

In conclusion, the Department encourages participants, beneficiaries, fiduciaries, parties in interest and other interested persons to take advantage of the wide range of compliance assistance offered by the Department. Those with questions about their rights and responsibilities in particular situations should look first to our web site: <http://www.dol.gov/EBSA/>. You may also call, toll-free, the Employee & Employer Hotline 1-866-444-EBSA (3272). To discuss substantive ERISA issues in connection with particular cases, please contact your local EBSA field office. The EBSA web site mentioned above includes a state-by-state list of phone numbers and addresses for these offices. Click on "About EBSA/EBSA Offices."

## II. Description of the Exemption

The exemption provides retroactive and prospective relief from the restrictions of section 406(a)(1)(A), (B) and (D) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B) and (D) of the Code, for the following transactions, effective January 1, 1975:

(1) The release by the plan or by a plan fiduciary of a legal or equitable claim against a party in interest in exchange for consideration, given by, or on behalf of, a party in interest to the plan in partial or complete settlement of the plan's or the fiduciary's claim; and

(2) An extension of credit by a plan to a party in interest in connection with a settlement whereby the party in interest agrees to repay, over time, an amount owed to the plan in settlement of a legal or equitable claim by the plan or a plan fiduciary against the party in interest.

### A. Conditions Applicable to All Transactions

The exemption is conditioned upon the existence of a genuine controversy involving the plan unless the case has been certified as a class action by the court. The Department believes that this condition is necessary to prevent the plan and parties in interest from engaging in a sham transaction purporting to fall within this class exemption, thus shielding a transaction, such as an extension of credit or other transaction with a party in interest, that would otherwise be prohibited.

The fiduciary that authorizes the settlement must have no relationship to, or interest in, any of the other parties involved in the litigation, other than the plan, that might affect its best judgment as a fiduciary. The Department intends a flexible standard for fiduciary independence, recognizing that the

exemption will encompass a wide range of situations, both in terms of the type of litigation and the cost of pursuing such litigation. For example, in some instances where there are complex issues and significant amounts of money involved, it may be appropriate to hire an independent fiduciary having no prior relationship to the plan, its trustee, any parties in interest, or any other parties to the litigation. In other instances, the plan's current trustee or investment manager, assuming that fiduciary's conduct is not at issue, may be an appropriate party to make the decision on behalf of the plan as to whether to settle the litigation.

In response to comments received by the Department regarding the settlement of class action litigation in which the ability to negotiate may be limited, the Department eliminated the requirement that the settlement be "negotiated" by the fiduciary. In lieu of this requirement, the exemption provides that the fiduciary may authorize a settlement if its terms and conditions are no less favorable to the plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.

The exemption is conditioned upon the settlement being reasonable given the likelihood of full recovery, the costs and risks of litigation, and the value of claims foregone. The claims foregone may include additional causes of action not available to the other plaintiffs in the same case. For example, where shareholders have brought a class action securities fraud case against the Company and its officers, the Company's employee benefit plan or the trustee, as the holder of record, may be named as a member of the class because it holds employer securities. The plan or trustee may also have ERISA claims against the Company and some or all of its officers, as well as against other parties. Before entering into a settlement with any defendant, the plan fiduciary should consider the value of these additional claims against that defendant. The plan fiduciaries may also be able to pursue claims against defendants not named in the securities fraud case, including knowing participants in the breach. Under certain circumstances, the plan will have additional sources of recovery, including fiduciary liability insurance, the plan's fidelity bond, and the personal assets of the defendants, including their own employee benefit plan accounts.<sup>7</sup>

<sup>7</sup> Section 206(d)(4) of the Act permits a plan to offset the benefits of a participant under an

The exemption also provides that the settlement must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. The intent of this condition is not to deny direct benefits to other parties to a transaction but, rather, to exclude transactions that are part of a broader overall agreement, arrangement or understanding designed to benefit parties in interest.

Where a settlement includes an extension of credit by a plan to a party in interest for purposes of repaying an amount owed in settlement of litigation, the exemption requires that the credit terms be reasonable. Fiduciaries must consider the creditworthiness of the party in interest and the time value of money in evaluating extensions of credit to settle litigation. The settling fiduciary should also consider security for such loans, such as a third party guarantee or letter of credit, to protect against default.

The Department has added a new condition which clarifies that this class exemption does not cover those transactions that are 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 multiemployer and multiple employer collectively bargained plans).

Finally, in response to a question received during the comment period, the Department has defined the terms "employee benefit plan" and "plan" to include an employee benefit plan described in section 3(3) of ERISA and/or plans as defined in section 4975(e)(1) of the Code.

### B. Conditions Applicable to Prospective Transactions

On a prospective basis, the existence of a genuine controversy must be determined by an attorney retained to advise the plan unless the case has been certified as a class action by the court. That attorney must be independent of the other parties to the litigation. All terms of the settlement must be specifically described in a written agreement or consent decree and the fiduciary authorizing the settlement must acknowledge its fiduciary status in writing.

The exemption provides that in certain instances assets, other than cash,

employee pension plan against an amount that the participant is ordered or required to pay, if the order or requirement to pay arises under a judgment of conviction of a crime involving the plan, a civil judgment, including a consent order or decree, entered into by a court, or where there is a settlement agreement between the participant and the Secretary of Labor or the PBGC in connection with a violation of Part IV of ERISA.