

trustee, as the holder of record of the securities, is a class member, whatever action or inaction that fiduciary determines to undertake has consequences for the plan. If the fiduciary takes no action, and the case is settled for far less than the full value of the plan's losses, the burden will be on the fiduciary to justify its inaction. The fiduciary responsible for authorizing settlement of class action claims must decide, not only whether or not to opt out of the class action, but also whether to protest the proposed settlement during the fairness hearing.<sup>6</sup>

*G. Only cash may be received in exchange for the release, unless the transaction at issue is being rescinded.* The commenters were universal in their objection to this condition. They pointed out that frequently, in cases involving investment in employer securities, the settlement consists of additional employer securities. In addition, settlements with plan sponsors often include nonmonetary relief, such as a promise of future contributions and plan amendments improving participants' rights, for example, the right to diversify their investments.

In response to these comments, the Department notes that the conditions for retroactive relief do not specify the type of the consideration that may be provided in exchange for the release. On a prospective basis, the Department has decided to modify the final exemption to permit assets other than cash to be provided in exchange for the plan's or

the plan fiduciary's release of a claim. As modified, the final exemption permits contributions of qualifying employer securities, or other marketable securities, in certain instances. Any assets contributed to the plan, in connection with a settlement, must consist of securities that can be objectively valued to determine fair market value, in accordance with Section 5 of the Voluntary Fiduciary Correction (VFC) Program (67 FR 15062, March 28, 2002). The final exemption has also been modified to provide that plan amendments, additional employee benefits, and the promise of future contributions may be included as part of a settlement agreement covered by this exemption.

*H. When is a settlement reasonable?* One commenter urged the Department to apply this condition to all transactions and to include the costs of litigation among the factors to be considered in determining whether a settlement is reasonable. Another commenter asked to include the value of claims foregone. The Department has adopted these suggestions. The final exemption requires that the settlement must be reasonable in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone. How these factors are weighed by fiduciaries will differ, depending on the type of case, but will always involve a prudent decision-making process, given the facts and circumstances of the particular situation.

*I. Should an interest rate be specified?* Most of the commenters urged the Department to eliminate the requirement that a reasonable interest rate be charged for an extension of credit in connection with a settlement covered by the exemption. The commenters explained that often a settlement requires a payment of the promised sum over several years, without specifying an interest rate. In response to these comments, the Department has modified this condition to delete the reference to interest in connection with the loan or extension of credit. As modified, any extensions of credit must be made on terms that are reasonable. Although the final exemption provides more flexibility, fiduciaries that agree to an extension of credit with a party in interest nonetheless must consider that party's creditworthiness and the time value of money in evaluating the settlement.

As noted above, the settlement of litigation with a plan sponsor often involves the promise of future contributions. Another commenter requested that the Department clarify

that the promise of future contributions is not loan or other extension of credit. The Department agrees with the commenter.

The Department encountered a case where the trustees had agreed to accept payments over time in order to collect amounts misappropriated by a party in interest. In this case, the trustees extended credit to the party in interest, but did not release their cause of action against him. In such a case, the class exemption will apply if the extension of credit is being made in connection with a settlement and both the settlement and the extension of credit meet all of the conditions of this exemption.

Several commenters urged the Department to require that extensions of credit be secured by property or a letter of credit. Although the Department has decided not to adopt this suggestion as a condition of the final exemption, the Department encourages fiduciaries to seek security for an extension of credit, wherever feasible, to protect the plan against the risk of default.

*J. Certain applicants request that the scope of AO 95-26A (October 17, 1995) be extended.* In AO 95-26A, the Department opined that settlement of litigation with a service provider may be covered by the statutory exemption for service providers provided under section 408(b)(2) of the Act. Several commenters asked whether the same rationale extended to the settlement of cases where the transaction at issue in the litigation is of the type addressed by a statutory or administrative exemption. The Department notes that the issues raised by the commenters, with respect to the scope of AO 95-26A, are beyond the scope of this exemption proceeding.

*K. Who bears the burden of proof?* Several commenters expressed concern that, if the retroactive conditions of the exemption are too subjective or difficult to meet, fiduciaries who acted in good faith in settling cases, particularly complex securities fraud cases, may be subject to litigation. According to the commenters, most practitioners were unaware of the Department's position that settling litigation with a party in interest might result in a prohibited transaction until the Department published the proposal for this class exemption. These commenters argued that, without a broad retroactive exemption, frivolous litigation may ensue.

Other commenters asserted that whether or not the fiduciaries were aware of potential prohibited transactions, these fiduciaries knew they were making decisions involving plan assets. If they acted prudently and in the interests of participants and

<sup>6</sup>For example, in *Great Neck Capital Appreciation Investment Partnership v. PriceWaterhouseCoopers*, In re Harnischfeger Industries, Inc. Securities Litigation, 212 F.R.D. 400 (E.D. Wisc. 2002), the original securities law class action settlement proposal included release of ERISA claims against the fiduciaries of the Harnischfeger employee benefit plans, even though the lawsuit had not alleged ERISA claims. At the fairness hearing, a participant protested that the participants' ERISA claims might be extinguished if this release was approved as part of the settlement. After considering the parties positions, the judge, during a conference call, "advised the parties that [he] was inclined to view the proposed settlement as unfair if its effect would be to extinguish the Plan participants' ERISA claims without compensation and that it also appeared to be unfair to require Plan participants to give up their right to participate in the settlement as a condition of asserting ERISA claims." 212 F.R.D. at 406. The securities law parties took the judge's hint and voluntarily agreed to exclude the ERISA claims from the release. In re IKON Office Solutions, Inc. Securities Litigation, 194 F.R.D. 166 (E.D.Pa. 2000), on the other hand, involved a securities law release that arguably released at least some of the ERISA claims and participants protested this at the fairness hearing. The court held that it would be premature, in the context of a settlement, for the court to address such issues—participants could either opt out and not be bound by the settlement, or take their chances pursuing what was left of their ERISA claims after receiving their portion of the securities class action settlement.