

beneficiaries in settling the litigation with the party in interest, these fiduciaries should have no trouble meeting the retroactive requirements of the exemption. These commenters argued that, given the Department's guidance on this issue in 1995, it is appropriate to shift the burden of proving substantive and procedural prudence from the person challenging the settlement to the fiduciary seeking the protection of the exemption.

In light of these comments, the Department confirms that the party seeking to take advantage of any administrative exemption granted by the Department has the burden of proving that it met each condition of the exemption. Nonetheless, the Department has been persuaded that many practitioners were unaware of the prohibited transaction issues involved in settlements. The Department is also aware that some attorneys may have advised their clients that the settlement of litigation with a party in interest is not the type of transaction intended to be covered by section 406 of the Act. After considering these comments, the Department believes that it is appropriate to modify the retroactive relief under the final exemption. Accordingly, for settlements entered into on or before 30 days after the date of publication of the final exemption, the determination that there was a genuine controversy need not have been made by an attorney.

*L. Should notice be required?* Several commenters urged the Department to require notice to all participants and beneficiaries in connection with the settlement of litigation. One commenter pointed out that the Department requires notice in connection with PTE 94-71 (59 FR 51216, October 7, 1994, as corrected, 59 FR 60837, November 28, 1994) (settlement agreements between the U.S. Department of Labor and plans) where the Department is a party to the settlement. This commenter argued that without the involvement of the Department, notice is even more important to the participants and beneficiaries because their rights to pursue their own ERISA litigation could be compromised or waived entirely by the plan fiduciary. The commenter recommended that notice to participants of the nature of the allegations leading to the settlement and the terms of the proposed settlement should be required. This commenter also urged that all settlements should take the form of a proposed consent decree filed after, or contemporaneous with, the Complaint. In addition, the analytical basis for the settlement should be open to inspection by participants for a stated period of

time. Another commenter explained that, in his experience, participants are not aware of litigation, or at least the plan's involvement, until after the settlement is final. Other commenters strongly oppose notice. These commenters asserted that such an undertaking could be very costly and disruptive, especially for minor litigation.

The Department has determined not to add a notice requirement as a condition of this class exemption. Requiring notice at the point where litigation is about to be settled could result in unnecessary delays and additional costs. The Department believes that the interests of the participants and beneficiaries will be sufficiently protected by the conditions of this class exemption, especially the requirement that the settlement is authorized by a fiduciary who is independent of the parties involved in the litigation.

*M. Discussion of other comments.* One of the commenters requested the Department's concurrence that, if ERISA claims are not covered by the release given by the plan or the plan fiduciary in settlement of litigation, the fiduciary need not obtain additional consideration to account for such claims. The Department agrees with this statement.

One commenter urged the Department to opine that, where a plan fiduciary causes a plan to release all the plan's non-ERISA claims arising out of a transaction, the fiduciary does not automatically release the fiduciary's own claims for breach of fiduciary duty arising out of the same transaction. The commenter explained that the proposed exemption did not distinguish between claims brought by the plan, *i.e.*, with the plan itself as a named party, and claims brought on behalf of the plan by a fiduciary. ERISA § 502(d)(1), 29 U.S.C. 1132(d)(1), provides that an employee benefit plan may sue and be sued as an entity. Claims for violations of title I of ERISA, however, may be brought by a fiduciary, participant or beneficiary of the plan or by the Secretary of Labor. ERISA §§ 502(a)(2), 502(a)(3), 502(a)(4), 502(a)(5), and 502(e)(1), 29 U.S.C. 1132(a)(2), 1132(a)(3), 1132(a)(4), 1132(a)(5) and 1132(e)(1). Some courts have concluded that plans may bring actions under other laws, but may not bring an action for a fiduciary breach under title I of ERISA. *E.g.*, *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2nd Cir. 1983). Other courts have not adopted this distinction. *E.g.*, *Samarar Aluminum Co. v. Pension Plan for Employees of the Aluminum*

*Indus. and Allied Indus.*, 782 F.2d 577, 581 (6th Cir. 1986). The commenter believes that a failure to distinguish between claims that a plan can make in its own name and those that must be made by a plan fiduciary, for example, could cause courts to conclude that releasing a plan's non-ERISA claims automatically releases a plan fiduciary's, or participant's or beneficiary's ERISA claims on behalf of the plan.

The Department amended the proposed exemption to clarify that it applies to releases by the plan or by a plan fiduciary. The issue of how a release of claims by a plan or plan fiduciary may affect ERISA claims that could otherwise be brought by a fiduciary, participant or beneficiary is beyond the scope of this exemption proceeding. In the Department's view, a fiduciary should understand, in advance of signing, the legal effect that a settlement agreement may have on all claims that might be brought by or on behalf of the plan or its participants and beneficiaries. Plan fiduciaries may need to obtain legal advice on the scope of claims affected by a proposed settlement agreement. The Department notes that it has long held the view that a fiduciary's release of ERISA claims does not bind the Secretary.

It is not uncommon for the same transactions to give rise to both ERISA and securities fraud claims. The plan, and by extension, the participants and beneficiaries of the plan, are entitled to the same recovery as other shareholders in the securities fraud settlement. However, the participants and beneficiaries may have another avenue of recovery not available to other shareholders. They are authorized, under ERISA, along with the plan fiduciary and the Secretary of Labor, to bring suit to make the plan whole for all losses caused by a breach of fiduciary duty. As noted above, the Department recognizes that, in a number of securities fraud class action settlements, the participants and/or plan fiduciaries have successfully objected to the original release and were able to modify the terms of the release to permit the plan to receive its share of the securities fraud settlement without releasing its ERISA claims against the parties in interest. In other instances, fiduciaries have successfully negotiated additional relief for the plan beyond that provided to shareholders who did not have ERISA claims against the defendants. The Department notes that plan fiduciaries should consider whether additional relief may be available for the ERISA claims before agreeing to a broad release.