In addition, the fiduciary's decisions in authorizing a settlement are subject to the fiduciary responsibility provisions of the Act.

*D. Plans must select an independent fiduciary.* Several commenters expressed concern about the additional cost of hiring independent fiduciaries in connection with settlements. The Department believes that plans often will not need to retain fiduciaries specifically to comply with this exemption. In most cases, the plan will be able to use a current fiduciary who is not a party to the action and who is not so closely allied with a party (other than the plan) as to create a conflict of interest. As with any other expense, the Department expects that fiduciaries will engage in prudent cost/benefit analysis to select the appropriate independent fiduciary in each case. In some cases, the cost of the independent fiduciary may be included in the damages

claimed by the plan and may be reimbursed by the defendant in settling the litigation.

One of the commenters suggested that to avoid duplication, the independent fiduciary should be permitted to rely on the opinion of plaintiffs' class counsel or experts hired to assist class counsel. The Department agrees that the fiduciary should not spend plan resources unnecessarily. Whether and to what extent a fiduciary should rely on a particular attorney or expert hired by one of the other parties are decisions that the fiduciary must make in accordance with its fiduciary responsibilities under ERISA.

In this regard, the Department notes that on occasion the independent fiduciary may wish to retain outside experts to assist the fiduciary in determining whether or not to settle litigation. The following are some of the factors that may assist the fiduciary in its determination: the size of the claim, the expertise of the fiduciary, and the subject matter of the litigation.

Several of the commenters asked the Department to clarify that the mere fact that a party in interest pays for an attorney, an independent fiduciary, or other expert hired by the plan, does not mean that these professionals are not independent for purposes of the exemption. The Department agrees with this assertion, assuming that the professional being paid by the party in interest understands that the plan is their client, not the party paying their bill. In addition, the amount of compensation paid to the professional by the party in interest constitutes no more than a small percentage of such professional's annual gross income.

*E. What is the role of the independent fiduciary where there is judicial approval of a settlement?* Several commenters recommended that judicial approval of a settlement should eliminate the need for an independent fiduciary. One of the commenters suggested that where the settlement is judicially approved, relief from section 406(b) of the Act should be available under the exemption for those fiduciaries that were defendants in the litigation. The Department has determined not to adopt these suggestions. The court, in reaching its conclusion that the settlement is fair, must balance the interests of all the litigants. ERISA, on the other hand, requires that a fiduciary make its decisions with an "eye single to the interests of the participants and beneficiaries." *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), cert. denied, 459 U.S. 1069 (1982). In response to the request for relief from

section 406(b), the Department does not believe that a sufficient showing has been made that such relief would be appropriate under the circumstances.

*F. Should there be special rules for settling class action litigation?* Several of the commenters explained that, with respect to certain types of class actions, class members do not have the option of opting out of the class—all are bound by the decision. The commenters explained that ERISA class actions are often non-opt out cases. According to the commenters, this means that where class action litigation is brought by the participants, the plan fiduciary may, without taking any action, be bound by the class action settlement. In light of this, the commenters asked how such a fiduciary could cause a prohibited transaction where it took no action and yet was bound by the settlement. The Department does not regard this exemption proceeding to be the appropriate setting for resolving questions concerning what types of settlement are more or less likely to be prohibited transactions.

The Department notes, however, that the fiduciary is unlikely to remain uninvolved in the settlement of an ERISA lawsuit initiated by participants for two reasons. First, the fiduciary will, in all likelihood, be named as a party to the lawsuit and the court will almost certainly require the plan fiduciary's input on the settlement. Alternatively, the party in interest likely will seek the involvement of the fiduciary because the party in interest (disqualified person) may need to take advantage of the relief provided by the class exemption in order to avoid the possible imposition of excise taxes under section 4975 of the Code. Under the Code, such excise taxes are paid by the disqualified person who participates in the prohibited transaction, not the fiduciary who caused the plan to engage in the transaction.

In order to meet the conditions of the class exemption, the fiduciary faced with a non-opt out class action must take such actions as are appropriate under the particular circumstances. For example, before such a settlement is imposed on a non-opt out class, generally there is an opportunity to object to its terms. If the fiduciary does not believe that the proposed terms and conditions of the settlement are as favorable to the plan as comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances, it should object to the settlement.

In securities fraud class action cases, there is often an option to opt out of the class. Where the plan or the plan