

advised that pursuant to section 3003(c) of ERISA, 29 U.S.C. section 1203(c), the Secretary of Labor is required to transmit to the Secretary of the Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will be referred to the Internal Revenue Service.]

In addition, you are cautioned that PWBA's decision to take no further action is binding on PWBA only. Any other governmental agency, and participants and beneficiaries, remain free to take whatever action they deem necessary.

If you have any questions about this letter, you may contact the Regional VFC Program Coordinator at *applicable address and telephone number*.

Appendix B.—VFC Program Checklist

Use this checklist to ensure that you are submitting a complete application. The applicant must sign and date the checklist and include it with the application. Indicate "Yes", "No" or "N/A" next to each item. A "No" answer or the failure to include a completed checklist will delay review of the application until all required items are received.

_____ 1. Have you reviewed the eligibility, definitions, transaction and correction, and documentation sections of the VFC Program?

_____ 2. Have you included the name, address and telephone number of a contact person familiar with the contents of the application?

_____ 3. Have you provided the EIN # and address of the plan sponsor and plan administrator?

_____ 4. Have you provided the date that the most recent Form 5500 was filed by the plan?

_____ 5. Have you enclosed a signed and dated certification under penalty of perjury for each applicant and the applicant's representative, if any?

_____ 6. Have you enclosed relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified?

_____ 7. Have you enclosed a statement identifying the current fidelity bond for the plan?

_____ 8. Where applicable, have you enclosed a copy of an appraiser's report?

_____ 9. Have you enclosed other documents as specified by the individual transactions and corrections?

_____ a. A detailed narrative of the Breach, including the date it occurred;

_____ b. Documentation that supports the narrative description of the transaction;

_____ c. An explanation of how the Breach was corrected, by whom and when, with supporting documentation;

_____ d. A list of all persons materially involved in the Breach and its correction (e.g., fiduciaries, service providers, borrowers, lenders);

_____ e. Documentation establishing the return on the plan's other investments during the time period the plan engaged in the transaction described in the VFC Program application;

_____ f. Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were computed; and

_____ g. Proof of payment of Principal Amount and Lost Earnings or Restoration of Profits.

_____ 10. If you are an eligible applicant and wish to avail yourself of excise tax relief under the Proposed Class Exemption, have you made proper arrangements to provide within 60 calendar days following the date of this application a copy of the Class Exemption's required notice to all interested persons and to the PWBA regional office to which the application is filed?

_____ 11. Where applicable, have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant, and for participants who need to be located, have you described how adequate funds have been segregated to pay missing participants and commenced the process of locating the missing participants using either the IRS and Social Security Administration locator services, or other comparable means?

_____ 12. Has the plan implemented measures to ensure that the transactions specified in the application do not recur? (Do not include this with the application. The Department will not opine on the adequacy of these measures.)

Signature of Applicant and Date Signed

Name of Applicant (Typed):

Title/Relationship to the Plan (Typed):

Name of Plan, EIN and Plan Number (Typed):

Appendix C.—List of PWBA Regional Offices

Atlanta Regional Office, 61 Forsyth Street, SW, Suite 7B54, Atlanta, GA 30303, telephone (404) 562-2156, fax (404) 562-2168; jurisdiction: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico.

Boston Regional Office, J.F.K. Building, Room 575, Boston, MA 02203, telephone: (617) 565-9600, fax: (617) 565-9666; jurisdiction: Connecticut, Maine, Massachusetts, New Hampshire, central and western New York, Rhode Island, Vermont.

Chicago Regional Office, 200 West Adams Street, Suite 1600, Chicago, IL 60606, telephone (312) 353-0900, fax (312) 353-1023; jurisdiction: northern Illinois, northern Indiana, Wisconsin.

Cincinnati Regional Office, 1885 Dixie Highway, Suite 210, Ft. Wright, KY 41011-2664, telephone (859) 578-4680, fax (859) 578-4688; jurisdiction: southern Indiana, Kentucky, Michigan, Ohio.

Dallas Regional Office, 525 Griffin Street, Rm. 707, Dallas, TX 75202-5025, telephone (214) 767-6831, fax (214) 767-1055; jurisdiction: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.

Kansas City Regional Office, 1100 Main Street, Suite 1200, Kansas City, MO 64105-2112, telephone (816) 426-5131, fax (816) 426-5511; jurisdiction: Colorado, southern Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming.

Los Angeles Regional Office, 790 E. Colorado Boulevard, Suite 514, Pasadena, CA 91101,

telephone (626) 583-7862, fax (626) 583-7845; jurisdiction: 10 southern counties of California, Arizona, Hawaii, American Samoa, Guam, Wake Island.

New York Regional Office, temporarily located at 201 Varick Street, New York, NY 10014, telephone (212) 337-2228, fax (212) 337-2112; jurisdiction: southeastern New York, northern New Jersey.

Philadelphia Regional Office, The Curtis Center, 170 S. Independence Mall West, Suite 870 West, Philadelphia, PA 19106-3317, telephone 215-861-5300, fax 215-861-5347; jurisdiction: Delaware, Maryland, southern New Jersey, Pennsylvania, Virginia, Washington, D.C., West Virginia.

San Francisco Regional Office, 71 Stevenson St., Suite 915, San Francisco, CA 94105, telephone (415) 975-4600, fax (415) 975-4589; jurisdiction: Alaska, 48 northern counties of California, Idaho, Nevada, Oregon, Utah, Washington.

**Please verify current telephone numbers and addresses on PWBA's website.

[FR Doc. 02-7516 Filed 3-27-02; 8:45 am]

BILLING CODE 4510-29-P

PENSION AND WELFARE BENEFITS ADMINISTRATION

[Application No. D-10933]

Proposed Class Exemption To Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of proposed class exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed class exemption from certain prohibited transaction restrictions of the Internal Revenue Code of 1986 (the Code). This exemption is being proposed in conjunction with the Department's Voluntary Fiduciary Correction (VFC) Program, the final version of which is being published simultaneously in this issue of the **Federal Register**, which allows certain persons to avoid potential civil actions under the Employee Retirement Income Security Act of 1974 (ERISA) initiated by the Department and the assessment of civil penalties under section 502(l) of ERISA in connection with investigation or civil action by the Department. If granted, the proposed exemption would affect plans, participants and beneficiaries of such plans and certain other persons engaging in such transactions.

DATES: Written comments and requests for a public hearing must be received by

the Department on or before May 13, 2002.

ADDRESSES: All written comments (at least three copies) and requests for a public hearing should be sent to: Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (attn: D-10933). Written comments may also be sent by e-mail to moffittb@pwba.dol.gov or by FAX to (202) 219-0204. Comments received from interested persons will be available for public inspection in the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Karen Lloyd, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693-8540 (not a toll free number) or Cynthia Weglicki, Plan Benefits Security Division, Office of the Solicitor, (202) 693-5600 (not a toll free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed class exemption from 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. The Department is proposing the class exemption on its own motion pursuant to 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).¹

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the 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 was determined that this action is "significant" under Section 3(f)(4) of the Executive Order. Accordingly, this action has been reviewed by OMB.

Paperwork Reduction Act

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

Currently, the Pension and Welfare Benefits Administration (PWBA) is soliciting comments concerning the information collection request (ICR) included in the proposed Class Exemption to Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program. The information collection provisions of the proposed Class Exemption would revise the currently approved collection of information included in PWBA's Voluntary Fiduciary Correction Program, which is published simultaneously in the **Federal Register**. A copy of the ICR may be obtained by contacting the Pension and Welfare Benefits Administration office listed below.

Comments pertaining to the ICR should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through May 28, 2002, OMB requests that comments be received within 30 days of publication of the Notice of

Proposed Class Exemption to ensure their consideration.

Address requests for copies of the ICR to Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW., Room N-5647, Washington, DC 20210. Telephone (202) 693-8410; fax: (202) 219-4745. These are not toll-free numbers.

The Department has submitted a copy of the proposed revision of the information collection request to OMB in accordance with 44 U.S.C. 3507(d) for review and clearance. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

On March 15, 2000, the Department of Labor published a Notice in the **Federal Register** (65 FR 14164), announcing the adoption of a Voluntary Fiduciary Correction Program (VFC Program). The purpose of the VFC Program is to encourage plan fiduciaries to make full correction of certain eligible transactions without fear of civil investigation or litigation. The VFC Program, upon proper application, correction, and receipt of a "no action" letter from the Department, provided relief to Plan Officials from civil penalties under section 502(l) of ERISA for breaches of fiduciary responsibility. The Notice requested comments from the public on all aspects of the Program. Responses indicate that the Program was generally well received by the public. Several commenters, however, while acknowledging the importance of Program relief from section 502(l) of ERISA, also requested additional relief from the tax on prohibited transactions under section 4975 of the Code. Section 4975(a) of the Code imposes a tax on each prohibited transaction at a rate of

¹ Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, 5 U.S.C. App. 1 [1995]) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975 of the Code to the Secretary of Labor.

15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The commenters suggested that providing excise tax relief would benefit employee benefit plans, participants, and beneficiaries by further encouraging Plan Officials to protect plan assets through correction of eligible transactions under the VFC Program. Moreover, the lack of protection from the sanctions of section 4975 of the Code was considered a disincentive to participation in the VFC Program. Because the goal of the Department in establishing the VFC Program was to encourage correction of fiduciary breaches and restoration of losses to participants and beneficiaries, the Department concluded that it would be appropriate to provide limited relief in the form of a Prohibited Transaction Class Exemption from the sanctions of section 4975 of the Code. This proposed exemption describes four prohibited transactions from among those transactions eligible for correction under the VFC Program as transactions suitable for relief from the tax obligations of sections 4975(a) and (b) of the Code. Plan Officials intending to take advantage of the exemption must comply with the requirements of the VFC Program. In addition, in order to appropriately protect the interests of participants and beneficiaries, the Department has elected to require Plan Officials intending to take advantage of the exemption to notify interested persons such as participants and beneficiaries of the plan. Plan Officials also will be required to send a copy of the notice to the appropriate Regional Office of the Pension and Welfare Benefits Administration. The notice must include an objective description of the transaction and the steps taken to correct it. Because section 4975(c)(2) of the Code requires an exemption to be in the interests of a plan as well as protective of its participants and beneficiaries before it can be granted, interested persons must be given adequate notice of the pending exemption and an opportunity to comment. Comments from participants and beneficiaries will contribute to the Department's understanding of the facts as described in the VFC Program application. Interested persons and the Department must receive the notice within 60 days following the date of submission of an application under the VFC Program. Beginning on the date of distribution of the notice, recipients will have 30 calendar days to provide comments to a Regional Office; the notice must include the address and

telephone number of such Regional Office. Notification may be given in any manner that is reasonably calculated to result in the receipt of such notice by interested persons, including but not limited to posting, regular mail, or electronic mail. The use of the exemption is not required for participation in the Program. The relief provided by the class exemption is not available without participation in the VFC Program, and, as such, the exemption's notice requirement is treated as a revision of the existing VFC Program ICR.

The VFC Program describes certain transactions that are breaches of fiduciary duty under Part 4 of Title I of ERISA and that may be corrected under the Program. Because the VFC Program is new, there is as yet insufficient data on the type or the number of eligible transactions that will be corrected under the Program to support a revision of the original estimates of participation. Based on the Department's experience with the Pension Payback Program, which dealt only with employee contributions and realized corrections by 0.1 per cent of all eligible plans, and allowing for the inclusion of additional transactions for correction under the VFC Program, the Department estimates that there will be 700 applicants to the VFC Program. All Plan Officials that apply to the VFC Program will not necessarily take advantage of the excise tax relief provided under this exemption, either by choice or because the corrected transaction is not an eligible transaction to which this exemption applies. For the purpose of computing the hour and cost burdens under the PRA, therefore, the Department has assumed that one half of all Plan Officials that choose to take advantage of the opportunity to correct a breach under the VFC Program, or 350 Plan Officials, will also choose to avail themselves of the opportunity for excise tax relief.

Because the information to be provided to interested persons in the notice is readily available in the documentation previously submitted as part of the application to the VFC Program, it is likely that a Plan Official that used the services of a professional to apply to the VFC Program will use the same professional to prepare the notice under the exemption. The Department estimates that it will take approximately one hour of a professional's time, or 350 total hours, to produce the notice to interested persons. At \$70 an hour for a professional's time, the cost to Plan Officials is \$24,500.

Plan officials must distribute the notice in a manner that is reasonably calculated to result in the receipt of such notice by interested persons. Notices are commonly distributed in one of three ways—posting, electronic mail, or regular mail. The Department assumes that only 10% of the applicants availing themselves of the exemption, or 35 Plan Officials, will choose to distribute the notice by regular mail. Based on an estimate of 88,000 participants in plans affected by the VFC Program, 44,000 of which will be in plans assumed to make use of the exemption, 4,400 participants and beneficiaries will receive a notice by regular mail. The cost of mailing 4,400 notices, at \$.34 per mailing, results in an additional cost of \$1,496. Because of the cost savings, most applicants will likely choose to use either posting or electronic mail as a means of distribution. Applying these methods of distribution, the time required to transfer the notice electronically or to post it in an appropriate place is minimal; the Department has therefore not accounted for a cost burden for notification under either of these choices. Distributing the notice by posting or electronic mail would therefore represent a cost savings of \$13,500. The total cost of preparing and distributing the notice under the exemption is \$25,996 (\$24,500 for a service provider's time and \$1,496 for distribution by regular mail).

Preparation of the mailing is likely to be done in-house by clerical staff. For 4,400 interested persons, 1½ minutes of a clerical worker's time per interested person results in a total hour burden of 110 hours.

Type of Review: Revision of a currently approved collection of information.

Agency: Pension and Welfare Benefits Administration, Department of Labor.

Title: Voluntary Fiduciary Correction Program.

OMB Number: 1210-0118.

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

Respondents: 700.

Frequency of Response: On occasion.

Responses: 700.

Estimated Total Burden Hours: 5,600 for existing ICR; 110 for proposed exemption; total of 5,710 hours.

Total Burden Cost (Operating and Maintenance): \$246,400 for existing ICR; \$25,996 for proposed exemption; total of \$272,396.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection

request; they will also become a matter of public record.

Economic Analysis

Establishing a class exemption to be used in conjunction with the Voluntary Fiduciary Correction Program (VFC Program) will have positive economic effects for employee benefit plans by promoting increased participation in the VFC Program. The purpose of the VFC Program is to encourage the correction of breaches of fiduciary duty under ERISA, resulting in the restoration of plan assets to the benefit of participants and beneficiaries. Under the VFC Program, fiduciaries are relieved of the possibility of civil action and the assessment of civil penalties under Section 502(l) of ERISA. The proposed exemption would enhance the benefits of participation in the VFC Program by granting relief from excise taxes under Section 4975 of the Internal Revenue Code for breaches of duty that are prohibited transactions.

Although plans have benefitted from the Interim VFC Program, we believe that fewer plans have taken advantage of the Interim VFC Program than might have with the inclusion of the proposed exemption. Comments received in response to the publication of the Interim VFC Program support this conclusion. Commenters indicate that, because participation in the VFC Program is voluntary, the lack of Section 4975 tax relief has been a disincentive to participation. This is borne out by information from the earlier Pension Payback Program (61 FR 9203, March 7, 1996) that experienced a .1% rate of participation among pension plans. (The Pension Payback Program was limited to the correction of delinquent participant contributions only.) A significant difference between the Interim VFC Program and the Pension Payback Program is the inclusion of excise tax relief under the latter. Allowing for the inclusion of three more categories of transactions for correction than were included in the Pension Payback Program, it is expected that participation in the VFC Program will increase because of the proposed exemption.

The benefits to plans outweigh any additional cost created by the proposed exemption. Department projections indicate that an average of \$114,000 per plan, or approximately \$80 million for all plans expected to participate in the VFC Program, will be restored to employee benefit plans. The Department estimates that 350 plans, or one half the number of anticipated participants in the VFC Program, will apply as a result of the relief offered by the proposed

exemption. Approximately \$40 million in assets will therefore be restored to plans as a result of the proposed exemption. The assets are then available for distribution to participants and beneficiaries or for additional investment opportunities. (The costs and benefits of the VFC Program have been described in more detail in the preamble for the Adoption of the VFC Program.) The economic benefit of the proposed exemption, in addition to the tax relief permitted fiduciaries, is therefore realized through increased participation in the VFC Program.

Fiduciaries that participate in the VFC Program will experience savings in civil penalties under section 502(l) of ERISA. For the 350 plans that participate in the VFC Program as a result of the proposed exemption, the elimination of 502(l) penalties for fiduciaries accounts for \$2.7 million. The civil penalty savings are in addition to excise tax savings under section 4975 of the Internal Revenue Code that fiduciaries may realize after satisfying certain conditions of the proposed exemption.

The cost for the proposed exemption is minimal—the result of notifying interested persons and the Department that a fiduciary intends to take advantage of the exemption, or approximately \$70–\$130 per plan (\$24,500–\$45,500 for 350 plans), depending on the method of notification selected.

In consideration of the comments received and the Department's experience with the Pension Payback Program, the Department believes that the proposed exemption will have a positive effect on applications to the VFC Program resulting in an economic benefit to plans and fiduciaries that exceeds the cost of the exemption.

Background

Title I of ERISA establishes certain standards of conduct for fiduciaries of employee benefit plans covered by ERISA, including provisions prohibiting fiduciaries from causing a plan to engage in certain classes of transactions with persons defined as parties in interest. In addition, prohibited transactions that involve plans described in section 4975(e)(1) of the Code are generally subject to taxation under section 4975 of the Code.

Section 409 of ERISA provides that a fiduciary who breaches any of the fiduciary responsibility provisions of Part 4 of Title I of ERISA shall be personally liable to the plan for any losses. Section 502(a)(2) and (a)(5) of ERISA authorizes the Secretary of Labor (the Secretary) to bring civil actions to enforce the provisions of Title I of

ERISA. Section 502(l) of ERISA requires the assessment of a civil penalty in an amount equal to 20% of the amount recovered under any settlement agreement with the Secretary or ordered by a court in an action initiated by the Secretary with respect to any breach of fiduciary responsibility under (or other violation of) Part 4 by a fiduciary.

Based on its experience with the Pension Payback Program (61 FR 9203, March 7, 1996) (Pension Payback Program) and continued interest in such programs, PWBA decided to establish the VFC Program. Under the VFC Program, persons who are potentially liable for a breach can avoid the possibility of civil investigation and/or civil actions initiated by the Department for that breach and the imposition of civil penalties under section 502(l) of ERISA, if they satisfy the conditions for correcting the breach, as described in the VFC Program. The Department believes that the VFC Program will encourage the full correction of certain breaches of fiduciary responsibility and the restoration to participants and beneficiaries of losses resulting from those breaches. In connection with the publication of the VFC Program, the Department sought comments from the public on all aspects of the Program. The VFC Program, as modified in response to the comments received, is being published simultaneously in this issue of the **Federal Register**.

A number of those who commented on the VFC Program requested that the Department amend the VFC Program to provide relief from the excise taxes imposed under section 4975 of the Code for prohibited transactions. The commenters noted that the Department granted similar relief from the taxes imposed by section 4975 of the Code as part of the Pension Payback Program. According to the commenters, the absence of relief from the excise taxes, as well as the possibility of referral by the Secretary to the Internal Revenue Service as mandated by section 3003 of ERISA, create a significant disincentive for Plan Officials to participate in the VFC Program.

Upon consideration of the comments received in connection with the VFC Program, the Department has determined that it would be appropriate to propose limited exemptive relief in this area without impairing the interests of plan participants and beneficiaries. Accordingly, the class exemption, as proposed, would provide relief from the excise taxes imposed by section 4975 of the Code for certain eligible transactions identified in the VFC Program. The Internal Revenue Service has advised the Department that it will not seek to

impose the sanctions of section 4975(a) and (b) of the Internal Revenue Code with respect to any prohibited transaction that is covered by the proposed class exemption, notwithstanding any subsequent changes to the proposed class exemption when it is finalized, provided that all of the requirements specified in the proposed class exemption have been met.

Description of the Proposed Exemption

1. Scope

The proposed exemption would provide relief from the sanctions imposed under section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for certain eligible transactions identified in the VFC Program. The proposed exemption does not provide relief for any transactions identified in the VFC Program that are not specifically described as eligible transactions under Section I of the proposal. The Department believes that it is appropriate to limit relief to those transactions for which the requisite findings under section 4975(c)(2) of the Code can be made. The Department is proposing prohibited transaction relief from the excise taxes under section 4975 of the Code in order to encourage plan fiduciaries to make full correction of certain eligible transactions which are violations of the prohibited transaction provisions of the Code.

The four eligible transactions described in the proposed exemption are as follows:

(A) The failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulations at 29 CFR section 2510.3-102.

(B) The making of a loan by a plan at a fair market interest rate to a party in interest with respect to the plan.

(C) The purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value.

(D) The sale of real property to a plan by the employer and the leaseback of such property to the employer, at fair market value and fair market rental value, respectively.

The eligible transactions may be illustrated by the following examples:

Example (1): Corporation A sponsors a pension plan for its employees. Corporation A borrowed \$100,000 from the plan. The loan was made at an interest rate no less than that available for a loan with similar terms (for example, the amount of the loan, amount and type of security, repayment schedule, and duration of loan) obtainable in an arm's-length transaction between unrelated parties.

Example (2): Corporation B sponsors a pension plan for its employees. The plan sold a parcel of real property to Corporation B. The price Corporation B paid to the plan was the fair market value of the property, as determined by a qualified independent appraiser as of the date of the transaction and reflected in a qualified appraisal report. (If there is a generally recognized market for the property, such as the New York Stock Exchange, the fair market value of the property is the value objectively determined by reference to the price on such market on the date of the transaction, and a determination by a qualified independent appraiser is not required.)

Example (3): Corporation C sponsors a pension plan for its employees. Corporation C sold a parcel of real property to the plan which was simultaneously leased back to Corporation C. The price paid by the plan for the property was its fair market value, and the rent paid by Corporation C to the plan is the fair market rental value, as determined by a qualified independent appraiser and reflected in a qualified appraisal report. The terms of the lease (for example, rent, duration and allocation of expenses) are not less favorable to the plan than those obtained in an arm's-length transaction between unrelated parties.

2. Proposed General Conditions

Section II of the proposal contains general conditions, as discussed below, which the Department views as necessary to ensure that any transaction covered by the proposed exemption would be in the interests of plan participants and beneficiaries, and to support a finding that the proposed exemption meets the statutory requirements of section 4975(c)(2) of the Code.

With respect to a transaction involving delinquent transmittal of participant contributions to a pension plan, the proposal requires that the contributions be transmitted to the pension plan not more than 180 calendar days from the date the amounts were received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date the amount otherwise would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

Second, the proposal requires that, with respect to the transactions described in Section I.B., I.C. and I.D., the amount of plan assets involved in the transaction did not exceed 10 percent of the fair market value of all the assets of the plan at the time of the transaction. For purposes of this requirement, the 10 percent limitation would apply after aggregating the value of a series of related transactions.

Third, under the proposed exemption, the fair market value of any plan asset involved in a transaction described in

Sections I.C. or I.D. must have been determined in accordance with section 5 of the VFC Program. Section 5 of the VFC Program requires that the valuation must meet the following conditions: (1) If there is a generally recognized market for the property (e.g., the New York Stock Exchange), the fair market value of the asset is the average value of the asset on such market on the applicable date, unless the plan document specifies another objectively determined value (e.g., the closing price); and (2) if there is no generally recognized market for the asset, the fair market value of that asset must be determined in accordance with generally accepted appraisal standards by a qualified independent appraiser and reflected in a written appraisal report signed by the appraiser. For purposes of these requirements under the VFC Program, an appraiser is considered qualified if the appraiser has met the education, experience and licensing requirements that are generally recognized for appraisal of the type of asset being appraised. An appraiser is "independent" if the appraiser is not one of the following, does not own or control any of the following, and is not owned or controlled by, or affiliated with, any of the following: (i) The prior owner of the asset, if the asset was purchased by the plan; (ii) the purchaser of the asset, if the asset was or is now being sold by the plan; (iii) any other owner of the asset, if the plan is not the sole owner; (iv) a fiduciary of the plan; (v) a party in interest with respect to the plan (except to the extent the appraiser becomes a party in interest when retained to perform this appraisal for the plan); or (vi) the VFC Program applicant.

Fourth, under the proposed exemption, the terms of a transaction described in Sections I.B., I.C., or I.D., must have been at least as favorable to the plan as the terms generally available in arm's-length transactions between unrelated parties.

Fifth, with respect to all of the eligible transactions, the transaction may not have been part of an agreement, arrangement or understanding designed to benefit a party in interest. The Department notes that the intent of this condition is not to deny a direct benefit to the party in interest but, rather, to exclude relief for transactions that are part of a broader overall agreement, arrangement or understanding designed to benefit parties in interest.

Sixth, with respect to all of the eligible transactions, the applicant may not have taken advantage of the relief provided by the VFC Program and the proposed exemption for a similar type of transaction identified in the

application during the three-year period prior to the submission of the application.

3. Compliance With VFC Program

In addition to compliance with the general conditions set forth above, Section III of the proposed exemption requires that the applicant meet the requirements set forth in the VFC Program that are applicable to the particular transaction. The proposal also requires that the applicant must have received a no action letter issued by PWBA with respect to such transaction, which must be an eligible transaction otherwise described in Section I of the proposed exemption. However, the fact that an applicant receives a no action letter issued by PWBA should not be viewed as a determination by PWBA that the applicant has satisfied all of the conditions of the proposed exemption. Each applicant must determine whether the pertinent conditions of the proposed exemption have been met.

4. Notice

Although the Department determined to eliminate the required notice from the final VFC Program (published simultaneously in this issue of the **Federal Register**), it believes that such a requirement is appropriate for those wishing to take advantage of the exemption in light of the additional relief provided. Consistent with the notice requirement of section 4975(c)(2) of the Code, the purpose of the notice requirement of this exemption is to afford interested persons the opportunity to provide the Department with relevant information concerning the transaction.

Notice under the proposed exemption must be given to interested persons within 60 calendar days following the date of the submission of an application under the VFC Program to the Department. Plan assets may not be used to pay for the notice. The exemption does not specify the format or specific content of the notice. However, the notice must include an objective description of the transaction and the steps taken to correct it, written in a manner reasonably calculated to be understood by the average Plan participant or beneficiary. The notice also must provide for a period of 30 calendar days, beginning on the date the notice is distributed, for interested persons to provide comments to the appropriate Regional Office of the United States Department of Labor, Pension and Welfare Benefits Administration. The notice must include the address and telephone number of such Regional Office.

A copy of the notice to interested persons, along with an indication of the date on which it was distributed, must be provided to the appropriate Regional Office within the same 60-day period following the date of the submission of the application. Accordingly, applicants under the VFC Program who intend to take advantage of the relief provided under this exemption would indicate on the checklist submitted as part of the VFC Program application that they will, within 60 calendar days following the date of the submission of the application, provide the Department's Regional Office with a copy of the notice to interested persons.

Notice may be given in any manner that is reasonably calculated, taking into consideration the particular circumstances of the plan, to result in the receipt of such notice by interested persons, including but not limited to posting, regular mail, or electronic mail, or any combination thereof.

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 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply, the requirement that all assets of an employee benefit plan be held in trust by one or more trustees, 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.

(2) The proposed exemption, if granted, will not extend to transactions prohibited under section 4975(c)(1)(F) of the Code.

(3) Before this exemption may be granted under section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plans.

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of other provisions of ERISA and the Code, including statutory

or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(5) If granted, the proposed class exemption will be applicable to a transaction only if the conditions specified in the class exemption are satisfied.

Written Comments and Hearing Requests

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

Proposed Exemption

The Department has under consideration the grant of the following class exemption, under the authority of 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).

Section I: Eligible Transactions

The sanctions resulting from the application of 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 following eligible transactions described in section 7 of the Voluntary Fiduciary Correction (VFC) Program, published simultaneously in this issue of the **Federal Register**, provided that the applicable conditions set forth in Sections II, III and IV are met:

A. Failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulation at 29 CFR section 2510.3-102. (*See* VFC Program, section 7.A.1.).

B. Loan at a fair market interest rate to a party in interest with respect to a plan. (*See* VFC Program, section 7.B.1.).

C. Purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value. (*See* VFC Program, sections 7.C.1. and 7.C.2.).

D. Sale of real property to a plan by the employer and the leaseback of the property to the employer, at fair market value and fair market rental value, respectively. (*See* VFC Program, section 7.C.3.).

Section II: Conditions

A. With respect to a transaction involving participant contributions to pension plans described in Section I.A., the contributions were transmitted to the pension plan not more than 180 calendar days from the date the amounts were received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date the amounts otherwise would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

B. With respect to the transactions described in Sections I.B., I.C., or I.D., the plan assets involved in the transaction, or series of related transactions, did not, in the aggregate, exceed 10 percent of the fair market value of all the assets of the plan at the time of the transaction.

C. The fair market value of any plan asset involved in a transaction described in Sections I.C. or I.D. was determined in accordance with section 5 of the VFC Program.

D. The terms of a transaction described in Sections I.B., I.C., or I.D. were at least as favorable to the plan as the terms generally available in arm's-length transactions between unrelated parties.

E. With respect to any transaction described in Section I, the transaction was not part of an agreement,

arrangement or understanding designed to benefit a party in interest.

F. With respect to any transaction described in Section I, the applicant has not taken advantage of the relief provided by the VFC Program and this exemption for a similar type of transaction(s) identified in the current application during the period which is 3 years prior to submission of the current application.

Section III: Compliance with VFC Program

A. The applicant has met all of the applicable requirements of the VFC Program.

B. PWBA has issued a no action letter to the applicant pursuant to the VFC Program with respect to a transaction described in Section I.

Section IV: Notice

A. Written notice of the transaction(s) for which the applicant is seeking relief pursuant to the VFC Program and this exemption, and the method of correcting the transaction, was provided to interested persons within 60 calendar days following the date of the submission of an application under the VFC Program. A copy of the notice was provided to the appropriate Regional Office of the United States Department of Labor, Pension and Welfare Benefits Administration within the same 60-day period, and the applicant indicated the

date upon which notice was distributed to interested persons. Plan assets were not used to pay for the notice. The notice included an objective description of the transaction and the steps taken to correct it, written in a manner reasonably calculated to be understood by the average Plan participant or beneficiary. The notice provided for a period of 30 calendar days, beginning on the date the notice was distributed, for interested persons to provide comments to the appropriate Regional Office. The notice included the address and telephone number of such Regional Office.

B. Notice was given in a manner that was reasonably calculated, taking into consideration the particular circumstances of the plan, to result in the receipt of such notice by interested persons, including but not limited to posting, regular mail, or electronic mail, or any combination thereof. The notice informed interested persons of the applicant's participation in the VFC Program and intention of availing itself of relief under the exemption.

Signed at Washington, DC, this 25th day of March, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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