

the conditions of this exemption have been met, except that:

(1) If such party in interest or disqualified person is not a fiduciary with respect to any assets of the plan, such party in interest or disqualified person shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (d) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(d) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (c) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan. For purposes of this exemption, the terms "party in interest" and "disqualified person" shall include such party in interest or disqualified person and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

Signed at Washington DC, this 30th day of January, 2006.

**Ivan L. Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Exemption Application D-11069]

#### Amendment to Prohibited Transaction Exemption 84-24 (PTE 84-24) For Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters

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

**ACTION:** Adoption of Amendment to PTE 84-24.

**SUMMARY:** This document amends PTE 84-24, a class exemption that provides relief for certain transactions relating to the purchase, with plan assets, of investment company securities or insurance or annuity contracts, and the payment of associated sales commissions to insurance agents or brokers, pension consultants, or investment company principal underwriters that are parties in interest with respect to such plan. The amendment extends relief to purchase transactions involving insurance agents and brokers, pension consultants, and investment company principal underwriters whose affiliates exercise investment discretion over plan assets that are not involved in the transaction.

**DATES:** The amendment is effective February 3, 2006.

**FOR FURTHER INFORMATION CONTACT:** Christopher Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8540 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** On September 14, 2004, notice was published in the **Federal Register** (69 FR 55463) of the pendency before the Department of a proposed amendment to PTE 84-24 (49 FR 13208 (April 3, 1984) as corrected at 49 FR 24819 (June 15, 1984)). PTE 84-24 provides an exemption from the restrictions of section 406(a)(1)(A) through (D) and section 406(b) 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 Code, by reason of section 4975(c)(1)(A) through (F) of the Code.<sup>1</sup>

<sup>1</sup> References to section 406 of ERISA as they appear throughout this amendment should be read to refer as well to the corresponding provisions of section 4975 of the Internal Revenue Code of 1986, as amended (the Code).

The amendment to PTE 84-24 was proposed by the Department 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).<sup>2</sup> The notice of pendency gave interested persons an opportunity to comment or to request a hearing on the proposed amendment. The Department received one comment on the proposed amendment. That comment, from the Investment Company Institute, supported the amendment as proposed. The Department did not receive a request for a public hearing.

For the sake of convenience, the entire text of PTE 84-24, as amended, has been reprinted in this notice.

#### 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.

This amendment has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this amendment is not a "significant regulatory action" under Executive Order 12866, section 3(f). Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

<sup>2</sup> Section 102 of the Reorganization Plan No. 4 of 1978 (5 U.S.C. App. at 214, 2000 ed.) 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.

### Paperwork Reduction Act

This amendment does not contain any "collection of information" as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) and therefore is not subject to the requirements of the PRA. The recordkeeping requirement that is one of the conditions imposed under PTE 84-24 (section V(e)(1)), both prior to this amendment and hereinafter, has been approved by OMB as part of the information collection request assigned OMB control number 1210-0059. The approval is currently scheduled to expire on August 31, 2008.

### Description of the Exemption, as Amended

PTE 84-24 provides relief for certain classes of transactions involving purchases with plan assets of insurance or annuity contracts and of securities issued by registered investment companies, and the receipt of sales commissions in connection therewith. Section I and section II of PTE 84-24 provide retroactive and prospective relief for covered transactions. Section III describes the transactions covered by the class exemption as follows: (a) The direct or indirect receipt by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets of an insurance or annuity contract; (b) the receipt of a sales commission by a principal underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter, an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company; (c) the effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company; (d) the purchase, with plan assets, of an insurance or annuity contract from an insurance company; (e) the purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan; and (f) the purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company principal underwriter, when such investment company, principal underwriter, or the investment company

investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) The sponsorship of a master or prototype plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2).

Section IV contains general conditions applicable to all transactions described in section III. Section V of the class exemption contains conditions specific to transactions described in section III(a) through (d). Section VI defines certain terms that are used in the class exemption. Section VI(b) defines the terms "insurance agent or broker," "pension consultant," "insurance company," "investment company," and "principal underwriter" to mean such persons and any affiliates thereof.

Section V excludes certain persons from engaging in transactions covered by the class exemption. In this regard, sections V(a)(1) and V(a)(3) provided that the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter may not engage in a covered transaction if such person is a trustee of the plan (other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan) or a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan on a discretionary basis. The amendment adopted by this notice provides a limited exception to such restrictions (which otherwise remain in effect). In this regard, section V(a), as amended, now provides that, notwithstanding the restriction contained therein, an insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter that is affiliated with a trustee or investment manager with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of a plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a nondiscretionary trustee.<sup>3</sup>

<sup>3</sup> As described in the notice of proposed amendment to PTE 84-24, the Department and the Service previously took the view that the class exemption extends relief to a plan's purchase of an insurance or annuity contract through an agent or broker affiliated with an entity that manages certain of the plan's assets to the extent that the investment manager is not, with respect to the transaction, a fiduciary expressly authorized in writing to manage, acquire, or dispose of, on a discretionary basis, the assets of the plan involved in the purchase transaction. See letter from the Department of the Service to John A. Cardon, Esq., et al., part 6 (October 31, 1977).

The amendment adopted in this notice also modifies the definition of the term "nondiscretionary trust services" in section VI(g) of PTE 84-24 to permit a party to use the exemption, notwithstanding its affiliation with a nondiscretionary trustee, including a directed trustee that performs such services pursuant to directions in accordance with ERISA section 403(a)(1), with respect to the plan assets involved in the transaction.

### 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 discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; 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) In accordance with section 408(a) of ERISA and 4975(c)(2) of the Code, the Department makes the following determinations:

- (i) The amendment set forth herein is administratively feasible;
- (ii) the amendment set forth herein is in the interests of plans and of their participants and beneficiaries; and
- (iii) the amendment set forth herein is protective of the rights of participants and beneficiaries of plans;

(3) The amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The amendment is 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.

### Exemption

Accordingly, PTE 84-24 is amended under the authority of section 408(a) of the Employee Retirement Income

Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), as set forth below:

#### *Section I—Retroactive Application*

The restrictions of sections 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

#### *Section II—Prospective Application*

The restrictions of section 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV and V are met.

#### *Section III—Transactions*

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract.

(b) The receipt of a sales commission by a principal underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company.

(c) The effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company principal

underwriter, when such investment company, principal underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) The sponsorship of a master or prototype plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2).

#### *Section IV—Conditions With Respect to Transactions Described in Section III*

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company principal underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter:

(1) For the provision of services to the plan; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of "reasonable compensation" within the contemplation of section 408(b)(2) and 408(c)(2) of the Act and sections 4975(d)(2) and 4975(d)(10) of the Code. If such total is in excess of "reasonable compensation," the "amount involved" for purposes of the civil penalties of section 502(i) of the Act and the excise taxes imposed by section 4975 (a) and (b) of the Code is the amount of compensation in excess of "reasonable compensation."

#### *Section V—Conditions for Transactions Described in Section III (a) Through (d)*

The following conditions apply solely to a transaction described in paragraphs (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter is not (1) a trustee of the plan (other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan), (2) a plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g) of the Code), (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan on a discretionary basis, or (4) for transactions described in sections III (a) through (d) entered into after December

31, 1978, an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a nondiscretionary trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of a sales commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an affiliate of the insurance company whose contract is being recommended, or if the ability of such agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or indirectly (e.g. through an affiliate), any compensation

or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a sales commission thereon by an investment company principal underwriter, the investment company principal underwriter provides to an independent fiduciary with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the principal underwriter of the investment company whose securities are being recommended, the nature of such relationship and of any limitation it places upon the principal underwriter's ability to recommend investment company securities;

(B) The sales commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the principal underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in paragraph (c)(1), and prior to the execution of the transaction, the independent fiduciary approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a principal underwriter involved in the transaction. Such fiduciary may not receive, directly or indirectly (e.g. through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written

disclosure required under paragraphs (b) and (c) of this section V need not be repeated, unless—

(1) More than three years have passed since such disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this section was obtained.

(e)(1) In the case of any transaction described in paragraphs (a), (b), or (c) of section III, the insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company principal underwriter shall retain or cause to be retained for a period of six years from the date of such transaction, the following:

(A) The information disclosed pursuant to paragraphs (b), (c), and (d) of this section V;

(B) Any additional information or documents provided to the fiduciary described in paragraphs (b) and (c) of this section V with respect to such transaction; and

(C) The written acknowledgement described in paragraph (b) of this section.

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance agent or broker, pension consultant, or principal underwriter, such records are lost or destroyed prior to the end of such six-year period.

(3) Notwithstanding anything to the contrary in section 504(a)(2) and (b) of the Act, such records are unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization any of whose members are covered by the plan.

#### Section VI—Definitions

For purposes of this exemption:

(a) The term “principal underwriter” is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(b) The terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “principal underwriter” mean such persons and any affiliates thereof.

(c) The term “affiliate” of a person means:

(1) Any person directly or indirectly controlling, controlled by, or under common control with such person;

(2) Any officer, director, employee (including, in the case of principal underwriter, any registered representative thereof, whether or not such person is a common law employee of such principal underwriter), or relative of any such person, or any partner in such person; or

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

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

(e) 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 a sister.

(f) The term “master or prototype plan” means a plan which is approved by the Service under Rev. Proc. 72-7, 1972-1 C.B. 715, or Rev. Proc. 72-8, 1972-1 C.B. 716, or their successors.

(g) “The term “nondiscretionary trust services” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1). The term “nondiscretionary trustee” of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of nondiscretionary trust services. For purposes of this exemption, a person who is otherwise a nondiscretionary trustee will not fail to be a nondiscretionary trustee solely by reason of his having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

Signed at Washington, DC this 30th day of January, 2006.

**Ivan L. Strasfeld,**

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

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