''Nondisplacement of Qualified Workers Under Certain Contracts''.

OMB Number: 1215–0 new.

Frequency: On occasion.

Affected Public: Individuals of households; business or other for-profit; Federal Government.

Number of Respondents: 36.

Estimated Time per Respondent: 15 minutes.

Total Burden Hours: 1 hour (NPRM); proposed 9 hours.

Description: ESA has proposed Regulations, 29 CFR Part 9, which will require that a contractor subject to the Executive Order maintain copies of any written offers of employment documentation.

Cheryl Ann Robinson,

Acting Department Clearance Officer.

[FR Doc. 95–17083 Filed 7–11–95; 8:45 am]

BILLING CODE 4510–27–M

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 95–60; Application Number D–09662]

Class Exemption for Certain Transactions Involving Insurance Company General Accounts

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits prospectively and retroactively to January 1, 1975, certain transactions engaged in by insurance company general accounts in which an employee benefit plan has an interest, if certain specified conditions are met. Additional exemptive relief is provided for plans to engage in transactions with persons who provide services to insurance company general accounts. The exemption also permits transactions relating to the origination and operation of certain asset pool investment trusts in which a general account has an interest as a result of the acquisition of certificates issued by the trust. The exemption affects participants and beneficiaries of employee benefit plans, insurance company general accounts, and other persons engaging in the described transactions.

EFFECTIVE DATE: The effective date of the exemption is January 1, 1975.

FOR FURTHER INFORMATION CONTACT: Lyssa Hall, Pension and Welfare Benefits Administration, Office of Exemption Determinations, U.S. Department of Labor, Washington, DC 20210, (202) 219–8971 (not a toll-free number) or Timothy Hauser, Plan Benefits Security Division, Office of the Solicitor, (202) 219–8637 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Exemptive relief for the transactions described herein, as well as for other transactions not covered by the proposed exemption, was requested in an application dated March 25, 1994, submitted by the American Council of Life Insurance (the ACLI) pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR section 2570 subpart B (55 FR 32836 August 10, 1990). In addition, the Department proposed additional relief on its own motion pursuant to the authority described above.

On August 22, 1994, the Department published a notice in the **Federal Register** (59 FR 43134) of the pendency of a proposed class exemption from certain restrictions of sections 406 and 407 of ERISA and from certain taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code.[1] The notice of pendency invited all interested persons to submit written comments concerning the proposed class exemption by October 21, 1994. The Department received fifteen public comments. Upon consideration of all of the comments received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the major comments are discussed below.

Discussion of Comments

A. General Exemption

The proposed general exemption provided relief from the restrictions of sections 406(a) and 407(a) for:

(1) Any transaction between a party in interest with respect to a plan and an insurance company general account, in which the plan has an interest as a contractholder; (2) any acquisition or holding by the general account of employer securities or employer real property; and (3) any acquisition or holding of qualifying employer securities or qualifying employer real property by a plan (other than through an insurance company general account) if the acquisition or holding contravenes the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of ERISA solely by reason of being aggregated with employer securities or employer real property held by an insurance company general account. The above exemptions are subject to the requirement that the plan's participation in the general account, as measured by the amount of the reserves arising from the contract held by the plan (determined under section 807(d) of the Code), does not exceed 10% of all liabilities of the general account.

Several commenters expressed concern regarding imposition of the 10% limitation. The commenters objected to the retroactive application of this requirement stating that it was unfair in light of the industry's prior reliance on the Department's interpretive guidance in IB 75–2 (29 CFR 2509.75–2). A commenter noted that, for many general account transactions, there will be no way of determining whether any particular condition has been met and, therefore, whether exemptive relief is available. Other commenters objected to the prospective application of the 10% limitation and suggested that, if not deleted by the Department, the percentage requirement should be raised to no less than 20 percent. One of the commenters suggested eliminating the percentage limitation if the insurance company satisfied other objective financial standards (e.g., a minimum capitalization or ratings requirement or standards similar to those used to determine ''qualified professional asset manager'' status in PTE 84–14.) In general, the commenters represented that it is unlikely that many insurance companies would fail to satisfy the 10% limitation. Nevertheless, the commenters stated that this limitation will add numerous steps to the compliance process for insurance companies and third parties. One commenter represented that, since the *Harris Trust* decision, securities transactions have been significantly impeded by the inability of many insurance companies to provide factual information concerning the level of beneficial ownership of general account assets held by plans. Finally, commenters represented that there has been no evidence of abuse involving third parties and insurance company general accounts.

The Department continues to believe that a limitation on the amount of

[1] Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 Fed. Reg. 1063, January 3, 1978), generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. In the discussion of the exemption, references to sections 406 and 408 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

business that a plan provides to an entity is necessary to reduce the risk that the plan would be in a position to improperly influence the investment decisions of the entity. Moreover, in light of the commenters' belief that the 10% limitation is unlikely to be exceeded, the Department is not persuaded by the arguments in favor of prospective modification of the 10% limitation. Accordingly, after consideration of the comments, the Department has determined not to revise the 10% limitation for transactions occurring after the date of publication of the grant of this exemption. In response to the comment regarding adoption of financial standards in place of the percentage limitation, the Department does not believe that the commenter's suggested alternative would adequately address the Department's concern with respect to the exercise of undue influence upon the insurance company's decision making processes. Therefore, the Department has determined not to adopt the commenter's suggestion.

With respect to the retroactive application of the 10% limitation, the Department believes that the arguments presented by the commenters have merit and has determined to modify the proposed exemption as requested. Therefore, the Department has deleted the percentage limitation for transactions occurring prior to the date of publication of the grant of this exemption.

A commenter recommended that, for purposes of determining compliance with the percentage limitation, if the percentage limitation requirement is met any time during the calendar year, the requirement should be deemed satisfied for the entire year. The Department believes that testing as of each transaction assures consistent treatment of all plan contractholders and provides for a more accurate characterization of the degree of a plan's interest in the general account at a given time. Accordingly, the Department has determined not to revise this condition as requested.

Two commenters requested that the Department modify the definition of reserves referenced in section I of the exemption. In this regard, the proposed exemption provides that the 10% limitation is to be measured based upon the amount of reserves arising from the contract(s) held by the plan, as determined under section 807(d) of the Code. The commenters urged the Department to modify this provision to provide that the percentage limitation be calculated based on general account reserves and liabilities required to be set forth in the annual statement for life insurance companies approved by the National Association of Insurance Commissioners (NAIC). The ACLI represents that the NAIC definition of reserves and liabilities is a more appropriate measure than the definition of reserves in section 807(d) of the Code because it is a broader definition of insurance company obligations. According to the ACLI, some general account contracts held by ERISA plans, e.g., guaranteed interest contracts (GICs) and other forms of funding arrangements without annuity purchase rate options, do not have section 807(d) reserves associated with them. These contracts would be included in the NAIC Annual Statement as separate liabilities and would be captured in the ACLI's suggested definition. In addition, the ACLI believes that it will be easier for insurers to identify the appropriate reserve and liability numbers using the NAIC definition and, therefore, easier to comply with this condition. Lastly, the ACLI notes that all states require that insurers use the form published by the NAIC.

The ACLI also states that it does not believe that the Department intended to include separate account liabilities associated with a contract held by an employee benefit plan as part of either the numerator or denominator of the 10% test, and requests that the final exemption clarify that liabilities associated with separate accounts are not included under the 10% test.

Finally, the ACLI recommends that surplus be included in the denominator of the calculation. The commenter states that surplus is the excess of assets over liabilities and represents additional amounts that could be made available to cover contract liabilities. The ACLI asserts that, under the proposed the 10% test, the Department actually rewards companies that have significant liabilities in relation to surplus and penalizes companies that have lower levels of liabilities relative to surplus. The commenter provides the following example as an illustration of this problem:

Company A. Assume Company A has an ERISA contractholder for which $7.5 million in reserves are held. Company A also has $50 million of total liabilities and $50 million of surplus. Company A would not satisfy the proposed 10% test ($7.5/$50=15%).

Company B. Assume Company B has the same level of general account reserves attributable to an ERISA contractholder ($7.5 million). However, Company B has $75 million of total liabilities and only $25 million of surplus. Company B would meet the test ($7.5/$75=10%).

According to the ACLI, the rule as structured permits parties in interest to make greater investments in and, presumably, to wield more influence over, financially weaker companies. Therefore, the ACLI believes that it makes more sense to measure reserves and liabilities of ERISA general account contracts against total general account liabilities and surplus.

The ACLI suggests that the percentage limitation should be calculated by

(a) adding—

(i) the amount of the reserves and liabilities set forth in the annual statement for life insurance companies approved by the National Association of Insurance Commissioners for the general account contract(s) held by or on behalf of the plan, to

(ii) the amount of the reserves and liabilities set forth in the annual statement for life insurance companies approved by the National Association of Insurance Commissioners for the general account contract(s) held by or on behalf of any other plans maintained by the same employer or affiliate thereof, and

(b) dividing by the total reserves and liabilities of the general account (exclusive of separate account liabilities) plus surplus set forth in the annual statement for life insurance companies approved by the National Association of Insurance Commissioners.

The Department finds merit in this comment and has modified the definition of reserves accordingly.[2] However, the Department has determined that it would be appropriate in calculating the percentage limitation to include in the numerator and denominator those reserves and liabilities associated with plan contracts that have been ceded by the insurance company to other insurance companies on a coinsurance basis.

The Department also concurs with the ACLI's suggestion to include surplus as set forth in the annual statement for life insurance companies approved by the NAIC in the denominator of the 10% test. Finally, the Department has modified the final exemption to clarify that liabilities associated with insurance company separate accounts are not included in the calculation of the 10% test.

A commenter noted that the language, ''in which the plan has an interest as a contractholder, * * *'' under section I(a) is too restrictive and may exclude

[2] The Department notes that the definition of reserves, as modified pursuant to the ACLI's recommendation, also applies to transactions described in section I(b) of the exemption.

certain general account transactions that should be covered by the exemption. For example, according to the commenter, the language in the proposal may not provide relief with respect to certain plans that have an interest in the general account because the plans are funded with general account contracts, i.e., individual or group annuity contracts, owned by the trustee of a trust. The commenter suggests that the exemption provide relief for transactions with the general account under circumstances in which the plan has an interest in contracts issued under any employer's plan, which is subject to title I of ERISA, and which are funded through the general account. This would include contracts under which the plan trustee is designated as the contractholder under the contract. The Department did not intend to exclude from relief transactions involving a general account in which a plan has an interest as the beneficial owner of a general account contract. The Department concurs with this comment and has modified section I of the exemption accordingly.

Several commenters requested that the Department expand section I of the proposal to include relief from section 406(b)(2) of ERISA. According to the commenters, section I is substantially similar to PTE 90–1 (55 FR 2891 (January 29, 1990) and PTE 91–38 (56 FR 31966 (July 12, 1991)) with the exception of not providing relief from section 406(b)(2) of ERISA. One of the commenters provided an example of a transaction that they believed would create a situation in which a violation of section 406(b)(2) would occur for which no relief would be available under the exemption. In the example provided by the commenter, ABC Commercial Bank serves as the investment manager of the equity investment portfolio of the XYZ Company Pension Trust. Certain of the benefits due under the XYZ Pension Trust are provided under a participating annuity contract with PDQ Insurance Company. ABC decides to securitize its student loan portfolio by placing those loans in a trust, selling participation interests in the trust, and continuing to service the student loans. The commenter asserts that, if PDQ Insurance Company purchases participation interests in such trust in the initial offering for its general account, ABC Bank, as seller, would technically be in violation of section 406(b)(2) of ERISA. As the Department explained in Advisory Opinion 79–72A [October 10, 1979], a fiduciary may avoid engaging in an act described in sections 406(b)(1) or 406(b)(2), absent any arrangement, agreement, or understanding with respect to a proposed transaction in which he or she may have an interest, by removing himself or herself from all consideration by the plan of whether or not to enter into the proposed transaction and by not otherwise exercising, with respect to the proposed transaction, any of the authority, control, or responsibility that makes him or her a fiduciary.

Since the example does not suggest that ABC Commercial Bank exercises any discretionary authority or control with respect to the transaction on behalf of the XYZ Pension Trust or PDQ Insurance Company, the Department does not believe that any issues are raised under section 406(b)(2) of ERISA. Thus, the Department is not persuaded by the arguments in favor of expanding the scope of section I of the exemption to provide relief from section 406(b)(2) of ERISA. However, upon further demonstration that this is a realistic concern, the Department would be prepared to consider further relief, if appropriate under the circumstances.

Several commenters requested that the Department modify section I of the exemption to provide relief from section 406(b) of ERISA for transactions involving affiliates and subsidiaries of the insurance company. According to the comments, affiliate transactions are regulated carefully under state and federal law to ensure that they are conducted on reasonable terms. Specifically, the commenters note that state insurance law requires that transactions between affiliates and subsidiaries be conducted on fair and reasonable terms, disclosed to the state insurance commissioner, and, under some circumstances, submitted in advance for approval to the state insurance commissioner. Moreover, the commenters state that the Code requires that transactions among affiliates be reflected on an arm's-length basis for tax purposes.

The Department notes that this request was initially included as part of the ACLI's application for exemption. As noted in the proposal, the Department did not believe that it had sufficient information regarding the operation of insurance companies to make the findings required by section 408(a) of ERISA. In a May 20, 1994 letter to the ACLI, the Department posed 72 questions to the insurance industry that were designed to provide the Department with the information needed to determine whether relief could be provided for transactions involving the internal operations of general accounts, as well as for transactions between a general account and an insurance company affiliate or subsidiary. The Department continues to believe that it is appropriate to consider affiliate transactions as part of its review of the information provided by the ACLI regarding the internal operation of general accounts. Moreover, the Department notes that it did not propose relief from section 406(b) of ERISA for affiliate transactions at the time the class exemption was proposed, and pursuant to the requirements of section 408(a) of ERISA, the Department is required to offer interested persons an opportunity for a hearing before granting an exemption from section 406(b). Accordingly, the Department does not believe that it would be appropriate to modify the exemption at this time.

Another commenter was concerned that the proposed exemption in section I(a) is too broad, especially with regard to the acquisition and holding of employer securities and employer real property. The commenter argued that the exemption could invite abuses if an insurance company general account were able to purchase a significant amount of employer stock, especially if the employer is a small company. The commenter recommended that the following limitations be incorporated into the final exemption:

(1) The number of shares of employer securities or the amount of employer real property acquired or held by the insurance company general account is *de minimis* in comparison to the number of shares of employer securities issued and outstanding or the total amount of employer real property;

(2) The acquisition or holding by the insurance company general account is accomplished through a mutual fund or portfolio investment;

(3) With respect to acquisition or holding of employer securities by an insurance company general account, the insurance company retains an independent fiduciary to vote the stock (and the independent fiduciary remains independent throughout the time the general account holds the employer securities); and

(4) No employee or member of the board of directors of the insurance company is also a member of the board of directors of the employer whose securities or real property is acquired or held by the insurance company general account.

The Department does not believe that the commenter has made a sufficient showing that the conditions currently contained in the proposed exemption would not adequately protect employee benefit plans investing in insurance company general accounts. In this regard, the Department notes that section IV(b) of the proposal provides that no relief is available under the exemption if the transaction is part of an agreement, arrangement, or understanding designed to benefit a party in interest. Therefore, the Department has determined not to accept this suggestion.

B. Specific Exemptions

Section II of the proposed exemption is divided into two subparts. Section II(a) would permit transactions involving persons who are parties in interest to a plan solely by reason of providing services to an insurance company general account in which the plan has an interest as a contractholder. Section II(b) would permit the furnishing of services, facilities, and any goods incidental to such services and facilities by a place of public accommodation owned by an insurance company general account to parties in interest if the services, facilities, and incidental goods are furnished on a comparable basis to the general public.

One commenter requested that the Department expand section II(a) to include persons who are parties in interest by reason of a relationship to a service provider described in section 3(14)(E) of ERISA. Another commenter suggested that broad relief be provided for transactions between a general account and persons who are parties in interest to a plan by reason of providing services to the plan.

Section 3(14)(E) of ERISA describes the circumstances under which a person will be a party in interest with respect to a plan by reason of a relationship to a sponsoring employer or an employee organization whose members are covered by a plan. The definition of party in interest under section 3(14)(E) does not involve a relationship to a service provider. Since the commenter provided no rationale as to why the relief should be extended to parties in interest by virtue of a relationship to the plan sponsor or participating employee organization, the Department has determined not to modify the exemption based on this comment.

The Department notes that section II(a) of the proposed exemption was intended to provide broad relief only for those service providers whose relationship to a plan arises as a result of providing services to an insurance company general account in which the plan has an interest as a contractholder. In response to the comment requesting broad relief for general account transactions with service providers to plans, the Department continues to believe that compliance with the prospective percentage limitation will not be difficult in light of the size of most general accounts. Accordingly, the Department is of the view that section I(a) of the exemption provides appropriate relief for any transaction involving a party in interest who is a service provider to a plan. Therefore, the Department cannot conclude that further relief is warranted.

C. Asset Pool Investment Trusts

Section III of the proposed exemption provided relief from sections 406(a), 406(b), and 407(a) of ERISA for the operation of asset pool investment trusts in which the insurance general account has an interest as a result of the acquisition of subordinated certificates. The proposal requires that the conditions of either PTE 83–1 (48 FR 895, January 7, 1983) or an applicable Underwriter Exemption be met other than the requirements that the certificates acquired by the general account not be subordinated and receive a rating that is in one of the three highest generic rating categories from an independent rating agency. In addition, the Department proposed relief for the operation of such trusts where a plan acquired subordinated certificates in a transaction that was not prohibited or otherwise satisfied the conditions of PTE 75–1.

A commenter urged the Department to clarify the condition under section III of the exemption which requires that the underlying assets of a trust include plan assets under section 2510.3–101(f) of the plan assets regulation with respect to the class of certificates acquired by the plan as a result of an insurance company general account investment in such class of certificates. According to the commenter, this exemption is of limited value because it only provides relief to the extent that a plan invests in the same class of securities as an insurance company general account. The commenter was concerned that the exemption would not be available for the operation of an asset pool investment trust where a general account investment results in benefit plan investors owning 25% or more of a different class of securities backed by the same pool of assets as the class of securities owned by a plan.

The Department did not intend to exclude the situation described by the commenter from the scope of relief provided by section III of the exemption. The Department has accepted this comment and modified the final exemption.

Several commenters requested that the Department expand the relief provided in section III of the proposed exemption to include other fixed investments and entities not covered by PTE 83–1 or the ‘‘Underwriter Exemptions’’. According to the commenters, other types of passive investment trusts that hold assets not specified in PTE 83–1 or the Underwriter Exemptions have been developed by the financial community to facilitate the provision of credit. General accounts have invested in every type of securities product collateralized by assets, including credit card receivables, trade receivables, accounts receivables, ‘‘repackaged’’ securities and other unsecured consumer and commercial loans, as well as swap contracts, foreign securities, and notional principal contracts.

The commenters represent that insurance company general accounts have comprised a significant and growing portion of the market for asset backed securities with current estimates indicating that life insurance companies comprise over 8% of the investors in collateralized asset pools. The commenters further assert that it is unfair to condition retroactive relief under section III of the proposed exemption upon compliance with the conditions set forth in PTE 83–1 or the Underwriter Exemptions due to the financial community's reliance on IB 75–2 prior to the *Harris Trust* decision.

One of the commenters argued that trusts which are non- qualifying trusts by reason of holding non-qualifying assets or by failing to satisfy other requirements of PTE 83–1 or the Underwriter Exemptions, but that are substantially similar to the fixed investment vehicles described in these exemptions, should be entitled to exemptive relief. The commenter suggests that section III of the exemption be modified as follows:

1. For Qualifying and Non-Qualifying Trusts and other fixed investment vehicles that were formed prior to a specified date (*e.g.*, 30 days after the publication date of the Proposed Exemption in final form in the **Federal Register**), the Department should reaffirm that IB 75–2 provides unconditional relief from the provisions of sections 406 and 407 of ERISA and section 4975 of the Code for transactions in connection with the servicing, management and operation of the entity. This relief would apply to investments made by General Accounts or plans in such investment vehicles before or after such effective date.

2. For investments in passive investment vehicles formed after such date, the Department should add as a condition of section III(2), a new

paragraph 2(C), providing that the entity in question need not satisfy the insurance/protection against loss requirement of PTE 83–1 or the qualifying assets test of the applicable Underwriter Exemption.

3. In addition, the Department should consider providing that the same rules would apply to fixed investment vehicles that fail to qualify under the Underwriter Exemptions solely by reason of not being organized as trusts under applicable local law.

The Department notes that the relief contained in section III was proposed by the Department on its own motion based on specific information received subsequent to the filing of the ACLI exemption application. The commenter specifically focused on the impact of the *Harris Trust* decision on certain asset pool investment trusts that were previously the subject of exemptive relief by the Department. The Department's ability to propose exemptive relief under section III of the exemption was based, in part, upon the record developed during its prior consideration of PTE 83–1 and the Underwriter Exemptions. After reviewing the comments and suggestions submitted, the Department recognizes that there may be a need for additional exemptive relief for investment trusts not described in the proposed exemption. However, the Department does not believe that it has sufficient information regarding the structure and operation of such trusts and the assets contained therein to make the findings necessary to grant further exemptive relief. Accordingly, the Department has determined not to adopt the alternatives suggested by the commenters. Of course, the Department would be prepared to consider proposing additional relief upon proper demonstration that the findings can be made under section 408(a) with respect to other investment entities not described in the proposal. Lastly, the Department notes that the broad retroactive relief provided under section I of the exemption would include relief for purchases and sales of certificates in entities that are not described in PTE 83–1 or the Underwriter Exemptions.

On its own motion, the Department has determined to extend the relief provided in section II(a) of the exemption to persons who are deemed to be parties in interest (including fiduciaries) with respect to a plan as a result of providing services to a plan (or as a result of a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H), or (I) of the Code) solely because of the plan's ownership of certificates issued by a trust that satisfies the requirements described in section III(a) of the exemption. For purposes of clarity, the Department has added a new subsection III(b) to the final exemption in this regard.

D. Additional Transactions

In its exemption application, the ACLI requested relief for certain transactions that may be viewed as being prohibited under the Supreme Court's analysis in *Harris Trust* merely as a result of a plan's purchase of a participating general account contract. The significant participation test contained in the plan asset regulation (section 2510.3–101) is a ''safe harbor'' provision that provides that the assets of an entity will be considered to include plan assets only if equity participation by ''benefit plan investors'' is ''significant.'' The ACLI represented that, under regulation section 2510.3–101(f)(2), an insurance company investing general account assets in an entity could be viewed as a benefit plan investor for the purposes of calculating the 25 percent significant participation test. As a result, transactions between the entity and a party in interest to a plan with an interest in the general account could be prohibited under section 406 of ERISA.

The Department noted in the preamble to the proposed exemption (59 FR 43137) that it did not have sufficient information regarding the effect of the *Harris Trust* decision on entities that conducted their business operations in accordance with the significant participation exception contained in the plan asset regulation. Specifically, while the ACLI application generally identified the potential effect of the *Harris Trust* decision on such entities, the application provides no specific information, either from affected entities themselves or other independent sources concerning the makeup of such entities, a description of the transactions for which exemptive relief is necessary, or the standards and safeguards upon which exemptive relief for such transactions should be conditioned.

In this regard, the Department invited interested persons to submit written comments to be considered in deciding whether to propose additional exemptive relief. In response to that notice, two commenters provided general information regarding transactions engaged in the ordinary course of an insurance company's business that would not be covered by the proposed exemption or existing exemptions. The comments briefly described the entities involved but did not provide any specifics on the standards or safeguards upon which exemptive relief for such entities should be conditioned. One commenter described the hardships and costs that would result for plans if relief is not provided for these transactions. In addition, the comments previously discussed with respect to Part III of the proposed exemption regarding extending the relief proposed therein to entities not covered by PTE 83–1 or the Underwriter Exemptions, also failed to describe the nature of the protections afforded to plans investing in such entities.

After reviewing the comments submitted, the Department is persuaded that additional exemptive relief may be needed for certain transactions and entities which are not covered by the proposed class exemption. However, the record is insufficient for the Department to clearly define the types of investment trusts and other entities that would comprise the class covered by such relief. Moreover, in order to propose relief for the transactions and entities described, the Department must be able to make the requisite findings necessary under section 408(a) of ERISA. While the commenters have identified their need for exemptive relief, the Department does not believe that they have identified conditions that would adequately protect the employee benefit plan investors if further relief is granted. Accordingly, the Department urges interested persons to submit more detailed information in order to more fully develop a record for the Department's consideration.

E. Conditions

Section IV of the proposed exemption contained the following three conditions which are applicable to transactions described in Sections I and II:

(a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the insurance company, the terms of the transaction are at least as favorable to the insurance company general account as the terms generally available in arm's length transactions between unrelated parties;

(b) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest; and

(c) The party in interest is not the insurance company, any pooled separate account of the insurance company, or an affiliate of the insurance company.

In general, commenters stated that it is unfair to apply the conditions retroactively. Several commenters specifically objected to the condition stated in section IV(b) and suggested that it should be deleted or clarified. The commenters asserted that this condition could be interpreted to preclude a party in interest from receiving any benefit from a transaction with a general account since virtually every agreement, arrangement, or understanding is designed to benefit all parties thereto. One commenter suggested that the Department clarify section IV(b) by noting that its purpose is to keep a party in interest from benefiting from a ''side deal.''

The Department agrees that under most circumstances parties will not enter into agreements in the normal course of business unless each gains or benefits from the arrangement. The intent of the condition in section IV(b) was not to deny direct benefits to the other parties to a transaction but, rather, to exclude relief for transactions that are part of a broader overall agreement, arrangement, or understanding designed to benefit parties in interest. The Department has determined not to delete this condition.

F. Definitions

1. Under the proposed exemption, an ''insurance company'' was defined under section V(d) as an insurance company authorized to do business under the laws of more than one state. One commenter suggested that this definition should be modified to include a company qualified to do business in one or more states so that smaller insurance companies that are authorized to do business in only one state will not be disadvantaged. The Department concurs with this suggestion and has modified the definition of an insurance company accordingly.

2. In response to a commenter's request that the Department modify the definition of affiliate in section V(a), the Department notes that the term affiliate is not referenced in section III of the exemption and, thus, no modification is necessary.

3. Since the date of publication of the proposal, three additional Underwriter Exemptions have been granted. The Department is adding PTEs 94–70, 94–73, and 94–84 to the definition of Underwriter Exemption contained in section V(h) of the final exemption.

G. Miscellaneous

1. Two commenters were generally opposed to providing any relief to the insurance industry with respect to the problems created by the *Harris Trust* decision. Several other commenters expressed support for the broad relief requested by the ACLI in its exemption application.

2. One commenter requested a hearing. However, the issues raised by the commenter appear to be outside the scope of the proposed exemption. Specifically, the issues identified by this commenter involve problems with guaranteed investment contracts, the insolvency of insurance companies, and nonpayments by state guaranty funds. The Department has determined that no issues were identified that would require the convening of a hearing and has determined not to hold a public hearing.

3. One commenter raised the question whether a fiduciary adviser can assist more than one client with respect to negotiating general account contracts involving the same insurance company general account. Specifically, the commenter was concerned that a fiduciary consultant helping one client to negotiate a general account contract with an insurance company could be viewed as engaging in a violation of section 406(b)(2) of ERISA under circumstances where the consultant previously assisted other clients in negotiating general account contracts with the same insurance company. The Department notes that this commenter raises issues that are beyond the scope of this exemption proceeding.

4. Another commenter requested that the Department clarify what portion of a general account will be considered to be plan assets when a general account invests in an entity. The commenter also urged the Department to fix the amount that will be so considered as of the date of the general account's investment, regardless of changes in the level of plan investment in the general account over the time of the general account's investment in an entity. In a footnote contained in the preamble to the proposed exemption, the Department noted that, for purposes of calculating the 25% threshold under the significant participation test (29 CFR section 2510.3–101(f)), only the proportion of an insurance company general account's equity investment in the entity that represents plan assets should be taken into account. In this regard, the commenter is concerned that, the 25% test may be satisfied at the time the general account makes its investment, but then failed by virtue of an increase in the general account's assets that constitute plan assets. In the Department's view, a change in the level of plan investment in a general account subsequent to the general account's purchase of an interest in an entity would not, by itself, trigger a determination of significant plan participation. However, it is the Department's further view that a purchase by the general account of an additional interest in the entity subsequent to its initial investment would trigger a determination of significant plan participation. In addition, a new acquisition in the entity by any other investor subsequent to the general account's initial investment would require a new determination of significant plan participation under 29 CFR § 2510.3–101(f).[3] Lastly, the commenter requests that the Department confirm that if, for example, a general account, 10% of whose assets constitute plan assets, makes a $10,000,000 investment in an entity, $1,000,000 of that investment will be considered plan assets. The Department concurs with the example set forth by the commenter.

5. The ACLI disagreed with the Department's characterization of the Supreme Court's holding in *Harris Trust* and requested that the Department modify the preamble to reflect what the ACLI believes to be the proper interpretation of the *Harris Trust* decision. The Department notes that the description of the *Harris Trust* decision in the preamble to the proposed exemption was part of a brief background explanation of what precipitated the ACLI's determination to seek exemptive relief from the Department. It was not the Department's intent to fully address the effect of the *Harris Trust* decision on insurance companies under title I of ERISA. The ACLI's comment raises issues beyond the scope of this exemption proceeding.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section

[3] In this regard, see Advisory Opinion 89–05 (April 5, 1989) in which the Department addressed other transactions that would constitute an acquisition triggering a determination of significant plan participation.

401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interests of plans and of their participants and beneficiaries and protective of the rights of the participants and beneficiaries;

(3) The exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

Exemption

Accordingly, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B [55 FR 32836, August 10, 1990].

Section I—Basic Exemption. The restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the transactions described below if the applicable conditions set forth in section IV are met.

(a) General Exemption. Any transaction between a party in interest with respect to a plan and an insurance company general account in which the plan has an interest either as a contractholder or as the beneficial owner of a contract, or any acquisition, or holding by the general account of employer securities or employer real property, if at the time of the transaction, acquisition, or holding, the amount of reserves and liabilities for the general account contract(s) held by or on behalf of the plan, as defined by the annual statement for life insurance companies approved by the National Association of Insurance Commissioners (NAIC Annual Statement) together with the amount of the reserves and liabilities for the general account contracts held by or on behalf of any other plans maintained by the same employer (or affiliate thereof as defined in section V(a)(1)) or by the same employee organization, as defined by the NAIC Annual Statement in the general account do not exceed 10% of the total reserves and liabilities of the general account (exclusive of separate account liabilities) plus surplus as set forth in the NAIC Annual Statement filed with the state of domicile of the insurer. For purposes of determining the percentage limitation, the amount of reserves and liabilities for the general account contract(s) held by or on behalf of a plan shall be determined before reduction for credits on account of any reinsurance ceded on a coinsurance basis. Notwithstanding the foregoing, the 10% limitation is only applicable to transactions occurring on or after [insert date of publication of this exemption].

(b) Excess Holdings Exemption for Employee Benefit Plans. Any acquisition or holding of qualifying employer securities or qualifying employer real property by a plan (other than through an insurance company general account), if:

(1) The acquisition or holding contravenes the restrictions of section 406(a)(1)(E), 406(a)(2), and 407(a) of the Act solely by reason of being aggregated with employer securities or employer real property held by an insurance company general account in which the plan has an interest; and

(2) The percentage limitation of paragraph (a) of this section is met.

Section II—Specific Exemptions (a) Transactions with persons who are parties in interest to the plan solely by reason of being certain service providers or certain affiliates of service providers. The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transaction to which the above restrictions or taxes would otherwise apply solely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan as a result of providing services to an insurance company general account in which the plan has an interest either as a contractholder or as the beneficial owner of a contract (or as a result of a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), if the applicable conditions set forth in section IV are met.

(b) Transactions involving place of public accommodation. The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the furnishing of services, facilities, and any goods incidental to such services and facilities by a place of public accommodation owned by an insurance company general account to a party in interest with respect to a plan that has an interest as a contractholder or beneficial owner of a contract in the insurance company general account, if the services, facilities, and incidental goods are furnished on a comparable basis to the general public.

Section III—Specific Exemption for Operation of Asset Pool Investment Trusts. (a) The restrictions of sections 406(a), 406(b), and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code shall not apply to transactions in connection with the servicing, management, and operation of a trust in which an insurance company general account has an interest as a result of its acquisition of certificates issued by the trust, provided:

(1) The trust is described in Prohibited Transaction Exemption 83–1 (48 FR 895, January 7, 1983) or in one of the Underwriter Exemptions (as defined in section V(h) below):

(2) The conditions of either PTE 83–1 or the relevant Underwriter Exemption are met, except for the requirements that:

(A) the rights and interests evidenced by the certificates acquired by the general account are not subordinated to the rights and interests evidenced by other certificates of the same trust; and

(B) the certificates acquired by the general account have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Corporation (S&P), Moody's Investor's Service, Inc. (Moody's), Duff & Phelp's, Inc. (D&P), or Fitch Investors Service, Inc. (Fitch).

Notwithstanding the foregoing, the exemption shall apply to a transaction described in this section III if: (i) A plan acquired certificates in a transaction that was not prohibited, or otherwise satisfied the conditions of Part II or Part III of PTE 75–1 (40 FR 50845, October 31, 1975); (ii) the underlying assets of a trust include plan assets under section 2510.3–101(f) of the plan assets regulation with respect to the class of certificates acquired by the plan as a result of an insurance company general account investment in any class of certificates; and (iii) the requirements of this section III(a)(1) and (2) are met, except that the words ''acquired by the general account'' in section III(a)(2)(A) and (B) should be construed to mean ''acquired by the plan.''

(b) The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transaction to which the above restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan as a result of providing services to a plan (or as a result of a relationship to such service provider described in section 3(14)(F), (G), (H), or (I) of the Act or section 4975(e)(2)(F), (G), (H), or (I) of the Code) solely because of the plan's ownership of certificates issued by a trust that satisfies the requirements described in section III(a) above.

Section IV—General Conditions. (a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the insurance company, the terms of the transaction are at least as favorable to the insurance company general account as the terms generally available in arm's-length transactions between unrelated parties.

(b) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

(c) The party in interest is not the insurance company, any pooled separate account of the insurance company, or an affiliate of the insurance company.

Section V—Definitions. For the purpose of this exemption:

(a) An ''affiliate'' of a person means—

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

(2) Any officer, director, employee (including, in the case of an insurance company, an insurance agent thereof, whether or not the agent is a common law employee of the insurance company), or relative of, or partner in, any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term ''employer securities'' means ''employer securities'' as that term is defined in Act section 407(d)(1), and the term ''employer real property'' means ''employer real property'' as defined in Act section 407(d)(2).

(d) The term ''insurance company'' means an insurance company authorized to do business under the laws of one or more states.

(e) The term ''insurance company general account'' means all of the assets of an insurance company that are not legally segregated and allocated to separate accounts under applicable state law.

(f) The term ''party in interest'' means a person described in Act section 3(14) and includes a ''disqualified person'' as defined in Code section 4975(e)(2).

(g) The term ''relative'' means a ''relative'' as that term is defined in section 3(15) of the Act (or a ''member of the family'' as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

(h) The term ''Underwriter Exemption'' refers to the following individual Prohibited Transaction Exemptions (PTEs)—

PTE 89–88, 54 FR 42582 (October 17, 1989); PTE 89–89, 54 FR 42569 (October 17, 1989); PTE 89–90, 54 FR 42597 (October 17, 1989); PTE 90–22, 55 FR 20542 (May 17, 1990); PTE 90–23, 55 FR 20545 (May 17, 1990); PTE 90–24, 55 FR 20548 (May 17, 1990); PTE 90–28, 55 FR 21456 (May 24, 1990); PTE 90–29, 55 FR 21459 (May 24, 1990); PTE 90–30, 55 FR 21461 (May 24, 1990); PTE 90–31, 55 FR 23144 (June 6, 1990); PTE 90–32, 55 FR 23147 (June 6, 1990); PTE 90–33, 55 FR 23151 (June 6, 1990); PTE 90–36, 55 FR 25903 (June 25, 1990); PTE 90–39, 55 FR 27713 (July 5, 1990); PTE 90–59, 55 FR 36724 (September 6, 1990); PTE 90–83, 55 FR 50250 (December 5, 1990); PTE 90–84, 55 FR 50252 (December 5, 1990); PTE 90–88, 55 FR 52899 (December 24, 1990); PTE 91–14, 55 FR 48178 (February 22, 1991); PTE 91–22, 56 FR 03277 (April 18, 1991); PTE 91–23, 56 FR 15936 (April 18, 1991); PTE 91–30, 56 FR 22452 (May 15, 1991); PTE 91–39, 56 FR 33473 (July 22, 1991); PTE 91–62, 56 FR 51406 (October 11, 1991); PTE 93–6, 58 FR 07255 (February 5, 1993); PTE 93–31, 58 FR 28620 (May 5, 1993); PTE 93–32, 58 FR 28623 (May 14, 1993); PTE 94–29, 59 FR 14675 (March 29, 1994); PTE 94–64, 59 FR 42312 (August 17, 1994); PTE 94–70, 59 FR 50014 (September 30, 1994); PTE 94–73, 59 FR 51213 (October 7, 1994); PTE 94–84, 59 FR 65400 (December 19, 1994); and any other exemption providing similar relief to the extent that the Department expressly determines, as part of the proceeding to grant such exemption, to include the exemption within this definition.

(i) For purposes of this exemption, the time as of which any transaction, acquisition, or holding occurs is the date upon which the transaction is entered into, the acquisition is made, or the holding commences. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into, or acquisition made, on or after January 1, 1975, or any renewal that requires the consent of the insurance company occurs on or after January 1, 1975, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition, and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered into or renewed, or holding commencing prior to January 1, 1975, if either the requirements of this exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975, if the transaction had been entered into, the acquisition was made, or the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a transaction or holding exempt by virtue of section I(a) or section I(b) at such time as the interest of the plan in the insurance company general account exceeds the percentage interest limitation contained in section I(a), unless no portion of such excess results from an increase in the assets allocated to the insurance company general account by the plan. For this purpose, assets allocated do not include the reinvestment of general account earnings. Nothing in this paragraph shall be construed as exempting a transaction entered into by an insurance company general account that becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

VI. Effective date. The effective date of this exemption is January 1, 1975.

Signed at Washington, DC this 7th day of July, 1995.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, U.S. Department of Labor.

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