

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2570****RIN 1210-AA98****Prohibited Transaction Exemption Procedures; Employee Benefit Plans****AGENCY:** Employee Benefits Security Administration, Labor.**ACTION:** Proposed rule.

**SUMMARY:** This document contains a proposed rule that, if adopted, would supersede the existing procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees' Retirement System Act of 1986 (FERSA). The Secretary of Labor is authorized to grant exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA and to establish an exemption procedure to provide for such relief. The proposed rule would clarify and consolidate the Department of Labor's exemption procedures and provide the public with a more comprehensive description of the prohibited transaction exemption process.

**DATES:** *Comment Date:* Written comments on the proposed regulation should be received by the Department of Labor on or before October 14, 2010. *Effective Date:* The Department proposes to make this regulation effective 60 days after the date of publication of the final rule in the **Federal Register**.

**ADDRESSES:** To facilitate the receipt and processing of responses, the Department encourages interested persons to submit their responses electronically by e-mail to: [e-OED@dol.gov](mailto:e-OED@dol.gov) or by using the Federal eRulemaking portal at <http://www.regulations.gov> (follow instructions for submission of comments). Persons submitting responses electronically are encouraged not to submit paper copies. Persons interested in submitting written responses in paper form should send or deliver their responses (preferably, at least three copies) to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Prohibited Transaction Exemption Procedures

Proposed Regulation. All written responses will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and at the Public Disclosure Room, Room N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark W. Judge, Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693-8550. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background**

Part 4 of Title I of ERISA establishes an extensive framework of standards and rules governing the conduct of plan fiduciaries; collectively, these rules are designed to safeguard the integrity of employee benefit plans. As part of this structure, section 406 of ERISA generally prohibits the fiduciary of a plan from causing such plan to engage in a variety of transactions with certain related parties, unless a statutory or administrative exemption applies to the transaction. These related parties (which include plan fiduciaries, sponsoring employers, unions, service providers, and other persons who may be in a position to exercise improper influence over a plan) are defined as "parties in interest" in section 3(14) of ERISA.<sup>1</sup> Section 406 also generally prohibits a plan fiduciary from (i) dealing with the assets of a plan in his or her own interest or for his or her account, (ii) acting in any transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or its participants and beneficiaries, or (iii) receiving any consideration for his or her own personal account from a party dealing with the plan in connection with a transaction involving plan assets, unless an exemption specifically applies to such conduct.

To supplement these provisions, sections 406 and 407(a) of ERISA impose restrictions on the nature and extent of plan investments in assets such as "employer securities" (as defined in section 407(d)(1) of ERISA) and "employer real property" (as

defined in section 407(d)(2) of ERISA). Most of the transactions prohibited by section 406 of ERISA are likewise prohibited by section 4975 of the Code, which imposes an excise tax on those transactions to be paid by each "disqualified person" (defined in section 4975(e)(2) of the Code in virtually the same manner as the term "party in interest") who engages in the prohibited transactions.

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules; these exemptions were enacted by Congress to prevent the disruption of a number of customary business practices involving employee benefit plans. The enumerated statutory exemptions generally afford relief for, among other things, loans to participants, the provision of services necessary for the operation of a plan for no more than reasonable compensation, loans to employee stock ownership plans, and deposits in certain financial institutions regulated by state or federal agencies.<sup>2</sup>

In addition, section 408(a) of ERISA authorizes the Secretary of Labor to grant administrative exemptions (on either an individual or a class basis) from the restrictions of ERISA sections 406 and 407(a) in instances where the Secretary makes findings on the record that such relief is (i) administratively feasible, (ii) in the interests of the plan and its participants and beneficiaries, and (iii) protective of the rights of participants and beneficiaries of such plan. Similarly, section 4975(c)(2) of the Code authorizes the Secretary of the Treasury or his delegate to grant administrative exemptions from the prohibitions of Code section 4975(c)(1) upon making the same findings. Before an exemption is granted, notice of its pendency must be published in the **Federal Register**. Interested persons must be given the opportunity to comment on the proposed exemption. If the transaction involves potential fiduciary self-dealing or conflicts of interest, an opportunity for a public hearing must be provided.

Sections 408(a) of ERISA and 4975(c)(2) of the Code also direct the Secretary of Labor and the Secretary of the Treasury, respectively, to establish procedures for granting administrative

<sup>1</sup> The transactions that are generally prohibited by section 406 include sales, exchanges, or leases of property; loans or extensions of credit; and the furnishing of goods, services, or facilities. In addition, section 406 generally prohibits a plan fiduciary from allowing the transfer to (or use by or for the benefit of) a party in interest of any assets of a plan.

<sup>2</sup> The Pension Protection Act of 2006 (Pub. L. 109-280, 120 Stat. 780), enacted on August 17, 2006, amended both ERISA and the Code to establish additional statutory exemptions for certain transactions, such as those involving the block trading of securities or other property between a plan and a party in interest, the cross trading of a security between a plan and any other account managed by the same investment manager, and the execution of certain foreign exchange transactions between a plan and a bank or broker-dealer.

exemptions. In this connection, section 3003(b) of ERISA directs the Secretary of Labor and the Secretary of the Treasury (the Secretaries) to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. In addition, under section 3004 of ERISA, the Secretaries are authorized to develop rules on a joint basis that are appropriate for the efficient administration of ERISA.

Pursuant to the foregoing statutory provisions, the Secretaries jointly issued an exemption procedure on April 28, 1975 (ERISA Procedure 75–1, 40 FR 18471, also issued as Rev. Proc. 75–26, 1975–1 C.B. 722). Under this procedure, a person seeking an exemption under both section 408(a) of ERISA and section 4975 of the Code was obliged to file an exemption application with both the Internal Revenue Service and the Department of Labor. However, the requirement of seeking exemptive relief for the same transaction from two separate federal departments soon proved administratively cumbersome.

To resolve this problem, section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR 332 (1978), *reprinted in* 5 U.S.C. app. at 672 (2006), *and in* 92 Stat. 3790 (1978)), effective on December 31, 1978, transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975 of the Code, with certain enumerated exceptions, to the Secretary of Labor. As a result, the Secretary of Labor now possesses authority under section 4975(c)(2) of the Code, as well as under section 408(a) of ERISA, to issue individual and class exemptions from the prohibited transaction restrictions of ERISA and the Code. The Secretary of Labor has delegated this authority, along with most of the Secretary's other responsibilities under ERISA, to the Assistant Secretary of Labor for the Employee Benefits Security Administration. See Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

FERSA, enacted in 1986, contained prohibited transaction rules similar to those found in ERISA and the Code that are applicable to parties in interest with respect to the Federal Thrift Savings Fund established by FERSA. The Secretary of Labor is directed under FERSA to prescribe, by regulation, a procedure for granting administrative exemptions from certain of those prohibited transactions. See 5 U.S.C. section 8477(c)(3). The Secretary of Labor has delegated this rulemaking authority under FERSA to the Assistant Secretary of Labor for the Employee

Benefits Security Administration. See Secretary of Labor's Order 6–2009.

Four years after the enactment of FERSA, the Department published a final regulation (29 CFR 2570.30 *et seq.* (1991), *reprinted in* 55 FR 32847 (August 10, 1990)) setting forth a revised exemption procedure that superseded ERISA Procedure 75–1. This regulation, which became effective on September 10, 1990, reflects the jurisdictional changes made by Presidential Reorganization Plan No. 4 and extends the scope of the exemption procedure to applications for relief from the FERSA prohibited transaction rules. In addition, the 1990 final regulation codified various informal exemption guidelines developed by the Department since the adoption of ERISA Procedure 75–1.

As noted previously, section 408(a) of ERISA authorizes the Secretary of Labor to grant administrative exemptions on either an individual or a class basis. Class exemptions provide general relief from the restrictions of ERISA, the Code, and/or FERSA to those parties in interest who engage in the categories of transactions described in the exemption and who also satisfy the conditions stipulated by the exemption. In their broad applicability and policy implications, class exemptions possess several of the characteristics of agency rulemaking; accordingly, persons who are in conformity with all of the requirements of a class exemption are not ordinarily required to seek an individual exemption for the same transaction from the Department. Individual exemptions, by contrast, involve case-by-case determinations as to whether the specific facts represented by an applicant concerning an exemption transaction (as well as the conditions applicable to such a transaction) support a finding by the Department that the requirements for relief from the prohibited transaction provisions of ERISA, the Code, and/or FERSA have been satisfied in a particular instance.

While the vast majority of administrative exemptions issued by the Department have been the product of requests for relief from individual applicants and/or the employee benefits community, section 408(a) of ERISA also authorizes the Department to initiate exemptions on its own motion. Recent examples of such Department-initiated exemptions include Prohibited Transaction Exemption (PTE) 2002–51 (class exemption, as amended in 2006, providing relief from the sanctions contained in section 4975 of the Code for certain eligible transactions identified in the Department's

Voluntary Fiduciary Correction Program) and PTE 2003–39 (class exemption providing relief for the receipt of consideration by a plan from a party in interest in connection with the release of a claim in settlement of actual or threatened litigation).

In considering individual exemption requests from applicants, the Department has consistently exercised its authority under ERISA section 408(a) by carefully examining the decision-making process utilized by a plan's fiduciaries with respect to a transaction. In applying this policy, the Department determines whether it can make findings that the transaction is designed to adequately safeguard the interests of the plan's participants and beneficiaries. Therefore, the Department requires, as a condition of every exemption, that the terms of the subject transaction be no less favorable to the plan than the terms which the plan could obtain in an arm's-length transaction with an unrelated party. Depending on the facts and circumstances of a particular transaction, additional conditions for exemptive relief generally are required.

The Department has followed this policy in considering requests for either prospective or retroactive exemptive relief. In general, the Department does not make determinations concerning the appropriateness, attractiveness, or prudence of the investment proposals submitted by exemption applicants. However, the Department ordinarily will not give favorable consideration to an exemption request if the Department believes that the proposed transactions are inconsistent with the fiduciary responsibility provisions of sections 403 and 404 of ERISA. Accordingly, the Department requires that an exemption transaction be designed to minimize the potential for conflicts of interest or self-dealing. This approach allows qualified professionals or responsible fiduciaries to assess the prudence of a transaction independently and in a manner that is protective of the plan's assets. Moreover, the structure of the transaction under consideration should preclude unilateral action by the applicant which could disadvantage the investing plan.

In keeping with the policy of evaluating the decisional processes surrounding a transaction, many of the exemptions issued by the Department are conditioned on the retention of an independent fiduciary to represent the interests of the plan, particularly where a plan fiduciary has interests with respect to a transaction which may conflict with his or her fiduciary duties to the plan. In these situations, an independent fiduciary typically will

exercise his or her authority to negotiate, approve, and/or monitor an exemption transaction on behalf of the plan. Similarly, valuations and other assessments relevant to an exemption are expected to be made by qualified professionals independent of the party in interest proposing to deal with the plan's assets in the subject transaction.

Over time, the Department has issued guidance explaining its policies and practices relating to the consideration of exemption applications. In 1985, the Department published a statement of policy concerning the issuance of retroactive exemptions from the prohibited transaction provisions of section 406 of ERISA and section 4975 of the Code (ERISA Technical Release 85-1, January 22, 1985). This statement noted that, in evaluating future applications for retroactive exemptions, the Department would ordinarily take into account a variety of objective factors in determining whether a plan fiduciary had exhibited good faith conduct in connection with the past prohibited transaction for which relief is sought (such as whether the fiduciary had utilized a contemporaneous independent appraisal or reference to an objective third-party source, e.g., a stock exchange, in establishing the fair market value of the plan assets acquired or disposed of by the plan in connection with the transaction at issue). However, while noting that the satisfaction of such objective criteria might be indicative of a fiduciary's good faith conduct, the release cautioned that the Department would routinely examine the totality of facts and circumstances surrounding a past prohibited transaction before reaching a final determination on whether a retroactive exemption is warranted.

In 1995, the Department issued a publication, *Exemption Procedures Under Federal Pension Law* (the 1995 Exemption Publication). In addition to providing a brief overview of the exemption process, the 1995 Exemption Publication included definitions for technical terms such as "qualified independent fiduciary," "qualified independent appraiser," and "qualified appraisal report." These definitions, derived from conditions contained in previously granted exemptions, provided important guidance about the Department's standards concerning the independence, knowledge, and competence of third-party experts retained by a plan to review and/or oversee an exemption transaction, as well as the contents of the reports and representations ordinarily required from such experts.

During its first two decades of evaluating individual exemption requests, the Department observed that a significant proportion involved transactions, terms, and safeguards which were remarkably similar to those contained in previously granted exemptions. Accordingly, to facilitate the prompt consideration of such routine applications, the Department published an administrative class exemption, PTE 96-62 (61 FR 39988 (July 31, 1996), as amended at 67 FR 44622 (July 3, 2002)). Under this class exemption (commonly referred to as EXPRO), the Department may authorize exemptive relief, on an expedited basis, for certain prospective transactions that would otherwise be prohibited under ERISA, the Code, or FERSA, provided that the applicant satisfies all of the conditions of the EXPRO exemption. Among other things, PTE 96-62 stipulates that the transaction for which an applicant seeks authorization must be substantially similar in all material respects to at least two other transactions for which the Department recently granted administrative relief from the same restriction.<sup>3</sup> Under PTE 96-62, authorization may be available in as few as 78 days from the acknowledgement of the receipt by the Department of a written submission filed in accordance with the class exemption. From 1996 to 2009, more than 400 applicants obtained expedited relief from the Department pursuant to the requirements of PTE 96-62.

In the years since the current exemption procedure was adopted in 1990, the accelerated development and expanded usage of various electronic media for the transmission of information—including the Internet, electronic mail (e-mail), and facsimile machines—has provided the Department with more technologically advanced means for discharging its responsibilities to the public. This rapid transformation has also altered the manner in which the Department ordinarily processes and disseminates prohibited transaction exemptions. In 1996, the Department established a Web site, <http://www.dol.gov>, which featured the electronic posting of notices of proposed and final prohibited transaction exemptions as published in

<sup>3</sup> Additional information concerning the requirements for obtaining administrative relief under PTE 96-62 (as amended) may be obtained by accessing the complete text of the class exemption at the Department's Web site: <http://www.dol.gov/ebsa/Regs/ClassExemptions>. A chronological listing of all final authorizations granted by the Department pursuant to PTE 96-62 since 1996 may also be found at: [http://www.dol.gov/ebsa/Regs/expo\\_exemptions.html](http://www.dol.gov/ebsa/Regs/expo_exemptions.html).

the **Federal Register**.<sup>4</sup> Shortly thereafter, the Department established a public e-mail portal on its Web site for ERISA-related questions and created individual e-mail accounts for its employees; these developments enabled exemption applicants and others to transmit exemption-related messages and documents to the Department on a virtually instantaneous basis.

In 2002, Congress enacted the E-Government Act (Pub. L. 107-347, 116 Stat. 2915) to facilitate Internet-based public access to, and participation in, the Federal rulemaking process; to implement the requirements of this statute, the Office of Management and Budget (OMB) launched a Web site, <http://www.regulations.gov>, in 2003. This Web site (which was upgraded in 2005 with the introduction of an electronic regulatory docket management system) enables individuals and organizations to access and comment upon proposed rulemaking documents issued by Federal agencies, as well as prohibited transaction exemptions proposed by the Department. In addition, the Department has recently established a dedicated e-mail address, [e-OED@dol.gov](mailto:e-OED@dol.gov), which permits interested persons to submit comments electronically concerning a proposed exemption.

The proposed regulation contained in this document updates the prohibited transaction exemption procedure to reflect changes in the Department's exemption practices since the current procedure was implemented in 1990. Among other things, key elements of the exemption policies and guidance currently found in ERISA Technical Release 85-1 and the 1995 Exemption Publication would be consolidated within the text of a unitary, comprehensive final regulation, thus reducing the regulatory burdens on applicants for exemptive relief. Adoption of these revised procedures should also encourage the prompt and fair consideration of all exemption applications by clarifying the types of information and documentation generally required for a complete filing, by affording expanded opportunities for the electronic submission of information and comments relating to an exemption, and by providing plan participants and other interested persons with a more thorough understanding of the exemption under consideration.

<sup>4</sup> In addition, the texts of all **Federal Register** notices relating to prohibited transaction exemptions published since 1995 are available in electronic format at the following Web site maintained by the U.S. Government Printing Office: <http://www.gpoaccess.gov/fr>.

## B. Overview of Proposed Changes to the Exemption Procedure Regulation

The current exemption procedure regulation at 29 CFR part 2570, subpart B consists of 23 discrete sections (§ 2570.30 through § 2570.52), arranged by topic and generally reflecting the chronological order of steps involved in processing an exemption application. This proposed revision to the exemption procedure retains the section-by-section topical structure of the existing regulation, along with most of the operative language. However, the Department also proposes several important substantive amendments; these changes are summarized below on a section-by-section basis.

### *Section 2570.30 Scope of the Regulation*

Section 2570.30(a) of the proposed regulation describes the statutory provisions of ERISA, the Code, and FERSA under which the Department is authorized to establish procedures governing the granting of administrative exemptions, and cites appropriately the Department's jurisdictional mandate pertaining to exemptions under Presidential Reorganization Plan No. 4 of 1978. A revised section 2570.30(b) describes the extent of exemptive relief generally permissible under section 408(a) of ERISA and corresponding sections of the Code and FERSA, including the availability (under limited circumstances) of retroactive relief for past prohibited transactions.

An updated § 2570.30(c) describes the authority of the Department to propose and issue administrative exemptions on its own motion. Currently, this authority is referenced somewhat awkwardly at the beginning of § 2570.32(a) under the section heading that describes "Persons who may apply for exemptions." Apart from repositioning this regulatory language, the revised § 2570.30(c) also specifies the provisions of the updated exemption procedure regulation generally applicable to exemptions initiated on the Department's own motion.

In addition, proposed § 2570.30(d) incorporates language found in the text of prior granted exemptions emphasizing that the scope of exemptive relief available from the Department does not extend to certain other fiduciary provisions of ERISA or to the exclusive benefit rule found in section 401(a) of the Code. Proposed sections 2570.30(e) and (f) replicate language in the current regulation relating to the provision of oral advice by Department employees concerning an exemption, and the handling of

exemption applications that are filed solely under section 408(a) of ERISA or solely under section 4975(c)(2) of the Code.

### *Section 2570.31 Definitions*

Section 2570.31 of the current exemption procedure regulation defines the following terms for purposes of the exemption procedures: Affiliate, class exemption, Department, exemption transaction, individual exemption, party in interest and pooled fund. The Department proposes to add three additional definitions, a qualified appraisal report, a qualified independent appraiser, and a qualified independent fiduciary, to the regulation. These three definitions are referred to in the glossary of the Department's 1995 Exemption Publication, and are commonly used in individual and class exemptions.

### *Section 2570.33 Applications the Department Will Not Ordinarily Consider*

Under § 2570.33(c) of the current regulation, an application for an individual exemption ordinarily will not receive separate consideration if the Department is considering a class exemption relating to the same type of transaction or transactions. Under the proposed regulation, however, this general rule may be waived in instances where (i) the issuance of the final class exemption may not be imminent, and (ii) the applicant can demonstrate that exigent circumstances compel it to seek immediate exemptive relief from the Department in order to protect the interests of the plan and its participants (such as the sale of an illiquid asset that has decreased in value).

### *Section 2570.34 Information To Be Included in Every Exemption Application*

Section 2570.34 of the current regulation describes the information to be included in every exemption application. An expanded § 2570.34(a)(2) would require the inclusion of a chronology of the events leading to the exemption transaction. In addition, as detailed below, section 2570.34 would be amended (through the addition of new subsections (c) and (d)) to incorporate key elements of the exemption policy and guidance currently found in the 1995 Exemption Publication, specifically with respect to the required content of the specialized statements that are obtained from independent appraisers and fiduciaries in support of an exemption transaction.

*Statements from qualified independent appraisers*—A new

§ 2570.34(c), setting forth the requirements for specialized statements from qualified, independent appraisers, would replace and clarify the content of section 2570.34(b)(5)(iii) of the existing regulation. This section requires that the independent appraisal report submitted by the appraiser on behalf of the plan be current and not more than one year old on the date of the transaction. Further, there must be a written update by the qualified independent appraiser reaffirming the accuracy of the prior appraisal as of the date of the transaction. If an appraisal report is a year old or more, a new appraisal must be submitted to the Department by the applicant. In addition, the appraisal must include the appraiser's rationale, credentials, and a statement regarding the appraiser's independence from the parties involved in the transaction. The appraiser would be required to submit a copy of its engagement letter with the plan (*i.e.*, the appraiser's client is the plan) outlining the appraiser's specific duties. Among other things, the appraiser's report must specify the valuation methodology applied by the appraiser, and should include documentation that supports the appraiser's conclusions on valuation. In addition, the applicant also must disclose the percentage of the appraiser's compensation that was derived from any party in interest (or any affiliate of the party in interest) involved in the exemption transaction. As a general matter, the appraisers retained in connection with an exemption transaction must not receive more than a *de minimis* amount of compensation from the parties in interest to the transaction or their affiliates.

*Statements from qualified independent fiduciaries*—A new § 2570.34(d), setting forth the requirements for specialized statements from qualified, independent fiduciaries, would replace and clarify the content of section 2570.34(b)(5)(iv) of the existing regulation. Many of the exemptions previously issued by the Department have been conditioned on the designation of an independent fiduciary who is qualified to represent the interests of the plan, particularly where the plan's named or other fiduciary has interests with respect to a transaction which may conflict with its fiduciary duties to the plan. Accordingly, certain past exemptions issued by the Department (generally involving non-complex transactions) have required the designation of an independent fiduciary or second fiduciary (*e.g.*, the employer or an officer of the employer who is

independent of the party engaging in the exemption transaction with the plan). See, for example, PTE 2008–01, 73 FR 3274 (Jan. 17, 2008) and PTE 2009–06, 74 FR 8992 (Feb. 27, 2009). However, even where an employer or a plan sponsor is independent of the parties engaging in the exemption transaction, such parties may nevertheless lack the expertise necessary to represent the interests of the plan in certain types of transactions. In such situations, the Department may condition relief upon the plan's retention of a "qualified independent fiduciary" who is neither the plan's named fiduciary nor a plan fiduciary who ordinarily provides fiduciary services to the plan. In such cases, the qualified independent fiduciary is responsible both for determining whether such transaction is in the interests of the plan and of its participants and beneficiaries, and for exercising its discretionary authority as to whether a plan should proceed with the transaction that is the subject of a prohibited transaction request.

Under § 2570.34(d), the Department would require the disclosure of the following information from a qualified independent fiduciary: A copy of such fiduciary's engagement letter with the plan describing the duties the fiduciary will undertake on behalf of the plan; a detailed explanation of why the proposed transaction is in the interests of the participants and beneficiaries; a statement that, in instances where the transaction is ongoing, the fiduciary agrees to monitor the proposed transaction throughout its duration on behalf of the plan, taking any appropriate action to safeguard the interests of the plan; what qualifications the fiduciary has to perform these duties on behalf of the plan and the level of ERISA experience the person has; and a representation to the effect that such fiduciary understands and acknowledges his or her ERISA duties and responsibilities in acting as a fiduciary on behalf of the plan. The fiduciary must also disclose if it is related in any way to the employer or its principals, as well as the percentage of its current compensation that was derived from any party in interest (or any affiliate of the party in interest) involved in the exemption transaction. As a general matter, an independent fiduciary retained in connection with an exemption transaction must receive no more than a *de minimis* amount of compensation from the parties in interest to the transaction or their affiliates.

*Statements from other experts*—A new § 2570.34(e) sets forth the content requirements for statements submitted

by independent, third-party experts other than independent appraisers or fiduciaries. The new section would clarify the language currently found at section 2570.34(b)(5)(iii) of the existing regulation. This new section would also require: a copy of the expert's engagement letter with the plan (*i.e.*, the third-party expert's client is the plan) describing the specific duties the expert will undertake on behalf of a plan; a summary of the expert's qualifications to serve in such capacity (including the expert's training, experience, and facilities); and a detailed description of any relationship that the expert may have with the party in interest engaging in the transaction with the plan, or its affiliates, that may influence the actions of the expert.

*Section 2570.35 Information To Be Included in Applications for Individual Exemptions Only*

Sections 2570.35(a)(5), (6), and (7) of the current regulation requires exemption applications to disclose information regarding whether the applicant or any of the parties to the exemption transaction is or has been, within a specified number of years past, a defendant in any lawsuit or criminal action concerning conduct as a fiduciary or other party in interest with respect to any employee benefit plan (§ 2570.35(a)(5)), convicted of a crime described in section 411 of ERISA (§ 2570.35(a)(6)), or under investigation or examination or engaged in litigation or a continuing controversy with certain Federal agencies (§ 2570.35(a)(7)). Section 2570.35(a)(7) also requires disclosure of whether any plan affected by the exemption transaction has been under such investigation or examination, or has been engaged in litigation or a continuing controversy, and further obligates the applicant to submit copies of all correspondence with the specified Federal agencies regarding the substantive issues involved in such proceedings which relate to compliance with the provisions of ERISA, provisions of the Code relating to plans, or provisions of FERSA.

*Disclosure of prior investigations, examinations, and lawsuits*—In an effort to reduce administrative burdens on applicants, the Department proposes to amend § 2570.35(a)(5) so as not to require disclosure of lawsuits relating solely to routine benefit claims. In addition, the Department proposes to amend § 2570.35(a)(7) to permit an applicant to submit a brief statement describing the Federal investigation, examination, litigation or controversy involving the plan in lieu of the

submission of all correspondence relating to such matters. However, the revised § 2570.35(a)(7) would reserve the Department's right to require the production of additional relevant information or documentation concerning any of these matters, and would stipulate that a denial of the exemption application will result if the additional requested information is not provided.

*Disclosure of prior convictions*—Under § 2570.35(a)(6) of the current regulation, an individual exemption application must describe whether an applicant or any of the parties in interest involved in the exemption transaction has, during the thirteen years preceding the application, been convicted of any crime described in section 411 of ERISA. Section 411, however, does not list all crimes that involve the abuse or misuse of a position of trust by a person with respect to client funds or securities. Accordingly, the Department proposes to amend this section by requiring individual exemption applications to disclose prior convictions of applicants or parties in interest involving the broader range of crimes described in section I(g) of PTE 84–14 (known as the QPAM class exemption)<sup>5</sup> that occurred in the thirteen years prior to the filing of the exemption application. Among other things, section I(g) of PTE 84–14 disqualifies certain individuals who have been convicted of felonies arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary from serving as a QPAM under the class exemption; in addition, the class exemption bars any individual convicted of a crime described in ERISA section 411 from serving as a QPAM. The Department believes that incorporating the disclosure of this additional information concerning the criminal records of the applicant and other parties in interest participating in the exemption transaction is necessary to evaluate the credibility and integrity of such parties, some of whom may possess substantial discretion regarding the exemption transaction or may make representations upon which the Department relies in determining whether the statutory criteria for an exemption have been satisfied.

*Disclosure of payment of civil monetary penalties and excise taxes assessed by the Treasury and Labor Departments in connection with prior prohibited transactions*—The current version of § 2570.35(a)(14)(v) requires

<sup>5</sup> See 49 FR 9494 (March 13, 1984), as amended by 70 FR 49305 (August 23, 2005).

an applicant to disclose whether any excise taxes due under sections 4975(a) and (b) of the Code by reason of a consummated exemption transaction have been paid. The Department proposes to amend this provision to also require disclosure as to whether any civil monetary penalties due under section 502(i) or (l) of ERISA have been paid. In addition, the applicant would be required to furnish documentary evidence (such as a cancelled check) demonstrating payment of all applicable excise taxes or civil penalties.

*Disclosure of party-in-interest investments*—The general purpose of the disclosure provision at § 2570.35(a)(16) is to enable the Department to determine whether the exemption transaction, in conjunction with other plan investments involving parties in interest, would unduly concentrate the plan's assets in certain investments so as to raise questions under the fiduciary responsibility provisions of section 404 of ERISA. Under the current version of § 2570.35(a)(16), the extent of applicant disclosure is limited to whether or not the assets of the affected plan(s) are invested in loans to any party in interest involved in the exemption transaction, property leased to any such party in interest, or securities issued by any party in interest involved in the exemption transaction. Where such investments exist, the current regulation requires an applicant to include an additional statement detailing the nature and extent of these investments, and whether a statutory or administrative exemption covers such investments. In the interest of greater transparency, the Department proposes to amend this section to require an applicant to disclose whether or not the assets of the affected plan(s) have been invested directly or indirectly in any other transactions (e.g., securities lending or extensions of credit), whether exempt or non-exempt, with the party in interest involved in the exemption transaction; accordingly, such disclosure would not be limited to plan investments in loans or leases involving the party in interest, or securities issued by the party in interest. In cases where any such investments exist, the applicant must also provide the Department with additional information describing, among other things: (1) The type of investment to which the statement pertains; (2) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report; (3) The approximate percentage of the fair market value of the plan's total assets as

shown in such annual report that is represented by all investments of this type; and (4) The applicable statutory or administrative exemption covering these investments (if any).

*Disclosure of net worth statement*—The Department proposes to add a new subsection (§ 2570.35(b)(4)) which would require that each application for an individual exemption furnish a net worth statement for any party in interest that provides a personal guarantee with respect to an exemption transaction.

*Retroactive exemptions*—The Department proposes the addition of a new subsection, § 2570.35(d), to provide guidance to applicants who are seeking retroactive relief for past prohibited transactions. This new subsection would incorporate the standards for retroactive exemptions issued by the Department in ERISA Technical Release 85-1 (January 22, 1985). The Department believes that the inclusion of these standards as part of an updated and comprehensive exemption procedure regulation will provide greater clarity to applicants for retroactive relief, thereby facilitating the prompt evaluation of such applications. Among other things, the new subsection reaffirms that, as a general matter, the Department will only consider granting retroactive relief for transactions already entered into where an applicant can satisfactorily demonstrate that the safeguards necessary for the grant of a prospective exemption were in place at the time of the consummated transaction. In this regard, an applicant should provide evidence that it acted in good faith at the time of the subject transaction by taking reasonable and appropriate steps to protect the plan from abuse and unnecessary risk. The new subsection also enumerates a variety of objective considerations that the Department ordinarily takes into account when evaluating whether the conduct of the applicant at the time of a previously consummated transaction satisfies the good faith standard.

#### *Section 2570.36 Where To File an Application*

The Department is revising this section to apprise applicants of the fax and e-mail information necessary to expedite delivery of the application or any other relevant information relating to the application. In addition, the Department is amending this section to require applicants to submit two paper copies of applications: One for the Department's file and one for the analyst's working copy, as well as an electronic version of the application.

#### *Section 2570.37 Duty To Amend and Supplement Exemption Application*

As in the current regulation, this section would require an applicant to notify the Department in writing if it discovers that any material fact or representation contained in the application or in any documents or testimony provided in support of the application is inaccurate, if any such fact or representation changes during this period, or if, during the pendency of the application, anything occurs which may affect the continuing accuracy of such fact or representation. The Department proposes to amend this section to clarify that an applicant must also notify the Department of any material fact or representation that has been omitted from the exemption application. The determination whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department. To the extent that a material representation is omitted, becomes inaccurate or changes, the prohibited transaction exemptive relief will no longer be available starting on the first day on which any one of these events occur.

#### *Section 2570.39 Opportunities To Submit Additional Information*

Under the current rule, in instances where the Department has issued a tentative denial letter to an applicant pursuant to § 2570.38 and the applicant has timely notified the Department of its intent to submit additional written information in support of the exemption application, the applicant must submit such information within 30 days from the date on which it expressed its intent to provide the information. In order to promote the uniform and efficient consideration of such additional information, the Department proposes to amend this section by requiring that the applicant submit the additional written information within 40 days from the date of the tentative denial letter. An applicant may only request an extension of time to submit the additional information in situations where reasons beyond its control render it unable to furnish the information within the 40-day limit. Such requests for an extension of time for the submission of additional information also must be made by the applicant before the expiration of the foregoing 40-day period. The Department will only grant such requests for extension in unusual circumstances and for a limited period of time as determined, respectively, by

the Department in its sole discretion. If the applicant is unable to timely submit such additional written information, the Department will issue a final denial letter pursuant to § 2570.41. The Department proposes to further amend § 2570.39 to indicate that the applicant may notify the Department of its intent to submit additional information electronically via the e-mail address provided in the tentative denial letter.

#### *Section 2570.40 Conferences*

Under the current rule, the Department will attempt to schedule (in response to a request made by an applicant under § 2570.38(b)) a conference concerning a tentative denial letter within the 45-day period following the later of (1) the date the Department receives the applicant's request for a conference, or (2) the date the Department notifies the applicant, after reviewing additional information submitted pursuant to § 2570.39, that it is not prepared to propose the requested exemption. The Department proposes to amend this section by substituting a simplified procedure that is intended to facilitate the prompt and efficient scheduling of such conferences. In instances where the applicant has expressed both a request for a conference and an intent to submit additional information in support of the application, pursuant to proposed § 2570.39, the Department would schedule a conference at a mutually convenient date and time that occurs within 20 days after the date on which the Department has provided notification to the applicant that it remains unprepared to propose the requested exemption based upon the additional information submitted by the applicant. Alternatively, in instances where the applicant requests a conference without expressing an intent to submit additional information pursuant to proposed § 2570.39, the Department would schedule a conference at a mutually convenient date and time that occurs within 40 days after the date of the issuance of the tentative denial letter. An applicant may only request an extension of time to schedule a conference in situations where reasons beyond its control render it unable to attend a conference within the foregoing time frames. Such requests for an extension of time for scheduling a conference must also be made before the expiration of the respective 20-day and 40-day periods. The Department will only grant such requests for extension in unusual circumstances and for a brief period of time as determined, respectively, by the Department in its sole discretion.

Under the current rule, in instances where a conference has already been held, the applicant may submit to the Department within 20 days of the conference any additional data, arguments, or precedents discussed at the conference but not previously or adequately presented in writing. The Department proposes to amend this provision by permitting the applicant to request an extension of time for the submission of this additional information where reasons beyond the applicant's control render it unable to submit the information within the foregoing 20-day limit. Such requests for an extension must be made before the expiration of the 20-day period. The Department will only grant such requests for extension in unusual circumstances and for a brief period of time as determined, respectively, by the Department in its sole discretion.

#### *Section 2570.42 Notice of Proposed Exemption*

Under section 2570.42 of the proposed regulation, the Department would publish a notice of proposed exemption in the **Federal Register** if, after reviewing the record pertaining to the exemption transaction (including any information submitted by an applicant), the Department tentatively concludes that the proposed exemption satisfies the statutory criteria for the granting of an exemption. In addition to providing notice of the pendency of the exemption before the Department, the revised section would describe the contents of the notice of proposed exemption.

#### *Section 2570.43 Notification of Interested Persons by Applicant*

Section 2570.43 of the current regulation describes the methods that an applicant may use to notify interested persons of a proposed exemption and the required content of the notice. In addition to a copy of the Notice of Proposed Exemption published in the **Federal Register**, the applicant must include in the notification to interested persons a supplemental statement. Section 2570.43 also states that, once the Department has published a notice of proposed exemption, the applicant must notify the interested persons described in the application in the manner indicated in the application unless the Department has informed the applicant beforehand that it considers the method of notification described in the application to be inadequate. Where the Department has determined the proposed method of notification to be inadequate, the applicant must obtain the Department's consent as to the

manner and time period of providing the notice to interested persons. After furnishing notification, an applicant must provide the Department with a declaration under penalty of perjury certifying that notice was given to the persons and in the time and manner that the Department deems adequate.

*Supplemental statement*—The Department proposes to modify the current text of the supplemental statement by expressly permitting interested persons to submit comments or requests for a hearing concerning a proposed exemption electronically (at either *e-OED@dol.gov* or *http://www.regulations.gov*) or by facsimile. The supplemental statement also would be modified to contain a statement advising those individuals submitting comments or requests for a hearing on an exemption to refrain from disclosing sensitive personal data, such as Social Security numbers.

*Methods of providing notice*—Under the current regulation, the method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that such persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail are considered reasonable methods of providing notice. The Department proposes to amend this provision to also permit applicants to utilize electronic means (such as e-mail) to deliver notice to interested persons of a pending exemption, provided that the applicant can satisfactorily prove electronic delivery to the entire class of interested persons.

*Summary of proposed exemption*—Since the current exemption procedure was adopted in 1990, the Department has noted that recipients of the Notice of Proposed Exemption and supplemental statement sometimes have difficulty understanding these documents. Many recipients, especially plan participants, contact the Department to express concern that their benefits under the plan may be adversely affected by the exemption transaction. As a consequence, the Department devotes considerable time explaining to plan participants and beneficiaries the basis for the proposed exemption and informing plan participants and beneficiaries of their right to submit written comments to the Department relating to the proposed exemption.

In order to provide notice recipients with a clearer understanding of the exemption transaction under consideration, the Department proposes to amend § 2570.43 (through addition of new subsections (d) and (e)) to require that certain exemption applicants (e.g.,



those seeking exemptive relief for relatively complex transactions) provide notice recipients with an additional statement that succinctly explains the essential facts and circumstances surrounding the proposed exemption. This additional supplementary statement, to be known as a Summary of Proposed Exemption (SPE), must be written in a manner calculated to be understood by the average recipient. Among other things, the SPE must objectively describe the exemption transaction and the parties thereto, the reasons why the plan seeks to engage in the transaction, and the conditions and safeguards proposed to protect the plan and its participants from potential abuse or unnecessary risk of loss in the event the Department grants the exemption. Applicants who are directed to provide interested persons with an SPE would also be required to furnish the Department with a copy of such summary for review prior to its distribution to interested persons.

#### *Sections 2570.44 Withdrawal of Exemption Application*

Section 2570.44 has been modified to clarify that if an applicant chooses to withdraw an application for exemption, such withdrawal generally shall not prejudice any subsequent applications for exemption filed by the applicant.

#### *Sections 2570.46 and 2570.47 Hearings*

Under § 2570.46 of the current regulation, the Department requires that persons who may be adversely affected by the grant of an exemption from the fiduciary self-dealing provisions of section 406(b) of ERISA and corresponding sections of the Code and FERSA must be given an opportunity to demonstrate the existence of issues that can only be fully explored in the context of a hearing. When persuasive evidence of the existence of such issues is provided, the Department will grant the requested hearing. This procedure is consistent with the requirements of ERISA section 408(a), which precludes the Department from granting an exemption from the fiduciary self-dealing restrictions unless the Department affords an opportunity for a hearing and makes a determination on the record with respect to the three statutory findings required for granting an exemption. In addition, under § 2570.47 of the current regulation, the Department may schedule a hearing on its own motion concerning a proposed exemption if it determines that such a hearing would be useful in exploring issues relevant to the exemption.

Prior notice of a hearing on an exemption application has always been provided by the Department, and is also implicit in the existing language of § 2570.46(c) and § 2570.47(b), under which an applicant may satisfy its own notice of hearing obligations to interested persons by furnishing such individuals with a copy of the hearing notice previously published by the Department in the **Federal Register** (provided that such copy is provided by the applicant within 10 days of its publication by the Department). The current language of the regulation, however, does not make clear the Department's obligation to provide notice of a hearing in connection with an administrative exemption that was proposed by the Department on its own motion. Accordingly, the texts of § 2570.46(b) and § 2570.47(a) would be modified to state expressly that, in instances where a hearing on a proposed exemption is indicated, the Department will publish a notice of such hearing in the **Federal Register**.

#### *Section 2570.48 Grant of Exemption*

Section 2570.48 of the proposed regulation describes the standards that must be satisfied for the Department to grant a final exemption. The language of the current exemption procedure regulation inadvertently omits the statutory requirement contained in both section 408(a) of ERISA and section 4975(c)(2) of the Code which stipulates that, prior to granting an exemption, the Department must make a finding that such relief is (1) administratively feasible, (2) in the interests of the plan's participants and beneficiaries, and (3) protective of the rights of the participants and beneficiaries of the plan. Accordingly, the text of the proposed regulation has been revised to conform to this statutory mandate.<sup>6</sup> In adopting this change, however, the Department wishes to emphasize that the tripartite administrative findings stipulated in section 408(a) of ERISA and/or section 4975(c)(2) of the Code have always constituted an integral part of the record in each of its prior exemption grants. In addition, the language of § 2570.48 has been broadened to encompass not only exemptions granted to applicants, but also exemptions that were initiated through the Department's own motion.

<sup>6</sup> Apart from the satisfaction of this statutory prerequisite, the legislative history of ERISA makes it clear that the Department retains broad discretion in determining whether the grant of an exemption is appropriate in a particular instance. H.R. Rep. No. 1280, 93d Cong., 2d Sess. 311 (1974).

#### *Section 2570.49 Limits to the Effect of Exemptions*

Under § 2570.49(a), (b) and (c) of the current regulation, the Department describes the limits on the effect of exemptions. This section would be amended by adding a new subsection (d) stipulating that, for transactions that are continuing in nature, an exemption does not protect parties in interest from liability with respect to an exemption transaction if, subsequent to the granting of an exemption, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions are not met.

Thus, for example, in the case of a continuing exemption transaction such as a loan or a lease, if any of the material facts were to change after the exemption is granted, the exemption would cease to apply as of the date of such change. In the event of any such change, the parties in interest involved in the exemption transaction may apply for a new exemption to protect themselves from liability on or after the date of such change.

#### **C. Request for Comments**

The Department invites comments from interested persons on all aspects of the proposed regulation. Comments should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Prohibited Transaction Exemption Procedures Proposed Regulation. Commenters are encouraged to submit their comments electronically to [e-OED@dol.gov](mailto:e-OED@dol.gov) or <http://www.regulations.gov> (follow instructions for submission of comments). All written responses will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and at the Public Disclosure Room, Room N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Comments on this proposal should be submitted to the Department on or before October 14, 2010.

#### **D. Regulatory Impact Analysis**

##### *Executive Order 12866*

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the



Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, it has been determined that this action is not “significant” within the meaning of section 3(f) of the Executive Order and therefore is not subject to review by OMB.

#### *Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, the reporting burden (time and financial resources) is minimized, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the information collection request (ICR) included in the Proposed Rule for the Prohibited Transaction Exemption Procedures. A copy of the ICR may be obtained by contacting the person listed in the PRA Addressee section below.

The Department has submitted a copy of the proposed rule to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department is particularly interested in comments that:

(A) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(B) Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(C) Enhance the quality, utility, and clarity of the information to be collected; and

(D) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through October 29, 2010, OMB requests that comments be received within 30 days of publication of the Proposed Rule for the Prohibited Transaction Exemption Procedures to ensure their consideration.

*PRA Addressee:* Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5718, Washington, DC 20210. *Telephone:* (202) 693-8410; *Fax:* (202) 219-5333. These are not toll-free numbers. A copy of the ICR also may be obtained at <http://www.RegInfo.gov>.

#### *Background*

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. In addition, section 408(a) of ERISA authorizes the Secretary of Labor to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a), while section 4975(c)(2) of the Code authorizes the Secretary of the Treasury or his delegate to grant exemptions from the prohibitions of Code section 4975(c)(1). Sections 408(a) of ERISA and 4975(c)(2) of the Code also direct the Secretary of Labor and the Secretary of the Treasury, respectively, to establish procedures to carry out the purposes of these sections.

Under section 3003(b) of ERISA, the Secretary of Labor and the Secretary of the Treasury are directed to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. Under section

3004 of ERISA, moreover, the Secretary of Labor and the Secretary of the Treasury are authorized to develop jointly rules appropriate for the efficient administration of ERISA.

Under section 102 of Reorganization Plan No. 4 of 1978 (Reorganization Plan No. 4), the foregoing authority of the Secretary of the Treasury to issue exemptions under section 4975 of the Code was transferred, with certain enumerated exceptions not discussed herein, to the Secretary of Labor. Accordingly, the Secretary of Labor now possesses the authority under section 4975(c)(2) of the Code, as well as under section 408(a) of ERISA, to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

On April 28, 1975, the Department published ERISA Procedure 75-1 in the **Federal Register** (40 FR 18471). This procedure provided necessary information to the affected public regarding the procedure to follow when requesting an exemption. On August 10, 1990, the Department issued its current exemption procedure regulation, which replaced ERISA Procedure 75-1, for applications for prohibited transaction exemptions filed on or after September 10, 1990. (29 CFR 2570.30 *et seq.*, 55 FR 32836, Aug. 10, 1990).

Under the current exemption procedure regulation, in order to make exemption determinations, the Department requires full information regarding all aspects of the transaction, the parties, and the assets involved, which is an information collection request (ICR) for purposes of the PRA. Sections 2570.34 and 2570.35 of the current exemption procedure regulation describe the information that must be supplied by the applicant, such as: Identifying information (name, type of plan, EIN number, etc.); an estimate of the number of plan participants; a detailed description of the exemption transaction and the parties for which an exemption is requested; a statement regarding which section of ERISA is thought to be violated and whether transaction(s) involved have already been entered into; a statement of whether the transaction is customary in the industry; a statement of the hardship or economic loss, if any, which would result if the exemption were denied; a statement explaining why the proposed exemption would be administratively feasible, in the interests of the plan and protective of the rights of plan participants and beneficiaries; and several other statements. In addition, the applicant must certify that the information supplied is accurate and complete.

The amended rule proposed by the Department would expand the ICR contained in sections 2570.34 and 2570.35 of the current exemption procedure regulation in several respects. For instance, the current requirement of specialized statements from qualified independent appraisers, where applicable, would be clarified to include the appraiser's rationale, credentials, and a statement regarding the appraiser's independence from the parties involved in the transaction. In this connection, the appraisal report prepared by the independent appraiser must be current and not more than one year old as of the date of the transaction. In addition, the content of specialized statements submitted by qualified independent fiduciaries, where applicable, would be clarified to require the disclosure of information concerning the independent fiduciary's qualifications, duties, independence from the parties involved in the transaction, and current compensation. The content of specialized statements from other kinds of experts would also be clarified in the new regulation to require disclosure of information concerning the expert's qualifications and their independence from the parties involved in the transaction.

In addition, a new requirement contained in section 2570.43(d) and (e) of the proposal, if adopted, would provide the Department with the discretion to require an applicant to furnish interested persons with a Summary of Proposed Exemption (SPE). The Department expects this requirement to be used in instances where the proposed transaction is relatively complex, and the notice of proposed exemption may not be readily understandable by interested persons (*i.e.*, participants and beneficiaries) because of the complexity of the transaction. Among other things, the SPE must objectively describe the exemption transaction and the parties thereto, the reasons why the plan seeks to engage in the transaction, and the conditions and safeguards proposed to protect the plan and its participants from potential abuse or unnecessary risk of loss in the event the Department grants the exemption, and be written in a manner calculated to be understood by the average recipient. Applicants who must provide interested persons with an SPE also would be required to furnish the Department with a copy of the SPE for its review and approval before the SPE is distributed to interested persons.

Finally, the Department also proposes to amend § 2570.43 to permit applicants to utilize electronic means (such as e-mail) to deliver notice to interested

persons of a pending exemption, provided that the applicant can demonstrate satisfactory proof of electronic delivery to the entire class of interested persons.

In order to assess the hour and cost burden of the revision to the current ICR associated with the exemption procedure regulation, the Department updated its estimate of the number of exemption requests it expects to receive and the hour and cost burden associated with providing information required to be submitted by applicants, including the new information required under this proposal. The Department also adjusted its estimate of the labor rates for professional and clerical help, and the size of plans filing exemption requests with the Department. In the revised estimate, the costs of hiring outside service providers (such as, law firms specializing in ERISA, outside appraisers, and financial experts) are accounted for as a cost burden.

Requirements related to these services are more explicitly specified in the proposed rule than they were in the previous procedure, and any paperwork costs associated with these requirements are built into the estimated fees for outside services. Additionally, mailing costs of the application are now built into the fees of the outside firm, as are costs for the new SPEs required under the proposal in certain circumstances.

#### Annual Hour Burden

Between 2005 and 2008, the Department received an average of 56 requests annually for prohibited transaction exemptions. For purposes of this analysis, the Department assumes that approximately the same number of applications will be received annually over the next three years.<sup>7</sup> The paperwork burden consists of the time required to prepare the information the outside legal counsel will use to prepare and submit an application for exemption and notice of an application to interested persons. Because notices are only distributed once a proposed application for an exemption has been published in the **Federal Register**, the Department estimates, based on the number of notices published between 2005 and 2008, that 25 applications annually will proceed to the notice stage.

The Department estimates that, on average, 10 hours of in-house legal professional and 10 hours of in-house

clerical time will be spent preparing the documentation for the application that will be used by the outside counsel.

Therefore, the Department estimates that preparing the application will require 560 in-house legal professional hours (56 applications times 10 hours) and 560 clerical hours (56 applications times 10 hours) for a total of 1,120 hours at an equivalent cost of \$79,861.<sup>8</sup>

For the notice to interested persons, the Department estimates that 25 applications will be published annually, and that approximately 17,175 notices to interested parties will be distributed.<sup>9</sup> The Department estimates the 5 minutes of clerical time will be spent assisting outside counsel with distribution of the notices. Therefore, distribution of notices will require approximately 1,431 hours at an equivalent cost of \$36,740 ((5 minutes/60 minutes) times 17,175 times \$25.67, the hourly clerical rate).

#### Annual Cost Burden

An application for a prohibited transaction exemption generally is prepared and submitted by, or under the direction of, attorneys with specialized knowledge of ERISA. The Department assumes that these same attorneys will also prepare and distribute the notice to interested persons. Because of the large amount of paperwork that is prepared and submitted (applications average approximately 60 pages with varying numbers of supporting documents), the Department estimates that legal fees will total approximately \$17,500 on average per case. This estimate includes potential meetings with DOL personnel as well as preparation of supplementary documents that are requested following some of these meetings and an SPE for some of the more complex cases. The Department estimates that the costs for the combined services of the qualified independent fiduciary and appraiser/ expert will total approximately \$10,000.

<sup>8</sup> The hourly wage estimates used in this analysis are estimates for 2008 and are based on data from the Bureau of Labor Statistics National Occupational Employment Survey (May 2008) and the Bureau of Labor Statistics Employment Cost Index (March 2009). Total labor costs (wages plus benefits plus overhead) for clerical staff were estimated to average \$25.67 per hour over the period based on metropolitan wage rates for clerical staff. Total labor cost for legal staff was estimated to average \$116.93 per hour based on metropolitan wage estimates for attorneys. The 560 clerical hours are estimated to cost \$14,375 and the 560 legal professional hours \$65,486. This totals to \$79,861.

<sup>9</sup> Based on a weighted average of 2006 Form 5500 Pension data. The data is split into plans with more than 100 participants and those with fewer than 100 participants. The Department estimates that half of the applications are from small plans (those with less than 100 participants) and half from larger plans (those with 100 or more participants). This gives a weighted average of 687 participants per plan, which when multiplied by 25 yields 17,175.

<sup>7</sup> This number excludes applications seeking expedited exemptive relief under Prohibited Transaction Class Exemption 96-62. The estimated burden hours associated with PTE 96-62 are provided in a separate ICR under OMB Control Number 1210-0098.

The new requirements contained in the proposal are incorporated into these cost estimates. Thus, the Department estimates that the cost per exemption application of the outside law firm, independent fiduciary, and appraiser/expert will be approximately \$27,500, which when multiplied by the estimated 56 cases is expected to result in a cost burden of approximately \$1,540,000.

The Department estimates that 17,175 notices to interested persons will be sent, and that 13,470 of the notices (80 percent) will be distributed via first class mail with a material cost of \$.05 per page and distribution costs of \$.44 per notice. This generates an estimated cost of \$6,733. The Department further estimates that 2,576 of the notices (15 percent of the total number of notices) will be distributed electronically and 859 (5 percent) will be distributed by alternative means approved by the Department.<sup>10</sup>

The Department estimates that SPEs will be requested with respect to 8 submissions (15% of the 56 submissions) per year, and that the SPEs will be sent with the notices. Based on an average plan size of 687 participants per plan, this results in the distribution of 5,496 SPEs, of which 4,397 (80 percent) will be mailed. The material cost associated with mailing the 4,397 SPEs at \$.05 per page is \$220. Therefore, the total cost burden for distribution of the notices and SPEs is estimated to be approximately \$6,953 (\$6,733 for the notices + \$220 for the cost of including the SPEs).

*Type of Review:* New collection.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Proposed Rule for Prohibited Transaction Exemption Procedures.

*OMB Number:* 1210-0060.

*Affected Public:* Business or other for-profit; not-for-profit institutions.

*Respondents:* 56.

*Responses:* 22,727.

*Frequency of Response:* Occasionally.

*Estimated Total Annual Burden*

*Hours:* 2,551.

*Estimated Total Annual Burden Cost:* \$1,546,953.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and

which are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact.

For purposes of the RFA, the Department continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.<sup>11</sup> Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, the Department believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). The Department therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

By this standard, the Department estimates that nearly half the requests for exemptions are from small plans. Thus, of the approximately 613,000 ERISA-covered small plans, the Department estimates that 28 small plans (.000046% of small plans) file prohibited transaction exemption applications each year. The Department does not consider this to be a substantial number of small entities. Therefore, based on the foregoing, pursuant to section 605(b) of RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Department invites

comments on this certification and the potential impact of the rule on small entities.

#### *Congressional Review Act*

The proposed rule being issued here will, when finalized, be subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the proposed rule does not include any federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding \$100 million or more, adjusted for inflation, on the private sector.

#### *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed rule does not have federalism implications, because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

#### **List of Subjects in 29 CFR Part 2570**

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Federal Employees' Retirement System Act, Exemptions, Fiduciaries, Party in interest, Pensions, Prohibited transactions, Trusts and trustees.

<sup>10</sup> The Department notes that it determines whether it is appropriate to distribute notices by means other than mailing on a case-by-case basis.

<sup>11</sup> The basis for this definition is found in section 104(a)(2) of the Act, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104-20, 2520.104-21, 2520.104-41, 2520.104-46 and 2520.104b-10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements.

For the reasons set forth in the preamble, the Department proposes to amend subchapter G, part 2570 of chapter XXV of title 29 of the Code of Federal Regulations as follows:

**PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

1. The authority citation for part 2570 reads as follows:

**Authority:** 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR 332 (1978), *reprinted in* 5 U.S.C. app. at 672 (2006), *and in* 92 Stat. 3790 (1978); Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

2. Revise subpart B to part 2570 to read as follows:

**Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications**

- Sec.
- 2570.30 Scope of rules.
  - 2570.31 Definitions.
  - 2570.32 Persons who may apply for exemptions.
  - 2570.33 Applications the Department will not ordinarily consider.
  - 2570.34 Information to be included in every exemption application.
  - 2570.35 Information to be included in applications for individual exemptions only.
  - 2570.36 Where to file an application.
  - 2570.37 Duty to amend and supplement exemption applications.
  - 2570.38 Tentative denial letters.
  - 2570.39 Opportunities to submit additional information.
  - 2570.40 Conferences.
  - 2570.41 Final denial letters.
  - 2570.42 Notice of proposed exemption.
  - 2570.43 Notification of interested persons by applicant.
  - 2570.44 Withdrawal of exemption applications.
  - 2570.45 Requests for reconsideration.
  - 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing.
  - 2570.47 Other hearings.
  - 2570.48 Decision to grant exemptions.
  - 2570.49 Limits on the effect of exemptions.
  - 2570.50 Revocation or modification of exemptions.
  - 2570.51 Public inspection and copies.
  - 2570.52 Effective date.

**Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications**

**§ 2570.30 Scope of rules.**

(a) The rules of procedure set forth in this subpart apply to prohibited transaction exemptions issued by the Department under the authority of:

(1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code);<sup>1</sup> or

(3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under these rules of procedure, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 of ERISA and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under these rules are ordinarily prospective in nature, an applicant may also obtain retroactive relief for past prohibited transactions if certain safeguards described in this subpart were in place at the time the transaction was consummated.

(c) These rules govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation and public inspection of the administrative record, and modification or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under these procedural rules does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(e) The Department will not propose or issue exemptions upon oral request

alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral advice from Department employees in preparing an exemption application. However, such advice does not constitute part of the administrative record and is not binding on the Department in its processing of an exemption application or in its examination or audit of a plan.

(f) The Department will generally treat any exemption application that is filed solely under section 408(a) of ERISA or solely under section 4975(c)(2) of the Code as an exemption request filed under both section 408(a) and section 4975(c)(2) if it relates to a transaction that would be prohibited both by ERISA and the corresponding provisions of the Code.

**§ 2570.31 Definitions.**

For purposes of these procedures, the following definitions apply:

(a) An *affiliate* of a person means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any director of, relative of, or partner in, any such person;

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner; and

(4) Any employee or officer of the person who—

(i) Is highly compensated (as defined in section 4975(e)(2)(H) of the Code), or

(ii) Has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets.

(b) A *class exemption* is an administrative exemption, granted under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3), which applies to any parties in interest within the class of parties in interest specified in the exemption who meet the conditions of the exemption.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or his or her delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest named or otherwise defined in the exemption.

<sup>1</sup> Section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR 332 (1978), *reprinted in* 5 U.S.C. app. at 672 (2006), *and in* 92 Stat. 3790 (1978)), effective December 31, 1978, generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department of Labor.

(f) A *party in interest* means a person described in section 3(14) of ERISA or 5 U.S.C. 8477(a)(4) and includes a *disqualified person*, as defined in section 4975(e)(2) of the Code.

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that satisfies all of the requirements set forth in this subpart at § 2570.34(c)(4).

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report on behalf of the plan regarding the particular asset or property appraised in the report, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates; the determination as to the independence of the appraiser is made by the Department on the basis of all relevant facts and circumstances. As a general matter, an independent appraiser retained in connection with an exemption transaction must not receive more than a *de minimis* amount of compensation (including amounts received for performing the appraisal) from the parties in interest to the transaction or their affiliates. For purposes of determining whether the compensation received by the appraiser is *de minimis*, all compensation received by the appraiser is taken into account. Such *de minimis* amount will ordinarily constitute 1% or less of the annual income of the qualified independent appraiser. In all events, the burden is on the applicant to demonstrate the independence of the appraiser.

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates; the determination as to the independence of a fiduciary is made by the Department on the basis of all relevant facts and circumstances. As a general matter, an independent fiduciary retained in connection with an exemption transaction must receive no more than a *de minimis* amount of compensation (including amounts

received for preparing fiduciary reports and other related duties) from the parties in interest to the transaction or their affiliates. For purposes of determining whether the compensation received by the fiduciary is *de minimis*, all compensation received by the fiduciary is taken into account. Such *de minimis* amount will ordinarily constitute 1% or less of the annual income of the qualified independent fiduciary. In all events, the burden is on the applicant to demonstrate the independence of the fiduciary.

#### **§ 2570.32 Persons who may apply for exemptions.**

(a) The Department will initiate exemption proceedings upon the application of:

(1) Any party in interest to a plan who is or may be a party to the exemption transaction;

(2) Any plan which is a party to the exemption transaction; or

(3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (a)(2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section, may be submitted by the applicant or by an authorized representative. An application submitted by a representative of the applicant must include proof of authority in the form of:

(1) A power of attorney; or

(2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an application for an exemption to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

#### **§ 2570.33 Applications the Department will not ordinarily consider.**

(a) The Department will not ordinarily consider:

(1) An application that fails to include all the information required by §§ 2570.34 and 2570.35 of this subpart or otherwise fails to conform to the requirements of these procedures; or

(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of part 1 or 4 of

subtitle B of Title I of ERISA or section 8477 or 8478 of FERSA or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the Internal Revenue Service to enforce the above-mentioned provisions of ERISA or FERSA.

(b) An application for an individual exemption relating to a specific transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions.

Notwithstanding the foregoing, the Department may consider an application for an individual exemption where there is a pending class exemption if the issuance of the final class exemption may not be imminent, and the applicant can demonstrate that time constraints necessitate consideration of the transaction on an individual basis.

(c) If for any reason the Department decides not to consider an exemption application, it will inform the applicant of that decision in writing and of the reasons therefore.

#### **§ 2570.34 Information to be included in every exemption application.**

(a) All applications for exemptions must contain the following information:

(1) The name(s) of the applicant(s);

(2) A detailed description of the exemption transaction including identification of all the parties in interest involved, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the transaction;

(3) The identity of any representatives for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) The reasons a plan would have for entering into the exemption transaction;

(5) The prohibited transaction provisions from which exemptive relief is requested and the reason why the transaction would violate each such provision;

(6) Whether the exemption transaction is customary for the industry or class involved;

(7) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department or by the Internal Revenue Service; and

(8) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and

beneficiaries from denial of the exemption.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would be—

- (i) Administratively feasible;
- (ii) In the interests of affected plans and their participants and beneficiaries; and
- (iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) With respect to the notification of interested persons required by § 2570.43:

- (i) A description of the interested persons to whom the applicant intends to provide notice;
- (ii) The manner in which the applicant will provide such notice; and
- (iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the **Federal Register**.

(3) If an advisory opinion has been requested by any party to the exemption transaction from the Department with respect to any issue relating to the exemption transaction—

- (i) A copy of the letter concluding the Department's action on the advisory opinion request; or
- (ii) If the Department has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted together with the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect of the issuance of an advisory opinion upon the exemption transaction.

(4) If the application is to be signed by anyone other than an individual party in interest seeking exemptive relief on his or her own behalf, a statement which—

- (i) Identifies the individual signing the application and his or her position or title; and
- (ii) Explains briefly the basis of his or her familiarity with the matters discussed in the application.

(5)(i) A declaration in the following form:

Under penalty of perjury, I declare that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This declaration must be dated and signed by:

(A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on his or her own behalf;

(B) A corporate officer or partner where the applicant is a corporation or partnership;

(C) A designated officer or official where the applicant is an association, organization or other unincorporated enterprise;

(D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction where the applicant is a plan.

(c) Specialized statements, as applicable, from a qualified independent appraiser on behalf of the plan, such as appraisal reports or analyses of market conditions, submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser acknowledging that the statement is being submitted to the Department as part of an application for exemption. Such statements must also contain the following written information:

(1) A copy of the qualified independent appraiser's engagement letter with the plan describing the specific duties the appraiser shall undertake;

(2) A summary of the qualified independent appraiser's qualifications to serve in such capacity;

(3) A detailed description of any relationship that the qualified independent appraiser has had or may have with any party in interest engaging in the transaction with the plan, or its affiliates, that may influence the appraiser;

(4) A written appraisal report prepared by the qualified independent appraiser, on behalf of the plan, which satisfies the following requirements:

(i) The report must describe the method(s) used in determining the fair market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

(ii) The report must take into account any special benefit that the party in interest or its affiliate(s) may derive from control of the asset(s), such as owning an adjacent parcel of real property or gaining voting control over a company; and

(iii) The report must be current and not more than one year old from the date of the transaction, and there must be a written update by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the transaction. If the appraisal report is a year old or more, a new appraisal shall be submitted to the Department by the applicant.

(5) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that he or she is a member of a professional organization of appraisers that can sanction its members for acts of malfeasance;

(6) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the appraiser's prior experience in valuing assets of the same type; and

(7) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current income that was derived from any party in interest involved in the transaction or its affiliates; in general, such percentage shall be computed by comparing, in fractional form:

(i) The amount of the appraiser's projected personal or business income from the current federal income tax year (including amounts received from preparing the appraisal report) that will be derived from the party in interest or its affiliates (expressed as a numerator); and

(ii) The appraiser's gross personal or business income for the prior federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by such fiduciary that contains the following written information:

(1) A signed and dated declaration under penalty of perjury that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct;

(2) A copy of the qualified independent fiduciary's engagement letter with the plan describing the fiduciary's specific duties;

(3) An explanation for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that person's qualifications to serve in such capacity, as well as a description of any prior experience by that person in acting as a qualified independent fiduciary with respect to a plan;

(4) A detailed description of any relationship that the qualified independent fiduciary has had or may have with the party in interest engaging in the transaction with the plan or its affiliates;

(5) An acknowledgement by the qualified independent fiduciary that it

understands its duties and responsibilities under ERISA in acting as a fiduciary on behalf of the plan;

(6) The qualified independent fiduciary's opinion on whether the proposed transaction would be in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plan, along with a statement of the reasons on which the opinion is based;

(7) Where the proposed transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and shall, during the pendency of the transaction:

(i) Monitor the transaction on behalf of the plan on a continuing basis;

(ii) Ensure that the transaction remains in the interests of the plan and, if not, take any appropriate actions available under the particular circumstances; and

(iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the transaction; and

(8) The qualified independent fiduciary shall submit a written representation disclosing the percentage of such fiduciary's current income that was derived from any party in interest involved in the transaction or its affiliates; in general, such percentage shall be computed by comparing, in fractional form:

(i) The amount of the fiduciary's projected personal or business income from the current federal income tax year that will be derived from the party in interest or its affiliates (expressed as a numerator); and

(ii) The fiduciary's gross personal or business income (excluding fixed, non-discretionary retirement income) for the prior federal income tax year (expressed as a denominator).

(e) Specialized statements, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an application for exemption must be accompanied by a statement of consent from such expert acknowledging that the statement is being submitted to the Department as part of an application for exemption. Such statements must also contain the following written information:

(1) A copy of the expert's engagement letter with the plan describing the specific duties the expert will undertake;

(2) A summary of the expert's qualifications to serve in such capacity; and

(3) A detailed description of any relationship that the expert has had or may have with any party in interest engaging in the transaction with the plan, or its affiliates, that may influence the actions of the expert.

(f) An application for exemption may also include a draft of the requested exemption which describes the transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

**§ 2570.35 Information to be included in applications for individual exemptions only.**

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34 of this subpart, the following information:

(1) The name, address, telephone number, and type of plan or plans to which the requested exemption applies;

(2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department;

(3) Whether any plan or trust affected by the requested exemption has ever been found by the Department, the Internal Revenue Service, or by a court to have violated the exclusive benefit rule of section 401(a) of the Code, section 4975(c)(1) of the Code, section 406 or 407(a) of ERISA, or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;

(4) Whether any relief under section 408(a) of ERISA, section 4975(c)(2) of the Code, or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any of the parties on behalf of whom the exemption is sought and, if so, the exemption application number or the prohibited transaction exemption number;

(5) Whether the applicant or any of the parties in interest involved in the exemption transaction is currently, or has been within the last five years, a defendant in any lawsuit or criminal action concerning such person's conduct as a fiduciary or party in interest with respect to any plan (other than a lawsuit with respect to a routine claim for benefits), and a description of the circumstances of such lawsuit or criminal action;

(6) Whether the applicant (including any person described in § 2570.34(b)(5)(ii)) or any of the parties in interest involved in the exemption

transaction has, within the last 13 years, been either convicted or released from imprisonment, whichever is later, as a result of: any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA, and a description of the circumstances of any such conviction. For purposes of this section, a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal;

(7) Whether, within the last five years, any plan affected by the exemption transaction or any party in interest involved in the exemption transaction has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund. If so, the applicant must provide a brief statement describing the investigation, examination, litigation or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the above matters. In this regard, a denial of the exemption application will result from a failure to provide additional information requested by the Department.

(8) Whether any plan affected by the requested exemption has experienced a reportable event under section 4043 of ERISA, and, if so, a description of the circumstances of any such reportable event;

(9) Whether a notice of intent to terminate has been filed under section 4041 of ERISA respecting any plan affected by the requested exemption, and, if so, a description of the circumstances for the issuance of such notice;



(10) Names, addresses, and taxpayer identifying numbers of all parties in interest involved in the subject transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

(12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction;

(13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;

(14) If the exemption transaction has already been consummated:

(i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the transaction before obtaining an exemption from the Department;

(ii) Whether the transaction has been terminated;

(iii) Whether the transaction has been corrected as defined in Code section 4975(f)(5);

(iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the transaction; and

(v) Whether any excise taxes due under section 4975(a) and (b) of the Code, or any civil penalties due under section 502(i) or (l) of ERISA by reason of the transaction have been paid. If so, the applicant should submit documentation (e.g., a canceled check) demonstrating that the excise taxes or civil penalties were paid.

(15) The name of every person who has investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether or not the assets of the affected plan(s) have been invested, directly or indirectly, in any other exempt or non-exempt transactions with the party in interest involved in the exemption transaction (including, but not limited to, plan investments in loans or leases involving the party in interest, securities lending with the party in interest, extensions of credit with the party in interest, or plan investment in securities issued by the party in interest), and, if such investments exist, a statement which indicates:

(i) The type of investment to which the statement pertains;

(ii) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

(iii) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

(iv) The statutory or administrative exemption covering these investments, if any;

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) who will bear the costs of the exemption application and of notifying interested persons; and

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are reflected in these documents and an analysis of their bearing on the requested exemption;

(3) A copy of the most recent financial statements of each plan affected by the requested exemption; and

(4) A net worth statement with respect to any party in interest that is providing a personal guarantee with respect to the exemption transaction.

(c) Special rule for applications for individual exemption involving pooled funds:

(1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds;

(2) The information required by paragraphs (a)(1) through (7) and (a)(13) through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph, the information required by paragraph (a)(16) of this section relates solely to other investment transactions between the pooled fund or funds and any parties in interest involved in the exemption transaction.);

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual exemption involving pooled funds in which certain plans participate.

(i) This paragraph applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20% of the total assets of the pooled fund, or

(B) Covers employees of:

(1) The party sponsoring or maintaining the pooled fund, or any affiliate of such party, or

(2) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), (a)(5) through (7), (a)(10), (a)(12) through (16), and (a)(18) and (19), of this section. The information required by this paragraph must be furnished in reference to the plan's investment in the pooled fund (e.g., the names, addresses and taxpayer identifying numbers of all fiduciaries responsible for the plan's investment in the pooled fund [§ 2570.35(a) (10)], the percentage of the assets of the plan invested in the pooled fund [§ 2570.35(a)(12)], whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted [§ 2570.35(a)(13)], etc.).

(iii) The information required by paragraph (c)(4) of this section is in addition to the information required by paragraphs (c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

(d) Retroactive exemptions:

(1) Generally, the Department will favorably consider requests for retroactive relief, in all exemption applications, where the safeguards necessary for the grant of a prospective exemption were in place at the time at

which the parties entered into the transaction. An applicant for a retroactive exemption must demonstrate that it acted in good faith by taking reasonable and appropriate steps to protect the plan from abuse and unnecessary risk at the time of the transaction.

(2) Among the factors that the Department would take into account in making a finding that an applicant acted in good faith include the following:

(i) The participation of an independent fiduciary acting on behalf of the plan who is qualified to negotiate, approve and monitor the transaction;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

(iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;

(iv) That the applicant has submitted an accurate and complete application for exemption containing documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, additional weight will be given to facts and representations which are prepared and certified by a source independent of the applicant;

(v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction knowing that such act or transaction was prohibited under section 406 of ERISA and/or section 4975 of the Code. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before entering the act or transaction;

(vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant with regard to the transaction upon discovery of the violation;

(vii) That the applicant has submitted a statement prepared and certified by an independent person familiar with the types of transactions for which relief is requested demonstrating that the terms and conditions of the transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable as that obtainable in a similar transaction with an unrelated party; and

(viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the

criteria under section 408(a) of ERISA and section 4975(c)(2) of the Code.

(3) The Department, as a general matter, will not favorably consider requests for retroactive exemptions where transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan. In addition, the Department will not favorably consider requests for exemptions where the transactions are inconsistent with the general fiduciary responsibility provisions of sections 403 or 404 of ERISA or the exclusive benefit requirements of section 401(a) of the Code.

#### **§ 2570.36 Where to file an application.**

The Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by these procedures may be mailed via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor, Room N-5700, 200 Constitution Avenue, NW., Washington, DC 20210. Alternatively, applications may be e-mailed to the Department at: [e-OED@dol.gov](mailto:e-OED@dol.gov) or transmitted via facsimile.<sup>2</sup> Notwithstanding the foregoing methods of transmission, applicants are also required to submit two paper copies of applications—one for the Department's file and one for the analyst's working copy.

#### **§ 2570.37 Duty to amend and supplement exemption applications.**

(a) While an exemption application is pending final action with the Department, an applicant must promptly notify the Department in writing if he or she discovers that any material fact or representation contained in the application or in any documents or testimony provided in support of the application is inaccurate, if any such fact or representation changes during this period, or if, during the pendency of the application, anything occurs that may affect the continuing accuracy of any such fact or representation. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an

investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

(d) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation shall be made by the Department. To the extent that a material representation is omitted, becomes inaccurate, or changes, the prohibited transaction exemptive relief will no longer be available starting on the earliest date of these events.

#### **§ 2570.38 Tentative denial letters.**

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing. At the same time, the Department will provide a brief statement of the reasons for its tentative denial.

(b) An applicant will have 20 days from the date of a tentative denial letter to request a conference under § 2570.40 of this subpart and/or to notify the Department of its intent to submit additional information under § 2570.39 of this subpart. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

(c) The Department need not issue a tentative denial letter to an applicant before issuing a final denial letter where the Department has conducted a hearing on the exemption pursuant to either § 2570.46 or § 2570.47.

#### **§ 2570.39 Opportunities to submit additional information.**

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application either by telephone or by letter sent to the address furnished in the applicant's tentative denial letter, or electronically via the e-mail address provided in the tentative

<sup>2</sup> The current facsimile number for the Office of Exemption Determinations is (202) 219-0204.

denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) An applicant will have 40 days from the date of the tentative denial letter described in § 2570.38(a) to submit in writing all of the additional information he or she intends to provide in support of the application. All such information must be accompanied by a declaration under penalty of perjury attesting to the truth and correctness of the information provided, which is dated and signed by a person qualified under § 2570.34(b)(5) of this subpart to sign such a declaration.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information he or she intends to provide in support of his application within the 40-day period described in paragraph (b) of this section, he or she may request an extension of time to furnish the information. Such requests must be made before the expiration of the 40-day period and will be granted only in unusual circumstances and for a limited period of time as determined, respectively, by the Department in its sole discretion.

(d) If an applicant is unable to submit all of the additional information he or she intends to provide in support of his exemption application within the 40-day period specified in paragraph (b) of this section, or within any additional period of time granted pursuant to paragraph (c) of this section, the applicant may withdraw the exemption application before expiration of the applicable time period and reinstate it later pursuant to § 2570.44.

(e) The Department will issue, without further notice, a final denial letter denying the requested exemption pursuant to § 2570.41 where—

(1) The Department has not received all the additional information that the applicant was required to submit within the 40-day period described in paragraph (b) of this section, or within any additional period of time granted pursuant to paragraph (c) of this section;

(2) The applicant did not request a conference pursuant to § 2570.38(b) of this subpart; and

(3) The applicant has not withdrawn the application as permitted by paragraph (d) of this section.

#### **§ 2570.40 Conferences.**

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. An applicant will not be entitled to a conference, however, where the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47 of this subpart.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present where:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information provided by the applicant pursuant to § 2570.39, it is still not prepared to propose the requested exemption. If, for reasons beyond its control, the applicant cannot attend a conference within the 20-day limit described in this paragraph, the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the 20-day limit. The Department will only grant such an extension in unusual circumstances and for a brief period of time as determined, respectively, by the Department in its sole discretion.

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) of this subpart but has not submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § 2570.38(a). If, for reasons beyond its control, the applicant cannot attend a conference within the 40-day limit described in this paragraph, the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the 40-day limit. The Department will only grant such an extension in unusual circumstances and for a brief period of time as determined,

respectively, by the Department in its sole discretion.

(f) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to paragraphs (d) or (e) of this section, the applicant will be deemed to have waived its right to a conference.

(g) Within 20 days after the date of any conference held under this section, the applicant may submit to the Department (electronically or in paper form) any additional data, arguments, or precedents discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this 20-day limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the 20-day limit described in this paragraph. The Department will only grant such an extension in unusual circumstances and for a brief period of time as determined, respectively, by the Department in its sole discretion.

#### **§ 2570.41 Final denial letters.**

The Department will issue a final denial letter denying a requested exemption where:

(a) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39(e) of this subpart are satisfied;

(b) After issuing a tentative denial letter under § 2570.38 of this subpart and considering the entire record in the case, including all written information submitted pursuant to § 2570.39 and § 2570.40(e) of this subpart, the Department decides not to propose an exemption or to withdraw an exemption already proposed; or

(c) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 of this subpart and after considering the entire record in the case, including the record of the hearing, the Department decides to withdraw the proposed exemption.

#### **§ 2570.42 Notice of proposed exemption.**

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the **Federal Register**. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) Where the proposed exemption includes relief from the prohibitions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA, inform interested persons of their right to request a hearing under § 2570.46 of this subpart and establish a deadline for receipt of requests for such hearings.

#### **§ 2570.43 Notification of interested persons by applicant.**

(a) If a notice of proposed exemption is published in the **Federal Register** in accordance with § 2570.42 of this subpart, the applicant must notify interested persons of the pendency of the exemption in the manner and time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the Department's consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the **Federal Register**; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption, and described in greater detail in the accompanying]<sup>3</sup> Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].<sup>4</sup> [If you may be adversely affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].]<sup>5</sup>

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee

Benefits Security Administration, Room \_\_\_\_\_, <sup>6</sup> U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, *Attention:* Application No. \_\_\_\_\_.<sup>7</sup> Comments and hearing requests may also be transmitted to the Department electronically at *e-oed@dol.gov* or at *http://www.regulations.gov* (follow instructions for submission), and should prominently reference the application number listed above. In addition, comments and hearing requests may be transmitted to the Department via facsimile at \_\_\_\_\_.<sup>8</sup> Individuals submitting comments or requests for a hearing on this matter are advised not to disclose sensitive personal data, such as social security numbers.

The Department will make no final decision on the proposed exemption until it reviews all comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, he or she must provide satisfactory proof of electronic delivery to the entire class of interested persons.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the foregoing requirements of this section. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement and signed by a person qualified under § 2570.34(b)(5) of this subpart to sign such a declaration. No exemption will be granted until such a statement and its accompanying declaration have been furnished to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its discretion, may also require an applicant to furnish interested persons

with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

(1) The exemption transaction and the parties in interest thereto;

(2) Why such transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;

(3) The reasons why the plan seeks to engage in the transaction; and

(4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval prior to its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

#### **§ 2570.44 Withdrawal of exemption applications.**

(a) An applicant may withdraw an application for an exemption at any time by oral or written (including electronic) notice to the Department. A withdrawn application generally shall not prejudice any subsequent applications for an exemption submitted by an applicant.

(b) Upon receiving an applicant's notice of withdrawal regarding an application for an individual exemption, the Department will confirm by letter the applicant's withdrawal of the application and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the **Federal Register**, the Department will publish a notice withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of withdrawal regarding an application for a class exemption or for an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class exemption

<sup>3</sup> To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in § 2570.43(d).

<sup>4</sup> The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

<sup>5</sup> To be added in the case of an exemption that provides relief from section 406(b) of ERISA or corresponding sections of the Code or FERSA.

<sup>6</sup> Apart from the satisfaction of this statutory prerequisite, the legislative history of ERISA makes it clear that the Department retains broad discretion in determining whether the grant of an exemption is appropriate in a particular instance. H.R. Rep. No. 1280, 93d Cong., 2d Sess. 311 (1974).

<sup>7</sup> The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

<sup>8</sup> The current facsimile number for the Office of Exemption Determinations is (202) 219-0204.

withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, he or she may contact the Department in writing (including electronically) to request that the application be reinstated. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. However, the applicant need not resubmit information previously furnished to the Department in connection with a withdrawn application unless reinstatement of the application is requested more than two years after the date of its withdrawal.

(e) Any request for reinstatement of a withdrawn application submitted, in accordance with paragraph (d) of this section, will be granted by the Department, and the Department will take whatever steps remained at the time the application was withdrawn to process the application.

#### **§ 2570.45 Requests for reconsideration.**

(a) The Department will entertain one request for reconsideration of an exemption application that has been finally denied pursuant to § 2570.41 if the applicant presents in support of the application significant new facts or arguments, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application.

(b) A request for reconsideration of a previously denied application must be made within 180 days after the issuance of the final denial letter and must be accompanied by a copy of the Department's final letter denying the exemption and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a declaration under penalty of perjury attesting to the truth of the new information provided, which is signed by a person qualified under § 2570.34(b)(5) to sign such a declaration.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original

decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides, based on the new facts and arguments submitted, to reconsider its final denial letter, it will notify the applicant of its intent to reconsider the application in light of the new information presented. The Department will then take whatever steps remained at the time it issued its final denial letter to process the exemption application.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter affirming its final denial.

#### **§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing.**

(a) Any interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption. Any such request must state:

(1) The name, address, telephone number, and e-mail address of the person making the request;

(2) The nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and

(3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the **Federal Register**. The Department may decline to hold a hearing where:

(1) The request for the hearing does not meet the requirements of paragraph (a) of this section;

(2) The only issues identified for exploration at the hearing are matters of law; or

(3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption must notify interested persons in the event that the Department schedules a

hearing on the exemption. Such notification must be given in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested persons a copy of the notice of hearing published by the Department in the **Federal Register** within 10 days of its publication, using any of the methods approved in § 2570.43(b).

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement, which is signed by a person qualified under § 2570.34(b)(5) to sign such a declaration.

#### **§ 2570.47 Other hearings.**

(a) In its discretion, the Department may schedule a hearing on its own motion where it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing. A notice of such hearing shall be published by the Department in the **Federal Register**.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a statement subscribed as true under penalty of perjury like that required in § 2570.46(d).

#### **§ 2570.48 Decision to grant exemptions.**

(a) The Department may not grant an exemption under section 408(a) of ERISA, section 4975(c)(2) of the Code, or 5 U.S.C. 8477(c)(3) unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the record of any hearing held in connection with the proposed exemption), it finds that the exemption is:

(1) Administratively feasible;

(2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and beneficiaries; and

(3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the Department determines to grant an exemption, it shall publish a notice in

the **Federal Register** which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.

**§ 2570.49 Limits on the effect of exemptions.**

(a) An exemption does not take effect or protect parties in interest from liability with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For transactions that are continuing in nature, an exemption does not protect parties in interest from liability with respect to an exemption transaction if, during the continuation of the transaction, there are material changes to the original facts and representations underlying such

exemption or if one or more of the exemption's conditions cease to be met.

**§ 2570.50 Revocation or modification of exemptions.**

(a) If, after an exemption takes effect, changes in circumstances, including changes in law or policy, occur which call into question the continuing validity of the Department's original findings concerning the exemption, the Department may take steps to revoke or modify the exemption.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the **Federal Register** and provide interested persons with an opportunity to comment on the proposed revocation or modification. Prior to the publication of such notice, the applicant will be notified of the Department's proposed action and the reasons therefore. Subsequent to the publication of the notice, the applicant will have the opportunity to comment on the proposed revocation or modification.

(c) Ordinarily the revocation or modification of an exemption will have prospective effect only.

**§ 2570.51 Public inspection and copies.**

(a) The administrative record of each exemption will be open to public inspection and copying at the EBSA Public Disclosure Room, U.S.

Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page.

**§ 2570.52 Effective date.**

This subpart is effective with respect to all exemptions filed with or initiated by the Department under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3) at any time after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE]. Applications for exemptions under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3) filed on or after September 10, 1990 but before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE] are governed by part 2570 of chapter XXV of title 29 of the Code of Federal Regulations (title 29 CFR part 2570 as revised July 1, 1991).

\* \* \* \* \*

Signed at Washington, DC, this 18th day of August 2010.

**Michael L. Davis,**

*Deputy Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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