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DEPARTMENT OF LABOR

Employee Benefits Security Administration

ZRIN 1210-ZA12

[Application Number D-11404]

Proposed Amendment to Prohibited Transaction Exemption 2006-06

(PTE 2006-06) For Services Provided in Connection With the
Termination of Abandoned Individual Account Plans

AGENCY: Employee Benefits Security Administration, U.S. Department of
Labor.

ACTION: Notice of Proposed Amendment to PTE 2006-06.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 2006-06, a prohibited transaction class exemption issued under the Employee Retirement Income Security Act of 1974 (ERISA). Among other things, PTE 2006-06 permits a "qualified termination administrator" (QTA) of an individual account plan that has been abandoned by its sponsoring employer to select itself to provide services to the plan in connection with the plan's termination, and to pay itself fees for those services. This amendment is being proposed in connection with the Department's amendment of regulations relating to the Termination of Abandoned Individual Account Plans at 29 CFR 2578.1, and the Safe Harbor for Distributions from Terminated Individual Account Plans at 29 CFR 2550.404a-3, which are being published simultaneously in this issue of the Federal Register. The Department's proposed amendment to PTE 2006-06 reflects changes, enacted as part of the Pension Protection Act of 2006, Pub. L. No. 109-280, to the Internal Revenue Code and would require, as a condition of relief under the class exemption, that benefits for a missing, designated nonspouse beneficiary be directly rolled over into an inherited individual retirement plan that fully complies with Code requirements. If adopted, the proposed amendment would affect plans, participants and beneficiaries of such plans and certain persons engaging in such transactions.

DATES: Written comments and requests for a public hearing on the proposed amendment should be received by the Department on or before April 2, 2007.

ADDRESSES: Comments (preferably, at least three copies) 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: PTE 2006-06 Amendment. Commenters are encouraged to submit responses electronically by e-mail to e-OED@dol.gov, or by using the Federal

eRulemaking portal at www.regulations.gov. All responses will be available to the public at the Public Disclosure Room, Room N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and online at www.regulations.gov and www.dol.gov/ebsa.

FOR FURTHER INFORMATION CONTACT: Brian Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8545 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 2006-06 (71 FR 20856, April 21, 2006). PTE 2006-06, which was granted in connection with the Department's final regulation at 29 CFR 2578.1, relating to the Termination of Abandoned Individual Account Plans, the Department's final regulation at 29 CFR 2550.404a-3, relating to the Safe Harbor for Distributions from Terminated Individual Account Plans, and the Department's final regulation at 29 CFR 2520.103-13, relating to the Terminal Report for Abandoned Individual Account Plans, provides an exemption from the restrictions of section 406(a)(1)(A) through (D), section 406(b)(1) and (b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (E) of the Code.

The Department is proposing the amendment on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).1

The Department seeks to amend the class exemption to reflect amendments to the Code that were adopted by enactment of the Pension Protection Act of 2006. Among other things, section 829 of the Pension Protection Act amended Code section 402(c) to permit the direct rollover of a deceased plan participant's benefit from an eligible retirement plan to an individual retirement plan established for the designated nonspouse beneficiary of such participant. In this connection, the Department is amending the regulatory safe harbor to require that a deceased participant's benefits be directly rolled over to an inherited individual retirement plan established to receive a distribution on behalf of a missing, designated nonspouse beneficiary. Similarly, the Department has determined to propose an amendment to PTE 2006-06 to ensure conformity with the amended Abandoned Plan Regulations. 2

The Department interprets the term "account" (other than an individual retirement plan) in section I(b)(1)(ii) and the term "other account" in section I(b)(3) and (4) of PTE 2006-06 to include an "inherited individual retirement plan" as used in the amended regulatory safe harbor in the context of a distribution to a nonspouse beneficiary that does not qualify for small account treatment under the regulatory safe harbor. Consequently, the current exemption provides relief to a QTA that selects itself as the provider of an inherited individual retirement plan under the safe harbor. Nevertheless, to make clear that the exemption covers such a selection, the Department has published a proposed amendment to PTE 2006-06, and this issue of the Federal Register specifically addresses this matter.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is 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. The Department has determined that this action is not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, the Office of Management and Budget (OMB) has determined that the action is significant within the meaning of section 3(f)(4) of the Executive Order, and the Department accordingly provides the following assessment of its potential costs and benefits.

These proposed amendments to PTE 2006-06 are being published concurrently with the issuance of an interim final rule that amends regulations pertaining to distributions from terminated plans to take advantage of recent changes to the Code. As explained earlier in the preamble, when finalized, the proposed amendments will make explicit the availability to a QTA of conditional exemptive relief to designate itself or an affiliate as the provider of an inherited individual retirement plan for a nonspouse beneficiary who has not returned a distribution election. Allowing QTAs to use their own or affiliated investment products to receive the distributions on behalf of nonspouse beneficiaries who have failed to make investment decisions facilitates the orderly termination and winding-up of a plan's affairs. Further, QTAs are not required to make use of proprietary or affiliated inherited individual retirement plans for the benefit of nonspouse beneficiaries. The Department continues to believe that the fee limitations, which are a condition of the exemption and applicable to distributions on behalf of nonspouse beneficiaries as well as other distributions, will encourage QTAs to make appropriate decisions regarding whether to use proprietary or affiliated products based on whether doing so will be in the best interests of participants and beneficiaries.

In the Department's view, the proposed amendments would assist in effectuating the purposes underlying the regulations to which the exemption relates. Accordingly, the Department has taken these amendments into account in its assessment of the economic benefits and costs of the interim final rule amending the regulations pertaining to distributions from terminated plans, which is included in the preamble to the interim final rule published elsewhere in this issue of the Federal Register.

Paperwork Reduction Act

The information collections included in PTE 2006-06 are currently

approved, together with information collections included in the safe harbor and termination of abandoned plans regulations, by the Office of Management and Budget (OMB) under OMB control number 1210-0127. This approval is currently scheduled to expire on April 30, 2008. The specific burden for the exemption includes a recordkeeping requirement for a QTA that terminates an abandoned plan and chooses to distribute the account balances of nonresponsive participants and beneficiaries into proprietary or affiliated individual retirement plans. These proposed amendments do not make any changes to the information collections of the exemption. Accordingly, the Department has not made a submission for OMB approval in connection with the proposed amendments.

Background

PTE 2006-06 is comprised of five sections. Section I describes the transactions that are covered by the exemption. Section II contains conditions for the provision of termination services and the receipt of fees. Section III contains the conditions for distributions. Section IV contains the general recordkeeping provisions imposed on the QTA, and section V contains definitions.

Section I(b) of the exemption provides relief from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for a QTA to use its authority in connection with the termination of an abandoned individual account plan to designate itself or an affiliate as provider of an individual retirement plan or other account to receive the account balance of a participant or beneficiary that does not provide direction as to the disposition of such assets.

Under PTE 2006-06, the other accounts currently permitted by the exemption include an account, other than an individual retirement account, as described in paragraph (d)(1)(ii) of the Safe Harbor Regulation, for a distribution made to a distributee other than a participant or spouse, and, for distributions of \$1,000 or less, an interest-bearing, federally insured bank or savings association account, as described in section (d)(1)(iii) of the Safe Harbor Regulation. This provision of PTE 2006-06 is the subject of the proposed amendment contained in this notice.

Section I(b) of the class exemption further permits the QTA to make the initial investment of the distributed proceeds in a proprietary investment product, receive fees in connection with the establishment or maintenance of the individual retirement plan or other account, and receive investment fees as a result of the investment of the individual retirement plan or other account's assets in a proprietary investment product in which the QTA or an affiliate has an interest.

Discussion of the Proposed Amendment

Section 829 of the Pension Protection Act amended section 402(c) of the Code to permit the direct rollover of a deceased participant's benefit from an eligible retirement plan to an individual retirement plan established on behalf of a designated nonspouse beneficiary.³ These rollover distributions would not trigger immediate tax consequences and mandatory tax withholding for the nonspouse beneficiary.

In light of the Pension Protection Act's favorable changes to the Code allowing a rollover distribution on behalf of a nonspouse beneficiary into an inherited individual retirement plan with the resulting deferral of income tax consequences, the Department is amending the class exemption to require that a deceased participant's benefit be directly rolled over to an inherited individual retirement plan established to receive the distribution on behalf of a missing, designated nonspouse beneficiary.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary, or other party in interest or disqualified person with respect to a plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not 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;

(2) This exemption does not extend to transactions prohibited under section 406(b)(3) of the Act or section 4975(c)(1)(F) of the Code;

(3) Before an exemption may be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(4) If granted, the proposed amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(5) The proposed amendment, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Written Comments and Hearing Request

The Department invites all interested persons to submit written comments or requests for a public hearing on the proposed amendment to the address and within the time period set forth above. Commenters can also submit responses electronically by e-mail to e-OED@dol.gov. All comments received will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection at the above address and on the www.regulations.gov web portal.

Proposed Amendment

Under section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, Subpart B (55 FR 32836, 32847, August 10, 1990), the Department proposes to amend PTE 2006-06 as set forth below:

Exemption ***

I. Covered Transactions ***

(b) ***

(1) Designate itself or an affiliate as: (i) Provider of an individual retirement plan; (ii) provider, in the case of a distribution on behalf of a designated beneficiary (as defined by section 401(a)(9)(E) of the Code) who is not the surviving spouse of the deceased participant, of an inherited individual retirement plan (within the meaning of section 402(c)(11) of the Code) established to receive the distribution on behalf of the nonspouse beneficiary under the circumstances described in section (d)(1)(ii) of the Safe Harbor Regulation for Terminated Plans (29 CFR section 2550.404a-3) (Safe Harbor Regulation); or (iii) provider of an interest bearing, federally insured bank or savings association account maintained in the name of the participant or beneficiary, in the case of a distribution described in section (d)(1)(iii) of the Safe Harbor Regulation, for the distribution of the account balance of the participant or beneficiary of the abandoned individual account plan who does not provide direction as to the disposition of such assets;

V. Definitions ***

(b) The term "individual retirement plan" means an individual retirement plan described in section 7701(a)(37) of the Code. For purposes of section III of this exemption, the term "individual retirement plan" shall also include an inherited individual retirement plan (within the meaning of section 402(c)(11) of the Code) established to receive a distribution on behalf of a nonspouse beneficiary. Notwithstanding the foregoing, the term individual retirement plan shall not include an individual retirement plan which is an employee benefit plan covered by Title I of ERISA.

Signed at Washington, DC, this 5th day of February 2007.

Ivan L. Strasfeld,

Director,

Office of Exemption Determinations.

1 Section 102 of the Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 [1996]) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975 of the Code to the Secretary of Labor.

2 See in this issue of the Federal Register Amendments to Safe Harbor for Distributions from Terminated Individual Account Plans and Termination of Abandoned Individual Account Plans to Require Inherited Individual Retirement Plans for Missing Nonspouse Beneficiaries.

3 Section 829 of the Pension Protection Act requires that the individual retirement plan established on behalf of a nonspouse beneficiary must be treated as an inherited individual retirement plan within the meaning of Code § 408(d)(3)(C) and must be subject to the applicable mandatory distribution requirement of Code § 401(a)(9)(B).

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