

**DEPARTMENT OF LABOR****Pension Welfare Benefits Administration**

[Application No: D-10936]

**Proposed Amendment to Prohibited Transaction Exemption 96-62 (PTE 96-62) To Permit Certain Authorized Transactions Between Plans and Parties in Interest****AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.**ACTION:** Notice of proposed amendment to PTE 96-62.

**SUMMARY:** This document contains a notice of pendency before the Department of a proposed amendment to PTE 96-62 (61 FR 39988, July 31, 1996). PTE 96-62 permits certain prospective transactions between employee benefit plans and parties in interest where such transactions are specifically authorized by the Department and are subject to terms, conditions and representations which are substantially similar to two individual exemptions granted by the Department within the 60 month period ending on the date of filing of a written submission seeking authorization for the transaction. If adopted, the proposed amendment would affect plans, participants and beneficiaries of such plans and certain persons engaging in such transactions.

**DATES:** Written comments and requests for a public hearing must be received by the Department on or before May 6, 2002.

**ADDRESSES:** All written comments and requests for a public hearing (preferably, at least three copies) should be addressed to: U.S. Department of Labor, Office of Exemption Determinations, Attention: D-10936, Pension and Welfare Benefits Administration, Room N-5649, 200 Constitution Ave., NW, Washington, DC 20210. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or fax. Any such comments should be sent either by e-mail to [padamsa@pwba.dol.gov](mailto:padamsa@pwba.dol.gov) or by fax at (202) 219-0204 by the end of the scheduled comment period. All comments received will be available for public inspection at the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Ave., NW, Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Allison Padams Lavigne, Office of Exemption Determinations, Pension and

Welfare Benefits Administration, U.S. Department of Labor, (202) 693-8540 (This is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 96-62. PTE 96-62 provides relief from a restriction described in sections 406(a) and 406(b) of the Employee Retirement Income Security Act (ERISA or the Act) or a parallel restriction described in section 8477(c)(2) of the Federal Employees' Retirement Systems Act (FERSA), and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of a parallel provision described in section 4975(c)(1)(A) through (F) of the Code. The Department is proposing this amendment to PTE 96-62, on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).<sup>1</sup>

**Background**

The rules set forth in section 406 of ERISA prohibit various transactions between employee benefit plans covered by Title I of ERISA and certain related parties, unless a statutory or administrative exemption applies to the transaction. These related parties, such as plan fiduciaries, sponsoring employers, unions and service providers are defined as parties in interest in section 3(14) of ERISA, and, in the absence of an exemption, may not engage in transactions described in section 406 of ERISA with a plan.

Specifically, section 406(a)(1) prohibits a fiduciary of a plan from causing the plan to engage in a transaction that constitutes a direct or an indirect: sale, exchange or leasing of any property between the plan and a party in interest; lending of money or other extension of credit between the plan and a party in interest; furnishing of goods, services or facilities between the plan and a party in interest; transfer to, or use by or for the benefit of a party in interest of any assets of the plan or acquisition on behalf of the plan of any employer security or real property in violation of section 407(a) of ERISA. Section 406(a)(2) provides that no fiduciary who has authority or discretion to control or manage plan assets shall permit the plan to hold any employer security or employer real

property if he knows or should know that holding such security or real property violates section 407(a) of ERISA. Section 406(b) prohibits a fiduciary, with respect to a plan, from dealing with the assets of the plan in his own interest or for his own account; acting in his individual capacity or in any other capacity in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or interests of the participants or beneficiaries; and receiving any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. In addition, such transactions that involve plans described in section 4975(e)(1) of the Code are generally subject to taxation under section 4975 of the Code. Lastly, the restrictions of section 8477(c)(2) of FERSA parallel section 406(b) of ERISA.

The Department has frequently exercised its statutory authority under section 408(a) of ERISA to grant both individual and class exemptions from the restrictions imposed by section 406 of ERISA where it has been able to find that the statutory criteria have been met.<sup>2</sup> This process has been helpful in providing exemptive relief for transactions which were prohibited, but were otherwise in the interests of the plans, participants and beneficiaries.

The Department has promulgated an exemption procedure<sup>3</sup> which provides, among other things, that an exemption will not be granted until a notice of pendency has been published in the **Federal Register**, and interested persons have been given an opportunity to comment on the proposed transaction. Following consideration of the entire record, the Department then makes its final determination whether to grant the exemption. If the Department contemplates not granting the requested exemption, the procedure also provides an applicant with the right to a conference.

Based on its experience in considering exemption applications, the Department has observed that many of the applications present routine transactions involving terms, conditions and circumstances which are substantially similar to those described

<sup>1</sup> Section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (1996)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

<sup>2</sup> Section 408(a) of ERISA provides, in part, that the Department may not grant an exemption unless a finding is made that such exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries of such plan and protective of the rights of participants and beneficiaries of such plan.

<sup>3</sup> See 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

in previously granted individual exemptions. In fact, many exemption applicants have made it a practice to consult previously granted exemption files in the preparation of their submissions. Such applicants often submit applications containing nearly identical transactions, terms and conditions to those previously granted. Since the enactment of ERISA, the Department has exempted a large number of recurring transactions, including loans, leases and sales of real property. As a result, standard terms and conditions have developed over time which assure that the transaction is protective of the plan's interest.

The Department granted PTE 96-62 in 1996, in an effort to reduce regulatory burdens associated with processing individual exemptions from the prohibited transaction provisions of ERISA. Effective July 31, 1996, PTE 96-62 provides a mechanism for expediting consideration of those routine transactions which are similar to those that have been previously considered by the Department in prior exemption proceedings, without sacrificing the interests of the plan participants and beneficiaries. Accordingly, the exemption is available to a party proposing to engage in a prohibited transaction, if the party can demonstrate to the Department that such transaction and the material terms, conditions and representations therein are substantially similar to at least two individual exemptions previously granted by the Department.

Section I of PTE 96-62 provides relief from certain of the restrictions described in section 406(a) of ERISA and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of a parallel provision described in section 4975(c)(1)(A) through (D) of the Code, for a transaction between a plan and a party in interest with respect to such plan, provided the conditions of the exemption are met. Under section II, additional relief is provided from certain of the restrictions described in section 406(b) of ERISA and the parallel restrictions described in section 8477(c)(2) of FERSA, as well as from the taxes imposed by section 4975(a) and (b) of the Code, by reason of a parallel provision described in section 4975(c)(1)(E) and (F). Sections I(a) and II(a) require that the transaction be substantially similar (as defined in section IV(a) of PTE 96-62) to transactions described in at least two individual exemptions that were granted by the Department, and which provided relief from the same restrictions as requested by the party, within the 60-month period ending on

the date of filing of the written submission.<sup>4</sup>

As a result of the program's success, the number of requests for individual exemptions relating to routine transactions has decreased. Thus, the Department is concerned that, in the near future, parties wishing to seek authorization for transactions pursuant to PTE 96-62 will not be able to find two substantially similar individual exemptions which were granted by the Department within the required 60-month time period.<sup>5</sup> Accordingly, in order to assist parties who in the future wish to utilize the exemptive relief provided by PTE 96-62, the Department is proposing to expand Sections I(a) and II(a) to permit parties to either base their submission on substantially similar transactions described in two individual exemptions granted within the past 60-months; or on one individual exemption granted within the past 120-months and one transaction which received final authorization by the Department under PTE 96-62 within the past 60-months (the Authorized Transaction). The Department believes that the alternate method for satisfying the requirements of sections I(a) and II(a) will continue to ensure that the transactions that the party compares to its proposed transaction reflect the current policies of the Department.

As of November 2001, over 160 transactions have been authorized by the Department under PTE 96-62. The Department maintains, on its website ([www.dol.gov/dol/pwba/public/programs/oed/oednew20.htm](http://www.dol.gov/dol/pwba/public/programs/oed/oednew20.htm)) a list of Authorized Transactions. This list includes the following information: the final authorization numbers, the name of the applicants, a description of the transactions, and the grant numbers and **Federal Register** citations of the exemptions on which the submissions were based. Parties wishing to base their submission on an Authorized Transaction will be able to refer to the submission previously filed by parties under PTE 96-62 and to the two granted individual exemptions identified as substantially similar for additional information regarding the subject transactions.<sup>6</sup>

<sup>4</sup> Section IV(a) defines the term "substantially similar" to mean alike in all material respects as determined by the Department, in its sole discretion.

<sup>5</sup> In this regard, transactions which are authorized pursuant to PTE 96-62 cannot be relied on by parties wishing to engage in similar transaction pursuant to PTE 96-62 because that exemption is limited to those transactions which were the subject of individual exemptions granted in accordance with the Department's exemption procedure.

<sup>6</sup> All files are available for public inspection at the Public Documents Room, Pension and Welfare

The Department notes that all other conditions contained in PTE 96-62 must continue to be satisfied with respect to those parties seeking to base their submission on an Authorized Transaction rather than on two substantially similar individual exemptions. Accordingly, these parties should submit, among other things, a comparison of the proposed transaction with the Authorized Transaction and the transaction which was the subject of the individual exemption, including an explanation as to why any differences should not be considered material.

### 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 ERISA and the Code to which the exemption does not expressly apply and the general fiduciary provisions of section 404 of ERISA. Section 404 requires, in part, that a fiduciary discharge his or her duties respecting the plan solely in the interest of participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA. This exemption, if granted does not affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

(3) This proposed amendment is supplemental to and not in derogation of any other provisions of ERISA or 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) If granted, the proposed amendment will be applicable to a transaction only if the transaction

satisfies the conditions specified in the class exemption.

### Written Comments and Requests for Hearing

All interested persons are invited to submit written comments or requests for a public hearing on the proposed amendment to the address or the fax number noted above within the time period set forth above. All comments received will be made a part of the record of this proceeding and will be available for public inspection.

### Proposed Amendment

Under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990), the Department proposes to amend PTE 96-62 as set forth below:

(1) Section I(a) is amended to read "The transaction is substantially similar (as defined in section IV(a) to transactions described in: (a) At least two individual exemptions that were granted by the Department, and provided relief from the same restriction, within the 60-month period ending on the date of filing of the written submission referred to in section III(a); or (b) one individual exemption that was granted by the Department, and provided relief from the same restriction, within the 120-month period ending on the date of filing the written submission referred to in section III(a), and at least one Authorized Transaction (as defined in section IV(g));"

(2) Section II(a) is amended to read "The transaction is substantially similar (as defined in section IV(a) to transactions described in: (a) At least two individual exemptions that were granted by the Department, and provided relief from the same restriction, within the 60-month period ending on the date of filing of the written submission referred to in section III(a); or (b) one individual exemption that was granted by the Department, and provided relief from the same restriction, within the 120-month period ending on the date of filing the written submission referred to in section III(a), and at least one Authorized Transaction (as defined in section IV(g));"

(3) Section III(a)(4) is amended to read "a comparison of the proposed transaction to at least two substantially similar transactions which were the subject of individual exemptions granted by the Department, or an individual exemption granted by the Department and an Authorized Transaction, and an explanation as to why any differences should not be

considered material for purposes of this exemption;"

(4) Section IV(b)(6) is amended to read "the Federal Register citations for the prior exemption(s) and/or the final authorization number of the Authorized Transaction (including the related Federal Register citations for the prior exemptions cited therein) identified by the party as substantially similar to the contemplated transaction."

(5) Section IV(g) is added to read: "The term Authorized Transaction means a transaction that has received final authorization pursuant to PTE 96-62 within a 60-month period ending on the date of the filing of the written submission referred to in section III(a)."

Signed at Washington, DC this 15th day of March 2002.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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### MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

**The United States Institute for Environmental Conflict Resolution; Agency Information Collection Activities; Extension of Currently Approved Information Collection; Comment Request; Application for the National Roster of Environmental Dispute Resolution and Consensus Building Professionals**

**AGENCY:** Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act and supporting regulations, this document announces that the U.S. Institute for Environmental Conflict Resolution (the Institute), part of the Morris K. Udall Foundation, is planning to submit to the Office of Management and Budget (OMB) a request for an extension for the currently approved information collection (ICR), OMB control Number 2010-0030: Application for the National Roster of Environmental Dispute Resolution and Consensus Building Professionals ("National Roster of ECR Practitioners"), currently operating pursuant to Terms of Clearance issued July 29, 1999. Before submitting the extension to OMB for review and

approval, the Institute is soliciting comments regarding the information collection (see section C. below entitled "Questions to Consider in Making Comments"). This document provides information on the continuing need for the Roster of ECR Practitioners Application and the information recorded in the application.

**DATES:** Comments must be submitted on or before May 20, 2002.

**ADDRESSES:** Direct comments and requests for information, including copies of the ICR to: Joan C. Calcagno, Roster Manager: U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 335o, Tucson, Arizona 85701. Fax: 520-670-5530. Phone: 520-670-5299. E-mail: [roster@ecr.gov](mailto:roster@ecr.gov)

**FOR FURTHER INFORMATION CONTACT:** Joan C. Calcagno, Roster Manager: U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 335o, Tucson, Arizona 85701. Fax: 520-670-5530. Phone: 520-670-5299. E-mail: [roster@ecr.gov](mailto:roster@ecr.gov)

### SUPPLEMENTARY INFORMATION:

#### A. Title for the Collection of Information

Application for National Roster of Environmental Dispute Resolution and Consensus Building Professionals ("National Roster of ECR Practitioners").

#### B. Potentially Affected Persons

You are potentially affected by this action if you are a dispute resolution or consensus building professional in the environmental or natural resources field who wishes to be listed on the National Roster of Environmental Dispute Resolution and Consensus Building Professionals.

#### C. Questions To Consider in Making Comments

The U.S. Institute for Environmental Conflict Resolution requests your comments to any of the following questions related to collecting information for the extension of the Application for the National Roster of ECR Practitioners:

(1) Is the continued use of the application ("collection of information") necessary for the proper performance of the functions of the agency, including whether the information has practical utility?

(2) Is the agency's estimate of the time spent completing the application ("burden of the proposed collection of information") accurate, including the validity of the methodology and assumptions used?