information collection instrument with instructions or additional information, please contact Patricia Power, Chief, Federal Firearms Licensing Center, 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies estimate of the burden of the proposed 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.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Federal Firearms License (Collector of Curios and Relics).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 7CR (5310.16). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None. The form is used by the public when applying for a Federal firearms license to collect curios and relics to facilitate a personal collection in interstate and foreign commerce. The information requested on the form establishes eligibility for the license.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 7,300 respondents will complete a 15 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1,825 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: June 10, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–14352 Filed 6–14–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11337]

Adoption of Amendment to the Class Exemption for the Release of Claims and Extensions of Credit in Connection With Litigation (PTE 2003–39)

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Adoption of Amendment to a Class Exemption.

SUMMARY: This document amends PTE 2003–39 (68 FR 75632, Dec. 31, 2003), a class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986, as amended (the Code). PTE 2003–39 generally exempts a plan's receipt of consideration from a related party in partial or complete settlement of actual or threatened litigation, as well as extensions of credit from a plan in connection with settlement payments made over time by the related party. The amendment expands the categories of assets that may be accepted by plans in the settlement of litigation, subject to certain conditions. Among other things, the amendment permits the receipt of non-cash assets in settlement of a claim (including the promise of future employer contributions) but only in instances where the consideration can be objectively valued. The amendment also modifies PTE 2003–39 to permit plans to acquire, hold, or sell employer securities such as warrants and stock rights which are received in settlement of litigation, including bankruptcy proceedings.

This amendment is being granted in response to requests from practitioners and independent fiduciaries who sought an expansion of the types of consideration that plans could accept in connection with the settlement of litigation. The amendment affects 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: *Effective Date:* The amendment is effective June 15, 2010.

FOR FURTHER INFORMATION CONTACT: Christopher Motta or Allison Padams-Lavigne, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210 (202) 693–8540 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On November 21, 2007, a notice was published in the **Federal Register** (72 FR 65597) of the pendency before the Department of a proposed amendment to PTE 2003–39, which exempts certain transactions from the restrictions of sections 406(a) and 407(a) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code.

The amendment described herein is being granted by the Department on its own motion pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570 Subpart B (55 FR 32836, August 10, 1990).[1] The notice gave interested persons an opportunity to submit written comments or request a public hearing on the proposed amendment to the Department. The Department received two comments and no requests for a public hearing. Upon consideration of the record taken as a whole, the Department has determined to grant the proposed amendment with minor modifications.

Executive Order 12866 Statement

Significant regulatory actions are subject to the requirements of Executive Order 12866 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

[1] Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 214 (2000) generally transferred the authority of the Secretary of Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. In the discussion of the exemption, references to specific provisions of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

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, this action is significant under section 3(f)(4) of the Executive Order.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA 95), the Department submitted the information collection request (ICR) included in the Class Exemption for Release of Claims and Extensions of Credit in Connection With Litigation (the "Class Exemption") to the Office of Management and Budget (OMB) for review and clearance at the time the class exemption was published in the **Federal Register** (68 FR75632, December 31, 2003) under OMB control number 1210–0091. The ICR was renewed by OMB through June 30, 2012, on June 15, 2009.

The Amendment to the Class Exemption contains the following information collections:

Written Settlement Agreement. The terms of the settlement must be specifically described in a written agreement or consent decree.

Acknowledgement by Fiduciary. The fiduciary acting on behalf of the plan must acknowledge in writing that s/he is a fiduciary with respect to the settlement of the litigation.

The amendment would expand the scope of non-cash consideration that may be accepted by an authorizing fiduciary on behalf of the plan in connection with the settlement of litigation (subject to additional conditions) to include employer securities, including bonds, and stock rights or warrants to acquire employer stock. The amendment also would make the valuation methods used to value non-cash consideration more flexible.

The amendment to the class exemption would modify the written settlement agreement information collection by requiring the agreement to specifically describe (i) the employer securities and written promises of future employer contributions (and the methodology for determining the fair market value of such consideration) that has been tendered as consideration in settlement of litigation and/or (ii) benefit enhancements as approved by the authorizing fiduciary that are provided to the plan as consideration for settlement. Because it is usual and customary business practice to express the terms of a settlement in writing with some degree of detail, no additional hour burden has been accounted for this provision of the amendment.

The 2007 amendment modifies the information collection associated with the Fiduciary Acknowledgment by requiring the authorizing fiduciary to acknowledge its fiduciary responsibility for the approval of an attorney's fee award in connection with the settlement in writing. The Department expects the authorizing fiduciary to incorporate this acknowledgement into the investment management or trustee agreement outlining the terms and conditions of the fiduciary's retention as a plan service provider, and that this agreement will already be in existence as part of usual and customary business practice. The additional hour burden attributable to the acknowledgement provided in the amendment is negligible; therefore, the Department has not increased the overall hour burden for this provision of the amendment.

I. Background

Based upon feedback from practitioners and independent fiduciaries working to settle litigation with parties in interest, the Department is amending PTE 2003–39 to expand the type of consideration that can be accepted by an employee benefit plan in settlement of litigation. While the Department encourages cash settlements, it recognizes that there are situations in which it may be in the interest of participants and beneficiaries to accept consideration other than cash in exchange for releasing the claims of the plan and/or the plan fiduciary. Because ERISA does not permit plans to hold employer-issued stock rights, warrants, or most bonds, without an individual exemption,[2] the transactions covered by PTE 2003–39 have been expanded to include the acquisition, holding, and disposition of employer securities received in settlement of litigation, including bankruptcy litigation. Other amendments to the class exemption seek to clarify the scope of the duties of the independent fiduciary charged with responsibility for settling litigation.

The Department understands that segments of the pension community question whether the receipt of property by a plan in consideration for the release of a claim arising out of litigation with a party in interest would constitute a prohibited transaction under section 406 of the Act. It is the Department's position that the release by the plan of a legal or equitable claim against a party in interest in exchange for consideration is an exchange of property (a chose in action) between the plan and the party in interest which is prohibited under section 406(a)(1)(A) of the Act in the absence of an exemption. This administrative class exemption provides conditional relief from this prohibition.

In many cases where a plan has brought, or is considering, a lawsuit against a party in interest, the plan will have terminated its relationship with the party, and the party will no longer be party in interest at the time of the settlement. A settlement of the claims against such a party would not constitute a prohibited transaction. In addition, the Department has concluded that the statutory exemption in ERISA section 408(b)(2) may be available under limited circumstances for an exchange of property made solely to resolve claims arising out of the performance of an underlying service arrangement.[3]

II. Description of Existing Relief

The class exemption for the release of claims and extensions of credit in connection with litigation provides limited relief. Since conflicted fiduciaries are not permitted to have a role under the exemption in settling the litigation, no relief is provided from the self-dealing provisions of ERISA. The current exemption permits the release of the plan's or the plan fiduciary's claim against a party in interest in exchange for consideration, and related extensions of credit. No relief is provided for any prohibited transactions that are the subject of the underlying litigation, or any new prohibited transactions (other than consideration for the release of claims) that may be proposed in settlement of litigation.[4]

[2] For example, PTE 2004–03, Lodgian 401(k) Plan and Trust Agreement, 69 FR 7506, 7509 (Feb. 14, 2004) (warrants); PTE 2003–33, Liberty Media 401(k) Savings Plan, 68 FR 64657 (Nov. 14, 2003) (stock rights); PTE 2002–02, The Golden Retirement Savings Program and The Golden Security Program, 67 FR 1242, 1243 (Jan. 9, 2002) (warrants).

[3] *See* Advisory Opinion 95–26A (October 17, 1995).

[4] Where the Department of Labor (DOL) and/or the Internal Revenue Service (IRS) is a party to the litigation, new prohibited transactions may be

Continued

Where a prohibited transaction giving rise to the actual or potential litigation is "corrected" in compliance with section 4975(f)(5) of the Code, this exemption will not be necessary because correcting a prohibited transaction under section 4975 of the Code does not give rise to a prohibited transaction under Title I of the Act.[5] Additionally, there is no prohibited transaction if the plan receives consideration,[6] but does not have to relinquish its cause of action, or other assets. Finally, if the dispute involves the provision of services or incidental goods by a service provider, the settlement may fall within the statutory exemption under section 408(b)(2) of the Act.[7]

The exemption is not available where a party in interest is suing an employee benefit plan, unless the party in interest is suing on behalf of the plan pursuant to section 502(a)(2) or (3) of ERISA, in their capacity as a participant, beneficiary, or fiduciary. Further, it is the view of the Department that, in general, no exemption is needed to settle benefits disputes,[8] including subrogation cases.

III. Description of Amendments

New Transactions

The proposed amendment expanded the transactions covered by the exemption. In this regard, warrants and stock rights are often offered to shareholders, including the company's employee benefit plan, in settlement of litigation, including bankruptcy. In such situations, bonds or other property that do not constitute qualifying employer securities under ERISA may also be offered to employee benefit plans. ERISA does not permit plans to hold these assets absent an individual exemption. Effective as of the date of publication of the final exemption in the **Federal Register**, a plan may acquire, hold, and dispose of employer securities in settlement of litigation, including bankruptcy. The transactions covered by the exemption include the subsequent disposition of stock rights and warrants by sale or by exercise of the rights or warrants.

Modified Conditions

The exemption currently requires that an attorney retained to advise [9] the plan determine that there is a genuine controversy, unless the case has been certified as a class action. As amended, this genuine controversy requirement may be met in non-class action cases if a Federal or State agency is a plaintiff in the litigation.

Section II (b) has been redrafted to clarify that the settlement is being authorized by a fiduciary (hereinafter referred to as the authorizing fiduciary).

Currently, the independent fiduciary must assess the reasonableness of the settlement in light of the risks and costs of litigation, and the value of claims foregone. The Department had become concerned that some independent fiduciaries, and those responsible for their retention, were viewing this condition too narrowly. As a result, the amendment clarified that in assessing the reasonableness of any settlement, the authorizing fiduciary must consider the entire settlement. This includes the scope of the release of claims and the value of any non-cash assets. In this regard, the Department further emphasized that the authorizing fiduciary, in assessing the reasonableness of the settlement, may not exclude consideration of the attorney's fee award or any other sums to be paid from the recovery (*e.g.,* for consultants) in connection with the settlement of the litigation.

Since the class exemption was finalized, attorneys for the Department have reviewed numerous releases in class-action litigation involving employee benefit plans. Some of these releases were unreasonably broad. The Department continues to believe that the role of the authorizing fiduciary includes a careful review of the scope of any release that will eliminate the claims of the plan or the plan fiduciaries. In some instances, it may be necessary for the authorizing fiduciary to raise objections with the court, for example, requesting that the court narrow the scope of the release.[10]

When a plan participates in a settlement, it does so as an independent legal entity with legal rights and obligations distinct from those of both the plan sponsor and from any given plan participant or beneficiary. In a class action, the authorizing fiduciary should consider whether the plan is being treated less equitably than are other class members, either by the terms of the settlement or through the failure of the settlement to adequately recognize the plan's particular interests. For example, a settlement could be viewed as less advantageous to the plan than to other class members if it requires the plan to surrender ERISA-related claims without payment of additional consideration, or if it imposes restrictions on the plan that are not placed on other class members (*e.g.,* by not considering some or all of the plan's securities in allocating settlement proceeds).

Attorney's fees awarded to plaintiffs' attorneys may reduce the plan's recovery, directly or indirectly.[11] Although the attorneys bringing these class actions are entitled to fair compensation, in some instances abuses have occurred.[12] In 2005, Congress passed the Class Action Fairness Act of 2005 [13] to address some of these abuses. Where the plan's share of the settlement is significant, the authorizing fiduciary is generally well-positioned to use its bargaining strength to ensure that these fees are reasonable. It is the view of the Department that the authorizing fiduciary's role may require involvement in the attorney's fee

permitted to resolve litigation pursuant to PTE 79–15, Class Exemption for Certain Transactions Authorized or Required by Judicial Order or Judicially Approved Settlement Decree, 44 FR 26979 (May 8, 1979). DOL may also enter into a voluntary settlement with parties covered by ERISA, in which case any prospective prohibited transactions may be covered by the Class Exemption to Permit Certain Transactions Authorized Pursuant to Settlement Agreements between the Department of Labor and Plans, PTE 94–71, 59 FR 51216 (Oct. 7, 1994).

[5] It should be noted that the Department of the Treasury has authority to issue regulations, rulings and opinions regarding the term "correction" as defined in § 4975 of the Code. Reorg. Plan No. 4 of 1978, 5 U.S.C. App. at 214 (2000). Treas. Reg. § 53.4941(e)–1(c)(1) (1986) (excise taxes on private foundations) applies to "correction" of prohibited transactions under section 4975(f) of the Code (dealing with pension excise taxes) by reason of Temp. Treas. Reg. § 141.4975–13 (1986).

[6] Parties entering into such arrangement should review the IRS rules with respect to restorative payments. Rev. Rul. 2002–45, 2002–2 C.B. 116.

[7] *See,* Advisory Opinion 95–26A (Oct. 17, 1995).

[8] *See Lockheed* v. *Spink,* 517 U.S. 882, 892–893 (1996) (the payment of benefits is not a prohibited transaction).

[9] The Department is aware that at least one commentator has interpreted this condition as requiring a formal opinion of counsel. This is not the case. Further, it is not necessary for the litigation to be filed. If suit has not been filed, the independent attorney can review the disputed issues and conclude that there is a genuine controversy. As noted in the original exemption, the purpose of this condition is to avoid covering sham settlements. *See, Dairy Fresh Corp.* v. *Poole,* 108 F. Supp. 2d 1344, 1353 (S.D. Ala. 2000).

[10] The Department does not suggest that other litigants can release ERISA-based claims of the Secretary of Labor, plan fiduciaries, participants or beneficiaries.

[11] In some instances, the amount of the settlement fund is finalized before the attorney's fee awards are determined. In other instances, the attorney's fees are calculated as a percentage of the settlement fund. Generally, a court will review the reasonableness of the attorney's fee award.

[12] This issue was considered by the Federal Trade Commission's Class Action Fairness Project. The FTC's Web site contains links to many of the materials produced in connection with the Class-Action Fairness Project. Federal Trade Commission Home Page: *http://www.ftc.gov/bcp/workshops/classaction/index.htm.*

[13] Public Law 109–2, 119 Stat. 4 (2005). The Act amends both Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. 1332. It expands federal jurisdiction over certain cases and contains new rules for class action settlements and calculation of attorney's fees.

decisions, including possibly filing a formal objection with the court regarding these fees.

The proposed amendment expanded the scope of non-cash consideration that may be accepted by an authorizing fiduciary on behalf of the plan, subject to additional conditions. Such consideration is divided into two categories: non-cash assets and benefits enhancements. Non-cash assets consist of property that can be appraised pursuant to the guidelines set forth in the Department's Voluntary Fiduciary Correction (VFC) Program.[14] As amended, employer securities, including bonds, and stock rights or warrants on employer securities, are covered.

The current exemption specifies that a written agreement to make future contributions could be accepted in exchange for a release. This continues to be the case. As amended, a written promise by the employer to increase future contributions falls within the expanded category of non-cash assets. The fair market value of a stream of future contributions can be determined by a qualified appraiser. In contrast, benefits enhancements, *i.e.,* where the employer offers to change the plan design to increase opportunities to diversify, or to offer other employee benefits, are plan amendments, not plan assets. Therefore, the exemption requires only approval by the authorizing fiduciary with respect to such benefits enhancements. Because such enhancements do not make the plan whole and may not benefit the same participants who were harmed by the actions that are the subject of litigation,[15] an authorizing fiduciary should give such offers special scrutiny.

As amended, relief is provided for the acquisition, holding, and disposition of employer securities that are not "qualifying," within the meaning of section 407(d)(5) of the Act. We understand from our conversations with independent fiduciaries that, in cases involving financially troubled companies, stock rights and warrants may be the only assets available. In other instances, employer-issued bonds or other debt instruments may offer the best value for the plan. The relief provided by the class exemption for accepting and holding such non-cash assets extends only to relief from the prohibited transaction provisions of sections 406(a) and 407(a) of the Act; no relief is provided from the fiduciary provisions of section 404 of the Act. Before authorizing a settlement involving non-cash assets, the authorizing fiduciary must determine whether accepting such assets is prudent and in the interest of participants and beneficiaries.

In addition, where such non-cash assets are employer securities, particular attention must be paid to ERISA's diversification requirements. Section 404(a)(1)(C) requires that a fiduciary diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Section 404(a)(2) provides that, in the case of an eligible individual account plan, the diversification requirement of section 404(a)(1)(C) and the prudence requirement (only to the extent that it requires diversification) of section 404(a)(1)(B) is not violated by the acquisition or holding of qualifying employer securities. If the employer securities do not meet the definition of qualifying employer securities under section 407(d)(5) of the Act, the exception contained in section 404(a)(2) from the diversification requirements of the Act will not apply to a Plan's investment in these assets. Accordingly, the authorizing fiduciary must determine the appropriate level of investment in employer securities, based on the particular facts and circumstances, consistent with its responsibilities under section 404 of the Act.

Where non-cash assets or benefits enhancements are being considered, the authorizing fiduciary must first determine that a cash settlement is either not feasible or is less beneficial than the alternative. Any non-cash assets must be valued at their fair market value in accordance with section 5 of the Voluntary Fiduciary Correction Program, 71 FR 20262, 20270 (Apr. 19, 2006). Both non-cash assets and benefits enhancements must be described in the written settlement agreement.

Where the plan receives employer securities as part of the settlement, the authorizing fiduciary or another independent fiduciary must retain sole responsibility for investment decisions regarding the assets unless the plan is a participant-directed individual account plan and the authorizing fiduciary allows the participants and beneficiaries to exercise control over the securities allocated to their accounts.[16] The proposed amendment provided that the plan could not pay any commissions in connection with the acquisition of assets pursuant to this exemption.

As is the case in the current exemption, the authorizing fiduciary must acknowledge in writing that it is a fiduciary for purposes of the settlement. As noted above, since the original exemption was granted at the end of 2003, the Department has learned that practitioners are divided on whether or not the authorizing fiduciary's role in the settlement included review of attorney's fees. It is the view of the Department that in any instance where an attorney's fee award or any other sums to be paid from the recovery has the potential to reduce the plan's overall recovery, the authorizing fiduciary should take appropriate steps to review the proposed fees. The exact nature of the authorizing fiduciary's role in connection with attorney's fees and other expenses paid from the recovery will vary depending on the size and nature of the litigation.

Discussion of the Comments Received

The Department received two comments with respect to the proposed amendment, each of which suggested modifications to the text of the proposal as described below.

One commenter suggested that the language of section II (m)(2) of the proposed exemption be modified to ensure that certain information offered confidentially by parties to a settlement (*i.e.,* data that is not readily classified as either company trade secrets or other commercial or financial information) be kept confidential by the Department and the Internal Revenue Service, and not be disclosable to plan participants or beneficiaries, fiduciaries, contributing employers or employee organizations.

To support its position, the commenter explained that settlements resulting from a mediation process

[14] 71 FR 20262 (Apr. 19, 2006). The VFC Program, as amended, covers certain prohibited transactions involving illiquid property. The exemption states that such property includes, but is not limited to, restricted and thinly traded stock, limited partnership interests, real estate and collectibles. 71 FR at 20279. Authorizing Fiduciaries may find the guidelines in the VFC Program helpful in considering whether accepting Non-Cash property as part of a settlement is appropriate given the risks and additional costs that may be incurred where a plan holds such property. Illiquid assets may complicate the plan's mandatory distributions at age 70½ pursuant to section 401(a)(9) of the Code. The Service takes the position that compliance with this provision may necessitate distribution of a participant's fractional interest in the illiquid asset, which could result in additional costs to the plan. *See, e.g.,* I.R.S. Priv. Ltr. Rul. 9726032 (June 27, 1997) and I.R.S. Priv. Ltr. Rul. 9226066 (June 26, 1992).

[15] *See generally,* Field Assistance Bulletin No. 2006–01 (Apr. 9, 2006) at *http://www.dol.gov/ebsa/regs/fab_2006-1.html* for a discussion of issues to be considered when the need arises to allocate settlement proceeds among different classes of participants and beneficiaries.

[16] The Department encourages the independent fiduciary to the extent possible, consistent with its fiduciary obligations, to dispose of property received as part of a settlement within a reasonably short timeframe in order to limit costs to the plan of the independent fiduciary's services.

frequently involve the preparation of statements by the parties; these statements may contain certain information relevant to the dispute, such as a company's loss analysis, that is deemed sensitive by one of the parties. Because such information may not always be readily classified as a trade secret or as confidential, commercial or financial information under either the current or amended version of the exemption, the commenter believes that an independent fiduciary may not be able to guarantee the confidentiality of such internally-generated information. As a result, the commenter stated that parties to a mediation are often unwilling to share sensitive information and analysis; thus depriving the independent fiduciary of information that may be relevant in evaluating the appropriateness of a proposed settlement. In the commenter's opinion, the independent fiduciary's access to sensitive information relevant to the settlement is paramount, even if such access results in a less transparent decisional record for plan participants and other interested parties.

After considering this comment, the Department has determined to modify the language of the final exemption to clarify that, where information is offered to an authorizing fiduciary by a party to the settlement negotiations on the condition that the fiduciary agree that the information be kept confidential, the fiduciary may accept the information and use it to assist in its decision making without making it available to plan participants and beneficiaries or the Secretary, provided that: (i) the fiduciary makes a written finding that the proferred information would likely assist the fiduciary in carrying out its responsibilities; and (ii) a decision of a court or an opinion of counsel confirms that the proferred information likely cannot be obtained unconditionally by seeking discovery through the court, or cannot be obtained in a timely fashion.

Another commenter proposed that Section I of the exemption be amended to modify the relief provided for the "acquisition, holding and disposition of employer securities received in settlement of litigation, including bankruptcy." This commenter stated that section II(i)(2) of the proposed amendment, which requires that the fair market value of non-cash assets tendered to a plan in exchange for a release of claims must be determined in accordance with section 5 of the Voluntary Fiduciary Correction (VFC) Program, would prove unduly restrictive and burdensome with respect to achievement of settlements involving the pricing and transfer of employer securities. The commenter stated that the valuation of non-cash assets in a settlement transaction is generally the product of litigation and settlement negotiations between adverse parties to a genuine controversy which may not have involved employee benefits, and as to which ERISA-regulated plans may have only a minor stake. The commenter also opined that a plan's decision whether to receive the non-cash assets will be made by an authorizing fiduciary who is, by definition, independent, a feature not present in the typical VFC context. The commenter further argues that certain conditions of the exemption (sections II (c) and (d)) of the exemption already require that the authorizing fiduciary find the settlement terms, including the value of any non-cash assets, are "reasonable" and "no less favorable to the plan than comparable arms-length terms and conditions." Accordingly, the commenter believes that the existing conditions in the exemption are sufficiently protective and rigorous without incorporating additional requirements from the VFC program.

Section 5(a)(1) of the VFC states that, for securities for which "there is a generally recognized market," the fair market is the "average" value of the asset "on the applicable date" unless the plan document provides another objectively determined value. According to the commenter, legal counsel for the plaintiff class may have good reason for agreeing to a method for valuing publicly traded employer securities on a basis other than the average price on a given date. Moreover, the commenter represents that, for some plans, the acceptance of settlement proceeds at the average daily price may require amending the terms of the plan. The commenter further states that, even in rare instances where an independent fiduciary possesses the authority to make such an amendment, the process of adopting such a change would consume time and resources without providing meaningful protection to plan participants.

The commenter notes that, in certain situations, the parties to a lawsuit may agree to settle their claims by utilizing the average price of publicly traded employer securities over a range of days rather than on a single day. The commenter then expresses the view that, because section 5(a)(1) of the VFC Program utilizes the words "the applicable date" in connection with determining the value of an asset for which there is a generally recognized market, any plan receiving proceeds under a settlement agreement that utilizes the average price of an employer security spread over a range of days would not be eligible for the relief afforded under the amended class exemption. The commenter further states that an authorizing fiduciary would thus be required to petition the Department for an individual exemption to obtain relief for transactions involving these types of settlements. Such an outcome would be unsatisfactory, the commenter states, because the authorizing fiduciary cannot know, at the time a settlement is reached, whether the Department ultimately, will approve such an individual exemption application.

Additionally, the commenter states that the other VFC related requirement of the proposed amendment imposes burdens on authorizing fiduciaries, particularly with respect to the valuation of securities such as warrants, and even stock, issued through bankruptcy reorganization. Specifically, the commenter points to section 5(a)(2) of the VFC program, which requires that, if there is no generally recognized market for the assets, the fair market value of such assets must be determined in accordance with "generally accepted appraisal standards by a qualified, independent appraiser." The commenter maintains that a company emerging from bankruptcy typically is not required to obtain appraisals of its securities from licensed appraisers. In this connection, the commenter states that it is unrealistic to expect that bankruptcy reorganizations will be negotiated to meet the requirements of the VFC Program because one of the shareholders or creditors that will be receiving a distribution also happens to be a benefit plan sponsored by the reorganizing debtor. The commenter states that the VFC-related requirements of the proposed amendment are administratively burdensome to authorizing fiduciaries, and that the remaining conditions of the proposed class exemption, along with the general fiduciary standards of ERISA, provide safeguards that are sufficient to protect plans receiving settlement proceeds.

After considering these comments, the Department has decided to modify the language of section II(i)(2) of the exemption to read as follows:

The non-cash assets are specifically described in writing as part of the settlement, and valued at their fair market value as of the date or dates specified in the settlement agreement utilizing objective third party sources such as price quotations from persons independent of the issuer or independent third party pricing services for the non-cash assets (in instances where there is a generally recognized market for the

assets) or utilizing an objective and generally recognized methodology for valuing the non-cash assets that is approved as reasonable by the authorizing fiduciary and fully described in the written settlement agreement.

The Department expects the authorizing fiduciary to be experienced and knowledgeable regarding the valuation of any non-cash asset that is part of a settlement. If the authorizing fiduciary is not experienced with the type of asset offered as part of the settlement, such fiduciary must seek advice from an experienced independent party with respect to the valuation at issue.

The commenter also suggested that, in the case of a securities class action in section (i)(1), the authorizing fiduciary cannot know in advance of a settlement what percentage of the recovery will be in the form of cash and what percentage will be in the form of employer securities, thus complicating the fiduciary's evaluation of the plan's diversification of assets. The preamble to the proposed exemption notes that a fiduciary must be mindful of ERISA's general diversification requirements under ERISA section 404(a) in instances where the plan is to receive employer securities as part of a settlement. The commenter also noted that, if the authorizing fiduciary must decline to accept a settlement which may result in a distribution raising a diversification issue, the plan may receive nothing if there is no cost-efficient means for the plan to pursue a recovery in a form that avoids a diversification problem.

The commenter suggested to the Department that the value of a particular settlement payable in employer securities, and the absence of cost-effective alternatives to accepting the settlement, may constitute circumstances which make it "clearly prudent" to accept the settlement although doing so would result in a lack of diversification. The authorizing fiduciary would still be required to consider whether the receipt of the employer securities would impair the plan's overall operations or ability to make benefit payments. In addition, the commenter opined that the amendment to the class exemption should permit a grace period (perhaps one year in duration) for the plan to divest those employer securities which exceed the limitations described in section 407(a) of the Act. In response, the Department continues to believe that the authorizing fiduciary has a responsibility to consider ERISA's diversification requirements when evaluating a settlement offer. Nevertheless, the Department concurs with the commenter's argument that the fiduciary must consider the totality of circumstances when evaluating a settlement consisting in whole or part of employer securities under section 404(a) of ERISA. Clearly, the impact of the receipt of employer securities on the plan's overall operations or the ability to make benefit payments is relevant to the authorizing fiduciary's determination as to whether or not the settlement is reasonable and consistent with the requirements of section 404 of ERISA. In addition, the Department has determined not to adopt the commenter's suggestion for a grace period. In the Department's view, it is the responsibility of the authorizing fiduciary to determine when to sell or otherwise dispose of the employer securities and the best method for such disposition.

Another commenter states that section II(c) of the proposed amendment, which requires that the authorizing fiduciary consider the scope of the release of claims and the attorney's fee award and other payments from the recovery in evaluating a particular settlement, is potentially problematic because: (1) Prospective members of a class must decide whether to opt out of the class, thereby foregoing the benefits of a settlement, before or simultaneously with the deadline for objecting; (2) class members who decline to opt out become bound to the terms of the settlement, including its release provisions; and (3) persons who opt out of the class have no standing to object to the settlement. Thus, according to the commenter, an authorizing fiduciary cannot object to the attorney's fees, or any other aspect of the settlement, without waiving the plan's right to opt out, and binding the plan to the release, even if the court overrules the objection and approves a fee award or other provision which the authorizing fiduciary found unreasonable. The commenter also believes that at the time of the opt-out decision, counsel for the plaintiff class will not yet have filed its motion for attorney's fees, and the notice to class members typically states only the upper limit of attorney's fees which counsel may receive.

The commenter notes that some of these issues would be mitigated if the authorizing fiduciary is retained well in advance of a settlement in order to raise plan-related concerns before the settlement is finalized. However, the commenter continues to believe that, even in situations of early retention, independent fiduciaries may find themselves with little leverage to negotiate modifications of a fee arrangement or other aspects of the settlement due to the plan's relatively small stake in the litigation. The commenter suggests that the language in the preamble be modified to acknowledge these constraints imposed on authorizing fiduciaries. The commenter also suggests that the text of the exemption be modified to provide that the authorizing fiduciary's judgments on the matters set forth in sections II(c), (d) and (i)(l), in situations where the plan is a member of a class asserting claims, are to be made on the basis of the information available to the authorizing fiduciary as of the deadline by which class members must decide whether to grant a release.

The Department continues to believe that the authorizing fiduciary must consider the entire settlement, including the scope of the release of claims and the amount of any attorney's fee award. In this regard, the Department recognized, in the preamble to the proposed amendment, that where the plan's share of the settlement is significant, the authorizing fiduciary is generally well-positioned to use its bargaining strength to ensure that the legal fees are reasonable. Conversely, where the plan has a small stake in the litigation as a member of a class asserting claims, the authorizing fiduciary, after the end of the opt-out period, may raise objections with the court which the court subsequently finds unpersuasive. The Department recognizes that there may be constraints on an authorizing fiduciary's ability to influence the terms of a settlement. Similarly, the Department also recognizes that judgments must be made on the basis of all of the information available to the fiduciary as of the deadline for the decision by class members to opt out of the class. The Department believes that section II(b) as proposed provides sufficient flexibility to enable an authorizing fiduciary to carry out its responsibilities under the class exemption, notwithstanding the variety of facts and circumstances that may arise in connection with each settlement.

Finally, the commenter notes that the proposed amendment in section II(i) limits the scope of acceptable consideration (other than cash) to non-cash assets and benefit enhancements. The commenter states that other types of non-cash elements that fall outside the categories enumerated in section II(i) of the proposed exemption often constitute a meaningful part of securities litigation settlements. These may include corporate governance reforms, resignations of corporate officials, and other promised actions which will enhance the value of the corporation whose securities are subject to the litigation.

The Department recognizes that the aforementioned types of corporate reforms could constitute a meaningful part of securities litigation settlements.[17] Thus, the Department has amended section II(i) of the operative language of the amendment in order to expand the scope of other enhancements that may be accepted by an authorizing fiduciary on behalf of the plan in determining whether to grant a release.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his or her duties with respect to the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 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 amendment will not extend to transactions prohibited under sections 406(b) of the Act and 4975(c)(1)(E) and (F) of the Code.

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

(4) The amendment is supplemental to, and not in derogation of, any other provisions of the Code and the Act, 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) The amendment is applicable to a transaction only if the conditions specified in the class exemption are satisfied.

Amendment

Section I. Prospective Exemption—Covered Transactions

Effective [INSERT DATE OF PUBLICATION OF FINAL EXEMPTION IN THE FEDERAL REGISTER], the restrictions of sections 406(a) and 407(a) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the following transactions, if the relevant conditions set forth in sections II through III below are met:

(a) The release by the plan or a plan fiduciary of a legal or equitable claim against a party in interest in exchange for consideration, given by, or on behalf of, a party in interest to the plan in partial or complete settlement of the plan's or the fiduciary's claim.

(b) An extension of credit by a plan to a party in interest in connection with a settlement whereby the party in interest agrees to repay, over time, an amount owed to the plan in settlement of a legal or equitable claim by the plan or a plan fiduciary against the party in interest.

(c) The plan's acquisition, holding, and disposition of employer securities received in settlement of litigation, including bankruptcy. Disposition of employer securities that are stock rights or warrants includes sale of these securities, as well as the exercise of the rights or warrants.

Section II Prospective Exemption—Conditions

(a) Where the litigation has not been certified as a class action by the court, and no federal or state agency is a plaintiff in the litigation, an attorney or attorneys retained to advise the plan on the claim, and having no relationship to any of the parties involved in the claims, other than the plan, determines that there is a genuine controversy involving the plan.

(b) The settlement is authorized by a fiduciary (The authorizing fiduciary) that has no relationship to, or interest in, any of the parties involved in the claims, other than the plan, that might affect the exercise of such person's best judgment as a fiduciary.

(c) The settlement terms, including the scope of the release of claims; the amount of cash and the value of any non-cash assets received by the plan; and the amount of any attorney's fee award or any other sums to be paid from the recovery, are reasonable in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.

(d) The terms and conditions of the transaction are no less favorable to the plan than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.

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

(f) Any extension of credit by the plan to a party in interest in connection with the settlement of a legal or equitable claim against the party in interest is on terms that are reasonable, taking into consideration the creditworthiness of the party in interest and the time value of money.

(g) The transaction is not described in section A.I. of Prohibited Transaction Exemption (PTE) 76–1 (41 FR 12740, 12742 (Mar. 26, 1976), as corrected, 41 FR 16620 Apr. 20, 1976) (relating to delinquent employer contributions to multiemployer and multiple employer collectively bargained plans).

(h) All terms of the settlement are specifically described in a written settlement agreement or consent decree.

(i) Non-cash assets, which may include employer securities, and written promises of future employer contributions (hereinafter, "non-cash assets"), and/or a written agreement to adopt future plan amendments or provide additional employee benefits or corporate reforms (hereinafter "enhancements") may be provided to the plan by a party in interest in exchange for a release by the plan or a plan fiduciary only if:

(1) The Authorizing Fiduciary determines that an all cash settlement is either not feasible, or is less beneficial to the participants and beneficiaries than accepting all or part of the settlement in non-cash assets and/or enhancements;

(2) The non-cash assets are specifically described in writing as part of the settlement, and valued at their fair market value as of the date or dates specified in the settlement agreement utilizing objective third party sources such as price quotations from persons independent of the issuer or independent third party pricing services for the non-cash assets (in instances where there is a generally recognized market for the assets) or utilizing an objective and generally recognized methodology for valuing the non-cash assets that is approved as reasonable by the authorizing fiduciary and fully described in the settlement agreement;

(3) The enhancements are specifically described in writing as part of the

[17] The Department notes that the authorizing fiduciary, in assessing the reasonableness of a settlement, must evaluate the totality of circumstances, which may include corporate reforms. *See* section II(i) of final exemption.

settlement. Enhancements may be included as part of the settlement without an independent appraisal. In deciding whether to approve the release of a claim in exchange for enhancements, the authorizing fiduciary shall take into account all aspects of the settlement, including the cash or other assets to be received by the plan, the solvency of the party in interest, and the best interests of the class of participants harmed by the acts that are the subject of the plan's claims;

(4) The authorizing fiduciary, or another independent fiduciary, acts on behalf of the plan and its participants and beneficiaries for all purposes related to any property, including employer securities as defined by section 407(d)(1) of the Act, received by the plan from the employer as part of the settlement. The authorizing fiduciary or another independent fiduciary continues to act on behalf of the plan and its participants and beneficiaries for the period that the plan holds the property, including employer securities, received from the employer as part of the settlement. The authorizing fiduciary or another independent fiduciary shall have sole responsibility relating to the acquisition, holding, disposition, ongoing management, and where appropriate, exercise of all ownership rights, including the right to vote securities, unless the plan is a participant-directed individual account plan and the authorizing fiduciary allows the participants and beneficiaries to exercise control over the securities allocated to their accounts;

(j) The plan does not pay any commissions in connection with the acquisition of the assets;

(k) The authorizing fiduciary acting on behalf of the plan has acknowledged in writing that it is a fiduciary with respect to the settlement of the litigation on behalf of the plan;

(l) The plan fiduciary maintains or causes to be maintained for a period of six years the records necessary to enable the persons described below in paragraph (m) to determine whether the conditions of this exemption have been met, including documents evidencing the steps taken to satisfy section II (c), such as correspondence with attorneys or experts consulted in order to evaluate the plan's claims, except that:

(1) if the records necessary to enable the persons described in paragraph (m) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the plan fiduciary, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the plan fiduciary responsible for record-keeping, shall be subject to the civil penalty that 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 the records are not maintained or are not available for examination as required by paragraph (m) below;

(m)(1) Except as provided below in paragraph (m)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (l) are unconditionally available at their customary location for examination during normal business hours by—

(A) any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

(C) any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) any participant or beneficiary of the plan or the duly authorized employee or representative of such participant or beneficiary.

(2) Nothing in this exemption supersedes any restriction on the disclosure of trade secrets or other commercial or financial information which is privileged or confidential and this exemption does not authorize any of the persons described in paragraph (m)(1)(B)–(D) to examine trade secrets or such commercial or financial information. Similarly, nothing in this exemption requires the disclosure of information to the persons described in paragraph (m)(1)(A–(D) which is offered to the authorizing fiduciary by a party to the settlement negotiations conditioned on the maintenance of its confidentiality, provided that: (1) the Fiduciary makes a written determination that the information would likely assist the Fiduciary in carrying out its responsibilities on behalf of the plan; and (2) a decision of a court or an opinion of an attorney, having no relationship to any of the parties involved in the claims other than the plan, confirms that the proffered information likely cannot be obtained unconditionally by seeking discovery through the court, or cannot be obtained in a timely fashion.

Section III. Definitions

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

For purposes of this exemption, the term "employer security" refers to employer securities described in section 407(d)(1) of ERISA.

IV. Effective Dates

This amendment to the class exemption is effective for settlements occurring on or after the date of publication of the final exemption in the **Federal Register**. For settlements occurring before the date of publication of the final exemption in the **Federal Register**, see the original grant of the Class Exemption for Release of Claims and Extensions of Credit in Connection with Litigation, 68 FR 75632 (Dec. 31, 2003).

Signed at Washington, DC this *10th* day of *June,* 2010.

Ivan L. Strasfeld,

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

[FR Doc. 2010–14381 Filed 6–14–10; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (10–066)]

NASA Advisory Council; Science Committee; Astrophysics Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Astrophysics Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, July 7, 8:30 a.m. to 5 p.m., and Thursday, July 8, 2010, 8:30 a.m. to 4 p.m. Eastern Daylight Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Room 3H46, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*