

**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

**29 CFR Part 2570**

**RIN 1210-AB49**

**Prohibited Transaction Exemption Procedures; Employee Benefit Plans**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** This document contains a final rule that supersedes 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. This final rule clarifies and consolidates the Department of Labor's exemption

procedures and provides the public with a more comprehensive description of the prohibited transaction exemption process.

**EFFECTIVE DATE:** This final rule is effective [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER OF THIS FINAL RULE], and applies to all exemption applications filed on or after that date.

**FOR FURTHER INFORMATION CONTACT:** Eric A. Raps, Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693-8532. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On August 30, 2010, the Department published a Notice of Proposed Rulemaking in the Federal Register (75 FR 53172) that would update the existing procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA, and invited written comments from the public concerning its contents. These comments are available for review at [www.regulations.gov](http://www.regulations.gov) and also under “Public Comments” on the “Laws &

Regulations” page of the Department’s Employee Benefits Security Administration (EBSA) website at <http://www.dol.gov/ebsa>.

The final rule contained in this document revises the prohibited transaction exemption procedure to reflect changes in the Department’s exemption practices since the previous exemption procedure was issued in 1990 (the 1990 Exemption Procedure). Among other things, key elements of the exemption policies and guidance previously found in ERISA Technical Release 85-1 and the 1995 Exemption Publication have been consolidated within the text of a unitary, comprehensive final regulation. Adoption of this updated procedure should also promote the prompt and efficient 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.

## **B. Overview of the Final Rule and Comments**

The exemption procedure contained in this document (and codified 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. Set forth below is a summary of those aspects of

the proposed rule on which the Department received comments, and the Department's response to those comments. Individuals interested in obtaining information concerning the content of the proposed rule not discussed herein should refer to the Notice of Proposed Rulemaking at 75 FR 53172.

*Section 2570.30 Scope of the Regulation.*

Section 2570.30(b) of the proposed rule stated that “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.” One commenter suggested that this formulation was too restrictive because, under the foregoing statutes, the Department has the authority to exempt not only fiduciaries engaged in prohibited transactions, but parties in interest (or disqualified persons under the Code) as well. Accordingly, the commenter requested that the Department broaden the scope of section 2570.30(b) to include “parties in interest.”

The Department notes that section 2570.30(b) of the proposed rule simply restated the statutory language found at section 408(a) of ERISA concerning the scope of the Department's authority to grant administrative exemptions from the prohibited transaction provisions of ERISA. Because section 408(a) of the Act provides the Department with the authority to grant exemptions for “any fiduciary or transaction, or class of fiduciaries or transactions,” the Department also has the authority to provide

exemptive relief to non-fiduciary parties in interest who engage in plan transactions. Therefore, it is unnecessary to adopt the commenter's suggested amendment. In this regard, the Department notes that, consistent with the legislative history of the Act<sup>1</sup>, the Department has routinely granted exemptive relief to non-fiduciary parties in interest and disqualified persons, and will continue to exercise its authority, as appropriate.

*Section 2570.31 Definitions.*

Section 2570.31 of the proposed rule defines the following terms for purposes of the exemption procedure regulation: affiliate, class exemption, Department, exemption transaction, individual exemption, party in interest, pooled fund, qualified appraisal report, qualified independent appraiser, and qualified independent fiduciary.

*Definition of "Affiliate"* - Section 2570.31(a) of the proposed rule specifically defined the term "affiliate" to include any employee or officer of the person who is highly compensated or "[h]as direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets . . . ." One commenter expressed the view that the language of this definition should be clarified so that the term "plan assets" would refer only to those plan assets involved in the exemption transaction. The commenter stated that, absent such a modification, a person could be deemed to be an affiliate if he or she had responsibility with respect to the assets of any plan, without

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<sup>1</sup> See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 310 (1974), and also 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, which 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.

regard to whether the authority or control relates to the plan at issue or the plan assets at issue.

In response to the commenter's suggestion, the Department has modified the definition of "affiliate" at section 2570.31(a) to clarify that the term applies to any employee or officer of the person who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction. In addition, the Department, on its own motion, has further modified the term "affiliate" to clarify the scope and meaning of the term "control" that is contained within that definition.

*Nature and Extent of Independence of Qualified Independent Appraisers and Fiduciaries* - Two commenters objected to the definition of a "qualified independent fiduciary" (section 2570.31(j) of the proposed rule), which requires that a person serving in such capacity be "independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates." One of the commenters also expressed a similar reservation with respect to the definition of a "qualified independent appraiser" (section 2570.31(i) of the proposed rule). One commenter opined that the words "independent of" and "unrelated to" are not defined in the proposed rule, particularly with respect to employees of the independent fiduciary who are related to employees of the party in interest (spouses, children, in-laws, etc.), and therefore should be deleted in the interests of clarity. Another commenter took the position that, if the Department's actual purpose in utilizing the foregoing language was to bar a qualified independent fiduciary from

being an affiliate of the party in interest engaging in the transaction, then the Department should revise and simplify the text of section 2570.31(j) of the final rule accordingly.

As noted previously, the purpose of including these definitions in the proposed rule was to emphasize that any independent fiduciary or appraiser retained in connection with an exemption transaction must not only be “qualified” (i.e., knowledgeable as to its duties and responsibilities under ERISA and knowledgeable as to the subject transaction and the markets, if any, where such transactions normally occur) to serve in that capacity, but also free from any relationships with the party in interest or its affiliates that could improperly affect its judgment. Because such relationships may be relevant to the Department’s determination as to whether an appraiser or fiduciary is independent, the Department has not adopted the suggestions of the commenters for modifying these definitions.

*Standards for Measuring Compensation Received By Qualified Independent Appraisers and Fiduciaries* - Several commenters indicated that the Department’s use of the word “income” in the definitions in sections 2570.31(i) and (j) (and also in sections 2570.34(c)(7) and (d)(8)) to describe the overall annual compensation received by qualified independent appraisers and fiduciaries is problematic. Two of these commenters expressed the view that substitution of the word “revenues” for income would be less susceptible to misinterpretation and more consistent with prior Departmental practice. One of the commenters also suggested that the text of section 2570.34(d)(8) be modified to reflect the substitution of the word “revenues” in place of

the word “income.” Another commenter agreed with this view, and pointed out that the term “income” as a definitional term lends itself to a variety of interpretations – gross income, taxable income, etc. Similarly, another commenter suggested the substitution of the term “gross revenue” in lieu of the term “income” with respect to the compensation received by qualified independent appraisers. In general, the Department concurs, and has modified sections 2570.31(i) and (j) and sections 2570.34(c)(7) and (d)(8) in the final rule by substituting, where appropriate, the term “revenue” for the term “income.”

In defining the terms “qualified independent appraiser” (section 2570.31(i)) and “qualified independent fiduciary” (section 2570.31(j)), the proposed rule provided that, in each instance, the determination as to the independence of the appraiser or fiduciary would be made “on the basis of all relevant facts and circumstances.” The definition of a “qualified independent fiduciary” further provided that, “[a]s a general matter, an independent fiduciary retained in connection with an exemption transaction must not receive 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.” The definition of a “qualified independent appraiser” under the proposed rule described the compensation to be received by such appraisers in virtually identical terms.



The Department received a number of comments objecting to the content of the foregoing definitions under the proposed rule. Two commenters suggested that a *de minimis* or percentage test bears, at best, a narrow relationship to any duty or commitment to impartially perform independent fiduciary responsibilities under ERISA, and does not take into account the complexity, risk, expertise, or expenditure of time that such a commitment may entail. One commenter expressed the view that inserting the proposed *de minimis* and 1% standards in the text of a final regulation would mean that any firm that provides independent fiduciary services and whose compensation exceeds such thresholds is presumptively subject to improper influence from a party in interest to the exemption transaction. Two commenters further expressed the view that, if the 1% and *de minimis* aspects of the proposed rule were ultimately adopted, plan fiduciaries and officials required to retain independent fiduciaries and appraisers in connection with complex exemption transactions would inevitably limit their selections to a handful of large banking, fiduciary, or valuation firms whose compensation would satisfy the foregoing standards, thus reducing the overall level of competition for such services. By way of example, one commenter posited a complex exemption transaction which could reasonably be expected to command an independent fiduciary fee of \$150,000 in a given year to be paid by a party in interest to the exemption transaction; the commenter concluded that, under the proposed rule, only firms with annual revenues of \$15,000,000 or more would be presumptively independent of the party in interest.

One commenter emphasized the negative effect that the *de minimis* standard would have upon smaller fiduciary and valuation firms, opining that smaller firms often possess greater expertise and objectivity with respect to evaluating exemption transactions than their larger institutional counterparts, and often provide their services to plans at less expense as a result of lower overhead costs. Two commenters expressed the view that the reduced competition resulting from the adoption of a 1% benchmark would likely have the undesirable effect of driving up the costs of engaging an independent fiduciary for exemption transactions; one of these commenters also ventured that such a provision might cause plans, rather than parties in interest, to pay the fees of such a fiduciary. Another commenter opined that the proposed compensation limitations in the proposed rule would make it especially difficult for newly-established independent fiduciary firms with few, if any, conflict of interest or affiliation problems to compete for significant assignments with respect to exemption transactions. This commenter further stated that this market access problem for new firms would persist even if the Department had specified a higher compensation threshold (e.g., 5%) in connection with the proposed *de minimis* standard.

Several commenters stated that the 1% compensation threshold for independent fiduciaries contained in the proposed rule is substantially lower than the percentage guidelines often utilized by the Department in past administrative exemptions (and in other ERISA contexts) for evaluating whether fiduciaries have a relationship with a party in interest that renders them susceptible to inappropriate influences or pressures. Two commenters specifically noted that the Department has, in past individual exemptions,

permitted independent fiduciaries to derive as much as 5% of their compensation from parties in interest involved in the exemption transaction. Several commenters stated that there are currently only a small number of firms that perform an independent fiduciary role in connection with complex exemption transactions, and that the restrictions on compensation contained in the proposed rule would tend to deter such firms from accepting these types of engagements in the future. One commenter also stated that the proposed *de minimis* / 1% benchmark does not account for the fact that an independent fiduciary's fee arrangement often requires that a significant portion of the fiduciary's compensation is used to pay outside lawyers, actuaries, and other consultants for services that enable the fiduciary to meet its duties to the plan.

Accordingly, several commenters expressed the opinion that the Department should consider alternatives in the final rule to the 1% and *de minimis* compensation standards for defining and evaluating the independence of fiduciaries and appraisers retained in connection with exemption transactions. In this connection, one commenter suggested that the Department should consider its proposed regulation relating to the definition of "adequate consideration" under section 3(18) of ERISA (see 53 FR 16732, proposed May 17, 1988), which enumerated various criteria for determining whether a plan fiduciary has made a good faith determination of the fair market value of an asset (other than a security for which there is a generally recognized market). One of the proposed criteria would require that the relevant fiduciary be independent of all parties to the transaction (other than the plan) and that the assessment of the independence of the fiduciary should be made in light of all relevant facts and circumstances. In this regard,

the commenter noted that none of the proposed criteria made any references to amounts or percentages of compensation received by a fiduciary from a party in interest.

While expressing various concerns about the possible effects of an express limitation on qualified independent fiduciary compensation, another commenter nevertheless acknowledged that a fiduciary whose compensation from parties in interest with respect to a proposed transaction represents a significant portion of the fiduciary's revenues can be, or can be perceived to be, susceptible to improper influence in carrying out its fiduciary duties. Accordingly, this commenter suggested the deletion of the Department's language at section 2570.31(j) in the proposed rule concerning *de minimis* amounts and the 1% compensation standard, and substituting a number of factors that the Department would utilize in evaluating the independence of a fiduciary. These factors would include the complexity of the exemption transaction, the amount of plan assets involved in the exemption transaction (expressed in both absolute terms and as a percentage of the plan's total assets), and the expected duration of the fiduciary's engagement.

In response to these comments, the Department wishes to point out that, in defining the terms "qualified independent appraiser" and "qualified independent fiduciary", the proposed rule provided that, in each instance, the final determination as to the independence of the appraiser or fiduciary is made "on the basis of all relevant facts and circumstances." The Department also notes that the references to the one percent standard for compensation received by appraisers and fiduciaries in connection with an

exemption transaction was not intended as an absolute limit with respect to compensation received by such persons from parties in interest.

Thus, the Department concurs that this provision should be clarified. In this regard, the Department notes that the percentage of an appraiser's or fiduciary's annual revenue derived from a party in interest (or its affiliates) to an exemption transaction is an important factor in determining whether such person is, in fact, independent of the party in interest engaging in the covered transaction. The Department also continues to believe that the percentage of an appraiser's or fiduciary's annual revenue that is attributable to a party in interest should be a *de minimis* amount. Accordingly, absent facts and circumstances demonstrating a lack of independence, the Department will operate according to the presumption that such appraiser or fiduciary will be independent if the revenues it receives or is projected to receive, within the current federal income tax year, from parties in interest (and their affiliates) to the transaction are not more than 2% of such appraiser's or fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, an appraiser or fiduciary nonetheless may be considered independent based upon other facts and circumstances provided that the appraiser or fiduciary receives or is projected to receive revenues that are not more than 5% within the current federal income tax year, from parties in interest (and their affiliates) to the transaction based upon its prior income tax year.

Accordingly, it is the Department's view that the language contained in sections 2570.31(i) and (j) in the final rule provides the Department with sufficient flexibility to take into account any and all relevant facts and circumstances that may have a bearing on its assessment of the qualifications and independence of appraisers and fiduciaries. In this connection, the Department further notes that the previously referenced factors cited by the commenter may be taken into account under this "facts and circumstances" standard.

*Section 2570.33 Applications the Department will not ordinarily consider.*

Section 2570.33 describes exemption applications that the Department will not ordinarily consider, such as applications involving a transaction or transactions that are the subject of an investigation under the reporting, disclosure and fiduciary responsibility provisions in parts 1 or 4 of subtitle B of Title I of ERISA. In connection with the application content provisions of the exemption regulation, one commenter suggested that the Department modify the language of the final rule to ensure the confidentiality of information disclosed in an application (or in any amendments or supplements thereto).<sup>2</sup>

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<sup>2</sup> Specifically, the commenter suggested modifications to the language of sections 2570.35(a)(7) and 2570.35(b) to make allowances for the confidentiality of information submitted to the Department in connection with an exemption application. Section 2570.35(a)(7) requires that an application for an individual exemption include a brief statement to the Department disclosing 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. Section 2570.37(b) states that 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 investigative or enforcement action by the foregoing agencies, the applicant must promptly notify the Department of such a fact. In considering this comment, the Department determined that it was appropriate to address the issue of information designated as confidential by an applicant under section 2570.33 of the final rule.

In support of its view, the commenter stated that investigations by EBSA are confidential, and that the EBSA Enforcement Manual makes information about current enforcement proceedings subject to strict confidentiality (except with respect to other governmental agencies). The commenter also argued that, absent an amendment excluding this information from public access, certain applicants affected by the application content requirements could be stigmatized or might be deterred from applying for exemptive relief from the Department.

The Department does not concur that the final rule should be modified to address the commenter's concerns with respect to preserving the confidentiality of certain information submitted as part of an exemption application. Because such information comprises part of the record in support of an exemption, it enables the public to understand the basis for the Department's decision. Section 2570.51(a) of both the 1990 Exemption Procedure and the proposed rule stipulates that "[t]he administrative record of each exemption application will be open to public inspection and copying." Thus, the Department will not process exemption applications containing such designations unless the claim of confidentiality and privilege is withdrawn or the Department determines that the designated information is not material to the exemption request. Accordingly, in order to provide further clarity, the Department has redesignated paragraph (c) of section 2570.33 as paragraph (d), and a new paragraph (c) describing the Department's policy on claims of confidentiality has been inserted.

*Section 2570.34 Information to be Included in Every Exemption Application.*

*Disclosure of Compensation Received by Qualified Independent Appraisers and Fiduciaries* - Section 2570.34(d)(8) of the proposed rule would have required that any statement provided by a qualified independent fiduciary in support of an exemption application include, among other things, a 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 for 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).” Section 2570.34(c)(7) of the proposed rule contained similar requirements for the content of statements submitted by a qualified independent appraiser in support of an exemption application.

One commenter suggested that this provision be amended in the final rule to expressly state that, in instances where a qualified independent fiduciary provides its services to a plan through a specialized unit which is the subsidiary or affiliate of a larger business organization, the fiduciary’s revenues (the denominator of the fraction described in this subsection) should be based solely upon the revenues of the specialized unit and not the larger organization. The commenter stated that, because the purpose of examining the proportion of the independent fiduciary’s compensation derived from parties in interest is to determine the fiduciary’s lack of susceptibility from undue



influence, the revenues of the specialized unit should be the proper focus of such an inquiry.

In addition, the commenter offered the view that the time frames contained in the foregoing denominator should reflect the greater of (i) the prior federal income tax year's income or (ii) the qualified independent fiduciary's good faith estimate of the current year's income. In the commenter's view, the relationship between the compensation in connection with the transaction in question and the current financial state of the business is at least as relevant as data that may be as much as a year old when the calculation is made.

Because, as previously noted, the focus of this provision is on the revenues generated by the independent fiduciary, the Department believes no further changes to the language of this provision are necessary. Further, the Department declines to adopt the commenter's suggested modification of the content of the denominator (as described at section 2570.34(d)(8)) with respect to the relevant time frame for computing the revenues received by an independent fiduciary from all sources. The Department is of the view that the formula described in the final rule affords greater objectivity and certainty in determining such amounts.

*Specialized Statements* - Section 2570.34(c) requires that a qualified independent appraiser act solely on behalf of the plan in preparing statements submitted in support of an application for exemption. In the Department's view, any appraiser retained to

perform an asset valuation on behalf of a plan must discharge its responsibilities in an independent and impartial manner. In this regard, the Department expects the qualified independent appraiser's determination to be unbiased, fair, and objective, and to be made in good faith and based on a detailed analysis of the prevailing circumstances then known to the appraiser. The same general standards of professional conduct also apply, as appropriate, to statements prepared by other third party experts under section 2570.34(e).

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

*Disclosure of party in interest investments* – Under section 2570.35(a)(16), as it appeared in the 1990 Exemption Procedure, the extent of applicant disclosure of plan investments with a party in interest was limited to whether or not the assets of the affected plans(s) were 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 existed, the applicant was required to include an additional statement detailing the nature and extent of these investments, and whether a statutory or administrative exemption covered such investments.

In the proposed rule, the Department proposed an amendment to this provision that would have required an applicant to disclose whether or not the assets of the affected

plan(s) had 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 have been 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 existed, the applicant would have been required to 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).

One commenter expressed the view that this proposed revision, which requires an exemption applicant to disclose all direct or indirect investments of a plan with the party in interest (regardless of whether such investments were exempt or non-exempt under the terms of ERISA) was "overbroad" and would be "extraordinarily burdensome" for applicants. The commenter stated that, for a plan with \$10 billion in assets, there could be literally thousands of transactions with or through a party in interest that would be required to be disclosed under this revised provision, regardless of how relevant these transactions might be to the exemption under consideration. The commenter questioned whether the disclosure of these transactions (and the costs associated with such disclosure) would result in a more efficient exemption process, and added that it desired

to see a continuation of the Department's existing practice of inquiring during the pendency of the exemption application about other relationships and transactions concerning a plan's investments with a party in interest.

After consideration of the comment, the Department generally concurs with the concerns expressed by the commenter that compliance with the disclosure requirements described in the proposed revision to section 2570.35(a)(16) may pose practical difficulties for some prohibited transaction exemption applicants. The purpose of this disclosure provision (as explained in the preamble of the 1990 Exemption Procedure) 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 and parties so as to raise questions under the fiduciary responsibility provisions of ERISA. Accordingly, the Department has determined to modify the language in the final rule by reverting to the existing requirement, contained in the 1990 Exemption Procedure, which requires an applicant for an individual exemption to disclose information regarding any plan investments in loans to, property leased to, or securities issued by, any party in interest involved in the exemption transaction. In addition, it is noted that section 2570.35(a)(16) of the final rule does not preclude the Department from requesting, during the pendency of the exemption application, additional information from the applicant.

*Retroactive exemptions* – In the proposed rule, the Department added a new section 2570.35(d) to provide guidance to applicants who are seeking retroactive relief

for past prohibited transactions. This new subsection incorporates the standards for retroactive exemptions that were described 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 consider granting retroactive relief for transactions already consummated only if 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 factors 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.

One commenter expressed concern about the practical effect of one of these factors (section 2570.35(d)(2)(v)), under which the Department would take into account whether “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 . . . .”

The commenter posited a situation in which, during the pendency of an application for prospective exemptive relief, certain exigencies (such as a change in the tax laws) create an incentive for a party in interest to immediately consummate the proposed transaction, despite the absence of administrative relief from the Department at that point in time. The commenter expressed the view that in such circumstances, where an applicant subsequently amends its application to obtain retroactive relief for a past prohibited transaction, the Department should adopt an accommodating posture with respect to those exigent circumstances that might induce a party in interest to a transaction to engage in that transaction prior to receiving a final grant of exemption.

The Department notes that the good faith factors enumerated under section 2570.35(d) do not constitute an exclusive or an exhaustive list of the criteria that the Department may consider in evaluating an application for a retroactive exemption. The determination of whether a fiduciary has acted in good faith will be based upon a review of the totality of facts and circumstances surrounding a past prohibited transaction (including the exigencies of the transaction) before determining whether a retroactive exemption is warranted. In this connection, the applicant for a retroactive exemption must demonstrate that the safeguards necessary for the grant of a prospective transaction were in place at the time that the transaction was consummated. Accordingly, the

Department has determined that no modifications to section 2570.35(d)(2)(v) are warranted.

*Section 2570.37 Duty to Amend and Supplement Exemption Applications.*

Section 2570.37(a) of the proposed rule required that an exemption applicant promptly notify the Department if, during the pendency of an exemption application, any material fact or representation contained in the application changes or is inaccurate. This section also required that, during the pendency of the exemption application, the applicant promptly notify the Department concerning any material fact or representation that had been omitted from the 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.

One commenter interpreted the phrase “during the pendency of the application” contained in paragraph (a) of section 2570.37 to mean the period “under which the application/exemption is in force.” With this interpretation in mind, the commenter expressed the view that changes to the facts underlying the original grant of an exemption (such as the size of a company, its business affiliations, lines of business, etc.) occur all of the time. As a consequence, the commenter opined that if a party in interest to a covered transaction fails to report any changes at all to the facts and representations underlying a granted exemption, such exemption may automatically become invalid.

Accordingly, the commenter proposed that the Department should limit the changes that need to be reported to the Department to those occurring prior to the granting of an exemption.

The Department does not concur with the commenter's interpretation of the words "during the pendency of the application". The applicable timeframe covered by section 2570.37(a) is the period between the submission of an exemption application and the point at which final administrative action is taken by the Department with respect to the application. In the case of a granted exemption involving a one-time transaction that has been consummated in accordance with the terms and conditions of the exemption, subsequent events do not affect the validity of the exemptive relief granted by the Department. In instances where the Department has granted an exemption for a transaction which is continuing in nature (e.g., a lease), section 2570.49(d) of the procedure would apply. This provision stipulates that "[f]or transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the transaction, there are *material* [emphasis added] changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met." The materiality of such changes is determined by the Department in light of the totality of the surrounding facts and circumstances.<sup>3</sup> Accordingly, after considering this comment, the Department has determined not to modify the language of section 2570.37(a) in the final rule. However, in the interests of

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<sup>3</sup> Where applicants are in doubt as to the continued validity of exemptive relief that has been granted, such applicants may seek guidance from EBSA's Office of Exemption Determinations.



clarity, the Department has, on its own motion, deleted paragraph (d) of section 2570.37 in the final rule.

*Sections 2570.40 and 2570.41 Conferences and Final Denial Letters.*

The 1990 Exemption Procedure stipulated that the Department would attempt to schedule a conference concerning a tentative denial letter at a mutually convenient date and time during the 45-day period following the later of (1) the date the Department received the applicant's request for a conference, or (2) the date the Department notified the applicant, after reviewing additional information submitted pursuant to section 2570.39, that it was not prepared to propose the requested exemption. The Department's proposal (at section 2570.40) would have replaced this 1990 rule by substituting a simplified procedure in order to facilitate the prompt and efficient scheduling of such conferences. The Department has largely retained the proposed language of this conference provision in the final rule, except for certain technical clarifications. In instances where the applicant has requested a conference and stated an intent to submit additional information in support of the application, the Department generally will schedule a conference for a 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

section 2570.39, the Department generally will schedule a conference for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter.

The Department, on its own motion, has made technical corrections to section 2570.40 in the final rule to clarify how the rule would apply where an exemption applicant, within 20 days of receiving a tentative denial letter, requests a conference and expresses an intent to submit additional written information, but fails to provide such information within 40 days from receipt of the tentative denial letter.

To address this situation, the Department has inserted a new paragraph (f) in section 2570.40. This new paragraph specifies that, where an applicant has requested a conference and expressed an intent to submit additional information pursuant to section 2570.39(b), but has failed to furnish such information within 40 days from the date of the tentative denial letter, the Department will generally schedule a conference for a date and time occurring within 60 days after the date of the issuance of the tentative denial letter. As part of this technical correction, the Department also has redesignated sections 2570.40(f) and (g) of the proposed rule, respectively, as sections 2570.40(g) and (h) of the final rule.

In addition, the Department has made an additional technical correction to the text of section 2570.41 of the final rule by deleting the reference in paragraph (b) to “section 2570.40(e)” and substituting “section 2570.40.”

*Section 2570.49 Limits on the effect of exemptions.*

The Department, on its own motion, has made a technical refinement to this section of the final rule by adding a new paragraph (e), which clarifies that the Department possesses the sole discretion to determine the materiality of any fact or representation which underlies an administrative exemption.

**C. 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*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA 95), the Department submitted the information collection request (ICR) included in the Notice of Proposed Rulemaking to OMB for review and clearance at the time the proposed rule was published in the Federal Register on August 30, 2010 (75 FR 53172). OMB approved the final amendment under OMB control number 1210-0160, on October 17, 2011. The approval will expire on October 31, 2014.

The Department solicited comments concerning the ICR in connection with the Notice of Proposed Rulemaking. The Department received no comments addressing its burden estimates; therefore, no substantive changes have been made in the final rule that would affect the Department's earlier burden estimates.

The paperwork burden estimates are summarized as follows:

*Type of Review:* New collection

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

*Title:* Final Rule for Prohibited Transaction Exemption Procedures

*OMB Number:* 1210-0060

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

*Respondents:* 56

*Responses:* 22,995

*Frequency of Response:* Occasionally

*Estimated Total Annual Burden Hours:* 2,564

*Estimated Total Annual Burden Cost:* \$1,547,013

#### *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 final 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>4</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 final 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 requested comments on the appropriateness of the size standard used in evaluating the impact of the rule on small entities but did not receive any comments.

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 final rule will not have a

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<sup>4</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.

significant economic impact on a substantial number of small entities. The Department invited public comments on its certification and the potential impact of the rule on small entities at the proposed rule stage and did not receive any comments.

#### *Congressional Review Act*

The final rule being issued here is 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 final 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 final 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.

For the reasons set forth in the preamble, the Department amends 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. Revise the authority citation for part 2570 to read 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, 5 U.S.C. App at 672 (2006); Secretary of Labor’s Order 3-2010, 75 FR 55354 (September 10, 2010).

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 the obligation to comply with certain other provisions

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<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.

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. For purposes of this paragraph, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(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; or

(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 involved in the subject exemption transaction.

(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 transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(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 and transactions named or otherwise defined in the exemption.

(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; in general, the determination as to the independence of the appraiser is made by the Department on the basis of all relevant facts and circumstances. In making this determination, the Department generally will take into account the amount of both the appraiser's revenues and projected revenues for the current federal income tax year (including amounts received for preparing the appraisal report) that will be derived from the party in interest or its affiliates relative to the appraiser's revenues from all sources for the prior federal income tax year. Absent facts and circumstances demonstrating a lack of independence, the Department will operate according to the presumption that such appraiser will be independent if the revenues it receives or is projected to receive, within the current federal income tax year, from parties in interest (and their affiliates) to the transaction are not more than 2% of such appraiser's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, an appraiser nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) to the transaction based upon its prior income tax year.

(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; in general, the determination as to the independence of a fiduciary is made by the Department on the basis of all relevant facts and circumstances. In making this determination, the Department generally will take into account the amount of both the fiduciary's revenues and projected revenues for the current federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from the party in interest or its affiliates relative to the fiduciary's revenues from all sources for the prior federal income tax year. Absent facts and circumstances demonstrating a lack of independence, the Department will operate according to the presumption that such fiduciary will be independent if the revenues it receives or is projected to receive, within the current federal income tax year, from parties in interest (and their affiliates) to the transaction are not more than 2% of such fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, a fiduciary nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) to the transaction based upon its prior income tax year.

**§ 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 (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 ordinarily will not 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 such an application if the issuance of the final class exemption may not be imminent, and the Department determines that time constraints necessitate consideration of the transaction on an individual basis.
- (c) The administrative record of an exemption application includes the initial exemption application and any supporting information provided by the applicant (as well as any comments and testimony received by the Department in connection with an application). If an applicant designates as confidential any information required by these regulations or requested by the Department, the Department will determine whether the information is material to the exemption determination. If it determines the information to be material,

the Department will not process the application unless the applicant withdraws the claim of confidentiality.

(d) If for any reason the Department decides not to consider an exemption application, it will inform the applicant in writing of that decision 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; or

(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 acting solely 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, acting solely on behalf of the plan, rather than, for example, on behalf of the plan sponsor, 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 from 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 misconduct;

(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 revenue that is 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 revenues 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 revenues from all sources 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 or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity suitable to perform its duties on behalf of the plan with respect to the exemption transaction;

(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 rather than, for example, acting on behalf of the plan sponsor;

(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 revenue that is 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 revenues 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 revenues from all sources (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 prepared on behalf of the plan 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) are invested in loans to any party in interest involved in the exemption transaction, in property leased to any such party in interest, or in securities issued by any such party in interest, and, if such investments exist, a statement for each of these three types of investments 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 pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.);

(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, only 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 have 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 to the plan 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 at (202) 219-0204. Notwithstanding the foregoing methods of transmission, applicants are also required to submit one paper copy of the exemption application for the Department's file.

**§ 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.

**§ 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 to the e-mail address provided in the tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) The additional information an applicant intends to provide in support of the application must be in writing and be received by the Department within 40 days from the date of the tentative denial letter. 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 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 within the 40-day period specified in paragraph (b) of this section, or within any additional period 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 the additional information that the applicant stated his or her intention to submit within the 40-day period described in paragraph (b) of this section, or within any additional period 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, 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 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) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 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 as determined, respectively, by the Department in its sole discretion.

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b) of this subpart, has notified the Department of its intent to submit additional information pursuant to § 2570.39, and has failed to furnish such information within 40 days from the date of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 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 60-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 60-day limit. The Department will only grant such an extension in unusual circumstances and for a brief period as determined, respectively, by the Department in its sole discretion.

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

(h) 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 written 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 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 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 within the 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>2</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>3</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>4</sup>

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room \_\_\_\_,<sup>5</sup> U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, DC 20210, ATTENTION: Application No. \_\_\_\_.<sup>6</sup> Comments and hearing requests may also be transmitted to the Department electronically at *e-oed@dol.gov* or at *www.regulations.gov* (follow instructions for submission), and should prominently reference the application number listed above. In addition, comments and hearing

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<sup>2</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>3</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>4</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>5</sup> The applicant will fill in the room number of the Office of Exemptions Determinations. As of the date of this final regulation, the room number of the Office of Exemption Determinations is N-5700.

<sup>6</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.

requests may be transmitted to the Department via facsimile at (202) 219-0204. 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 the 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 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 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 ceases to be effective 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.

(e) 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 is made by the Department.

**§ 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, N.W., 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 B 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 on or after [INSERT DATE THAT IS 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 [INSERT DATE THAT IS 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 October, 2011.

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PHYLLIS C. BORZI

Assistant Secretary

Employee Benefits Security Administration, Department of Labor

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