

DEPARTMENT OF LABOR**Employee Benefits Security Administration**

[Application Number D-11046]

Proposed Amendment to Prohibited Transaction Exemption 80-26 (PTE 80-26) For Certain Interest Free Loans to Employee Benefit Plans

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

ACTION: Notice of Proposed Amendment to PTE 80-26.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 80-26. PTE 80-26 is a class exemption that permits parties in interest with respect to employee benefit plans to make certain interest free loans to such plans, provided the conditions of the exemption are met. The proposed amendment, if adopted, would affect all employee benefit plans, the participants and beneficiaries of such plans, and parties in interest with respect to those plans engaging in the described transactions.

DATES: If adopted, the proposed amendment would be effective as of the date the granted amendment is published in the **Federal Register**. Written comments and requests for a public hearing should be received by the Department on or before January 31, 2005.

ADDRESSES: All written comments and requests for a public hearing (preferably three copies) should be addressed to the U.S. Department of Labor, Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, (attention: PTE 80-26 Amendment). Interested persons are also invited to submit comments and/or hearing requests to the Employee Benefits Security Administration via e-mail to moffitt.betty@dol.gov or by fax to (202)219-0204 by the end of the comment period.

FOR FURTHER INFORMATION CONTACT: Christopher Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8554 (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 80-26 (45 FR 28545, April 29, 1980, as amended at 65 FR 17540, April 3, 2000; and 67 FR 9485, March 1,

2002).¹ PTE 80-26 provides an exemption from the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(B) and (D) of the Code.

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

A. General Background

The prohibited transaction provisions of the Act generally prohibit transactions between a plan and a party in interest (including a fiduciary) with respect to such plan. Specifically, section 406(a)(1)(B) and (D) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect-

(B) lending of money or other extension of credit between the plan and a party in interest; or

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Accordingly, unless a statutory or administrative exemption is applicable, loans, including interest free loans, to a plan from a party in interest and the repayment of such loans are prohibited.

In addition, section 406(b)(2) of the Act provides that a fiduciary with respect to a plan shall not, in his individual or any other capacity act in a transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

B. Description of Existing Relief

Section I of PTE 80-26 permits the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, and the repayment of such loan or other extension of credit in accordance with its terms or other written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for

payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only—

(1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) For a period of no more than three days, for a purpose incidental to the ordinary operation of the plan;

(c) The loan or extension of credit is unsecured; and

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan.

On April 3, 2000, PTE 80-26 was amended to permit, from November 1, 1999 through December 31, 2000, the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, and the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, provided that, among other requirements, the proceeds of the loan or extension of credit are used only for a purpose incidental to the ordinary operation of the plan which arises in connection with the inability of the plan to liquidate, or otherwise access its assets or access data, as a result of a "Y2K problem." This amendment also added a new section to the class exemption that provided a definition of the term "Y2K problem."

On March 1, 2002, PTE 80-26 was amended to permit, from September 11, 2001 through January 9, 2002, the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, and the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, provided that, among another requirements, the proceeds of the loan or extension of credit were used only for a purpose incidental to the ordinary operation of the plan which arose in connection with difficulties encountered by the plan in liquidating, or otherwise accessing its assets, or accessing its data in a timely manner as a direct or indirect result of the September 11, 2001 disruption. This amendment also added a definition of the term "September 11, 2001 disruption" to the class exemption.

C. Discussion of the Proposed Exemption

The Department, on its own motion, proposes to amend PTE 80-26 by removing the three-day limitation that is

¹ A minor correction was made to the title of the final exemption in a notice published in the **Federal Register** on May 23, 1980, (45 FR 35040).

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

imposed on the lending of money or other extension of credit for purposes incidental to the ordinary operation of the plan. In this regard, the Department recognizes that a plan may benefit if permitted to enter into an interest-free loan with a party in interest or disqualified person for a purpose incidental to the ordinary operation of the plan in instances where the duration of the loan exceeds three days. Specifically, the Department believes that the conditions currently contained in the class exemption are sufficient to ensure that such loans would pose little, if any, risk of abuse or loss to the plan and its participants and beneficiaries. Accordingly, the Department believes that, with respect to an interest-free loan having a duration of more than three days that is entered into under the class exemption for a purpose incidental to the ordinary operation of a plan, the plan would be adequately protected to the extent that, among other things: no interest or other fee is charged to the plan; no discount for payment in cash is relinquished by the plan; and each loan or extension of credit is unsecured. Consistent with the Department's view that loans described in section 408(b)(3) of ERISA and/or section 4975(d)(3) of the Code are not within the scope of PTE 80-26, such loans are expressly excluded from the relief described herein.

This proposed amendment incorporates the clarification described in PTE 2002-13 (67 FR 9483 (Mar. 1, 2002)). In this regard, the proposed exemption specifically defines the terms "employee benefit plan" and "plan" as an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code.

The Department notes that ERISA's general standards of fiduciary conduct apply to the decision of an independent fiduciary to enter into an interest free loan and any related transactions. Section 404 requires a fiduciary, among other things, to discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, the plan fiduciary must act prudently with respect to the decision to enter into the loan and any related transactions. In this regard, the proposed removal of the three-day limitation from PTE 80-26 should not be viewed as an approval by the Department of any transactions that may give rise to the need for a loan or other extension of credit. The Department is not providing any relief under this proposal for any violation of ERISA which may arise in connection with a

transaction involving an interest free loan, notwithstanding that such loan otherwise complies with the conditions of this proposed exemption.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary, or other party in interest or disqualified person with respect to a plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

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

Written Comments and Hearing Request

The Department invites all interested persons to submit written comments or requests for a public hearing on the proposed amendment to the address and within the time period set forth above. All comments received will be made a

part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection at the above address.

Proposed Amendment

Under section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, Subpart B (55 FR 32836, 32847, August 10, 1990), the Department proposes to amend PTE 80-26 as set forth below:

Section I. Retroactive General Exemption

If this proposed class exemption is granted, effective January 1, 1975 until the date of publication of the final exemption in the **Federal Register**, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only—

(1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) for a period of no more than three business days, for a purpose incidental to the ordinary operation of the plan;

(c) The loan or extension of credit is unsecured; and

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan.

Section II: Temporary Exemption

Effective November 1, 1999 through December 31, 2000, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the

repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only for a purpose incidental to the ordinary operation of the plan which arises in connection with the plan's inability to liquidate, or otherwise access its assets or access data as a result of a Y2K problem.

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan; and

(e) The loan or extension of credit begins on or after November 1, 1999 and is repaid or terminated no later than December 31, 2000.

Section III. September 11, 2001 Market Disruption Exemption

Effective September 11, 2001 through January 9, 2002, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only for a purpose incidental to the ordinary operation of the plan which arises in connection with difficulties encountered by the plan in liquidating, or otherwise accessing its assets, or accessing its data in a timely manner as a direct or indirect result of the September 11, 2001 disruption;

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan; and

(e) The loan or extension of credit begins on or after September 11, 2001, and is repaid or terminated no later than January 9, 2002.

Section IV. Prospective General Exemption

If this proposed class exemption is granted, effective as of the date following the date of publication of the final exemption in the **Federal Register**, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only—

(1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) for a purpose incidental to the ordinary operation of the plan;

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan; and

(3) The loan is not described in section 408(b)(3) of ERISA or section 4975(d)(3) of the Code.

Section V: Definitions

(a) For purposes of section II, a "Y2K problem" is a disruption of computer operations resulting from a computer system's inability to process data because such system recognizes years only by the last two digits, causing a "00" entry to be read as the year "1900" rather than the year "2000."

(b) For purposes of section III, the "September 11, 2001 disruption" is the disruption to the United States financial and securities markets and/or the operation of persons providing administrative services to employee benefit plans, resulting from the acts of terrorism that occurred on September 11, 2001.

(c) For purposes of this exemption, the terms "employee benefit plan" and "plan" refer to an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code.

Signed at Washington, DC, this 10th day of December, 2004.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Employee Benefits Security Administration U.S. Department of Labor.

[FR Doc. 04-27451 Filed 12-14-04; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission

DATE: Week of December 13, 2004.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

ADDITIONAL MATTERS TO BE CONSIDERED:

Week of December 13, 2004

Tuesday, December 14, 2004

12:55 p.m. Affirmation Session (Public Meeting) (Tentative)

A. Hydro Resources, Inc. Petition for Review of LBP-04-23 (Final Environmental Impact Statement Supplementation) (Tentative)

b. State of Alaska Department of Transportation and Public Facilities (Confirmatory Order Modifying License); Intervenor's Motion for Reconsideration of CLI-04-26 (Tentative)

c. Final Amendments to 10 CFR Part 50, Appendix E, Relating to (1) Nuclear Regulatory Commission Review of Changes to Emergency Action Levels, Paragraph IV.B and (2) Exercise Requirements for Co-Located Licensees, Paragraph IV.F.2 (Tentative)

1 p.m. Briefing on Emergency Preparedness Program Initiatives (Public Meeting) (Contact: Nader Mamish, 301-415-1086)

This meeting will be webcast live at the Web address—<http://www.nrc.gov>.

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415-1292. Contact person for more information: Dave Gamberoni, (301) 415-1651.

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The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/what-we-do/policy-making/schedule.html>.

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