

Morgan Lewis

MORGAN LEWIS RETAIL ADVICE GROUP

DOL PROHIBITED TRANSACTION EXEMPTION PROCEDURES COMPARISON

January 24, 2024

**Redline Comparison of Original, Proposed
and Final Rules**

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TAB 1

DOL Prohibited Transaction Exemption Procedures: October 2011 Final vs. January 2024 Final

PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

1. The authority citation for part 2570 continues to read as follows:

Authority: 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App at 672 (2006); Secretary of Labor’s Order 3–2010, 75 FR 55354 (September 10, 2010). Subpart I is also issued under 29 U.S.C. 1132(c)(8).

2. Revise subpart B to read as follows:

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Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

§ 2570.30 Scope of ~~rules~~this subpart.

(a) The rules of procedure set forth in this subpart apply to applications for prohibited transaction exemptions issued by the Department under the authority of:

(1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code); ~~1~~-or

Note 1 to paragraph (a)(2). See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 310 (1974), and also section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332, reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective December 31, 1978, which generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department.

(3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under ~~these~~the rules of procedure in this subpart, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by ERISA section 406 ~~of ERISA~~ and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under ~~these~~the rules in this subpart are ordinarily prospective in nature, it is possible that an applicant may ~~also~~ obtain retroactive relief for past prohibited transactions if ~~certain~~, among other things, the Department determines that appropriate safeguards ~~described in this subpart~~ were in place at the time the exemption transaction was consummated, and no plan participants or beneficiaries were harmed by the exemption transaction.

(c) ~~These~~The rules in this subpart govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation, and public inspection of the administrative record, and modification or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under ~~these~~the procedural rules in this subpart does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA, if applicable, which require, among other things, ~~that a fiduciary~~fiduciaries to discharge ~~his or her~~their duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the ~~requirement of~~requirements of Code section 401(a) ~~of the Code~~, including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their

beneficiaries, or the rules with respect to other Code provisions, including that an administrative exemption with respect to a contribution to a pension plan does not affect the deductibility of the contribution under Code section 404.

(e) The Department will not propose or issue exemptions upon oral request alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral ~~advice~~feedback from Department employees in preparing an exemption application. ~~However, such advice does not constitute part of the administrative record and is not,~~ which will not be binding on the Department in its processing of an exemption application or in its examination or audit of a plan.

(f) The Department will generally treat any exemption application that is filed solely under ERISA section 408(a) ~~of ERISA~~ or solely under Code section 4975(c)(2) ~~of the Code~~ as an exemption request filed under both ERISA section 408(a) and Code section 4975(c)(2) if it relates to a plan that is subject to both ERISA and the Code and the exemption transaction ~~that~~ would be prohibited by both ~~by~~ ERISA and the corresponding Code provisions ~~of the Code~~.

§ 2570.31 Definitions.

(g) The Department issues an administrative exemption at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). The existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemptions for applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption. Previously issued administrative exemptions, however, may inform the Department's determination of whether to propose future exemptions based on the unique facts and circumstances of each application. § 2570.31 Definitions.

For purposes of ~~these~~the procedures in this subpart, the following definitions apply:

(a) An *affiliate of a person* means—

- (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (a)(1), the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;
- (2) Any officer, director ~~of, relative of, or partner in,~~ partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or
- (3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or a five percent or more ~~partner or owner; of,~~
- ~~(4) Any employee or officer of the person who— (i) Is highly compensated (as defined in section 4975(e)(2)(H) of the Code), or (ii) Has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction.~~

(b) A *class exemption* is an administrative exemption, granted under ERISA section 408(a) ~~of ERISA,~~ Code section 4975(c)(2) ~~of the Code~~, and/or 5 U.S.C. 8477(c)(3), which applies to any transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or ~~his or her~~their delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under ERISA section 408(a) ~~of ERISA,~~ Code section 4975(c)(2) ~~of the Code~~, and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest and exemption transactions named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in ERISA section 3(14) ~~of ERISA~~ or 5 U.S.C. 8477(a)(4) and includes a disqualified person, as defined in Code section 4975(e)(2) ~~of the Code~~.

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that ~~satisfies all of the requirements set forth in this subpart at:~~

(1) Is prepared by a qualified independent appraiser; and

(2) Satisfies all the requirements set forth in § 2570.34(c)(45).

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report ~~on behalf of the plan~~ regarding the particular asset or property appraised in the report, that is independent of and unrelated to any party in interest engaging in the exemption transaction (and ~~its~~their affiliates; ~~in~~). In general, the ~~determination as to the~~Department determines an appraiser's independence of the appraiser is made by the Department on the basis of based on all relevant facts and circumstances. ~~In making this, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the appraiser. In making the independence~~ determination, the Department ~~generally~~ will ~~take into account~~consider the amount of ~~both~~ the appraiser's revenues and projected revenues for the current ~~federal~~Federal income tax year (including amounts received for preparing the appraisal report) that will be derived from ~~the party~~parties in interest ~~or its~~(and their affiliates) relative to the appraiser's revenues from all sources for the appraiser's prior ~~federal~~Federal income tax year. ~~Absent facts and circumstances demonstrating a lack of independence, the~~The Department ~~will operate according to the presumption generally will not conclude~~ that ~~such appraiser will be independent if~~an appraiser's independence is compromised solely based on the revenues it receives ~~or is projected to receive, within the current federal income tax year, from~~from ~~the~~ parties in interest (and their affiliates) ~~to the transaction are not more than 2% of such appraiser's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%~~that engaged in the exemption transaction, to the extent that the appraiser neither receives nor is projected to receive more than two (2) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, an appraiser ~~nonetheless~~ may be considered independent based upon other facts and circumstances provided that ~~it~~the appraiser neither receives ~~or~~nor is projected to receive ~~revenues that are not~~ more than five (5%) percent of its revenues within the current ~~federal~~Federal income tax year from parties in interest (and their affiliates) ~~to the~~participating in the exemption transaction ~~based upon its prior income tax year.~~

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction (and its affiliates; ~~in~~). In general, the Department will make the determination ~~as to the independence of~~whether a fiduciary is ~~made by the Department on the basis of~~independent based on all relevant facts and circumstances, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the fiduciary. In making this determination, the Department generally

will also take into account, among other things, the amount of both the fiduciary's revenues and projected revenues for the current ~~federal~~Federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from ~~the party~~parties in interest ~~or its~~engaging in the exemption transaction (and their affiliates) relative to the fiduciary's revenues from all sources for the prior ~~federal~~Federal income tax year. ~~Absent facts and circumstances demonstrating a lack of independence, the Department will operate according to the presumption that such fiduciary will be independent if~~The Department generally will not conclude that a fiduciary's independence is compromised solely based on the revenues it receives ~~or from parties in interest (and their affiliates) that engaged in the exemption transaction, to the extent that the fiduciary neither receives nor~~ is projected to receive, more than two (2) percent of its revenues within the current ~~federal~~Federal income tax year, ~~from the parties in interest (and their affiliates) to the transaction are not more than 2% of such fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%. Although larger percentages merit more stringent scrutiny,~~ a fiduciary ~~nonetheless~~ may be considered independent based upon other facts and circumstances provided that ~~it~~the fiduciary neither receives ~~or nor~~ is projected to receive ~~revenues that are not~~ more than five (5%) percent of its revenues within the current ~~federal~~Federal income tax year from the parties in interest (and their affiliates) to the that engaged in the exemption transaction ~~based upon its prior income tax year.~~

(k) A pre-submission applicant is a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. A party that contacts the Department to inquire broadly, without reference to a specific fact pattern, about prohibited transaction exemptions is not a pre-submission applicant.

§ 2570.32 Persons who may apply for exemptions, and the administrative record.

(a) The following persons may apply for exemptions:

~~(a) The Department will initiate exemption proceedings upon the application of:~~

- (1) Any party in interest to a plan who is or may be a party to the exemption transaction;
- (2) Any plan which is a party to the exemption transaction; or
- (3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section, ~~may~~ be submitted by the applicant or by an authorized representative. An application submitted by ~~a~~an authorized representative of the applicant must include proof of authority in the form of:

- (1) A power of attorney; or
- (2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an exemption application ~~for an exemption~~ to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

(d)(1) The administrative record is open for public inspection, pursuant to § 2570.51(a), from the date an applicant submits an application to the Office of Exemption Determinations.

(2) The administrative record includes, but is not limited to, the initial exemption application and any modifications or supplements thereto; all correspondence with the applicant after the applicant submits the exemption application; and any information provided by the applicant in connection with the exemption application, whether provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

(3) Although the administrative record is open and available to the public only after an applicant submits an exemption application, the record includes any material documents or supporting information that was submitted to the Department in connection with the subject transaction of the application, whether orally or in writing, before formal submission of the application. The administrative record does not include records of communications with the Department which were either not with respect to the subject transaction of the application or not followed by the submission of an exemption application related to those communications.

(4) If documents are required to be provided in writing, by either the applicant or the Department, the documents may be provided either by mail or electronically, unless otherwise indicated by the Department at its sole discretion.

§ 2570.33 Applications the Department will not ordinarily consider.

(a) The Department ordinarily will not consider: ~~an (1) An~~ application that fails to include all the information required by §§ 2570.34 and 2570.35 ~~of this subpart~~ (or fails to include current information) or otherwise fails to conform to the requirements ~~of these procedures; or~~ in this subpart.

~~(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of part 1 or 4 of subtitle B of Title I of ERISA or section 8477 or 8478 of FERSA or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the Internal Revenue Service to enforce the above-mentioned provisions of ERISA or FERSA.~~

(b) An application for an individual exemption relating to a specific exemption transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions. Notwithstanding the ~~foregoing~~ preceding sentence, the Department may consider such an application if the issuance of the final class exemption ~~may~~ is not ~~be~~ imminent, and the Department determines that time constraints necessitate consideration of the exemption transaction on an individual basis.

~~(c) The administrative record of an exemption application includes the initial exemption application and any supporting information provided by the applicant (as well as any comments and testimony received by the Department. If a party, excluding a Federal, state, or other governmental entity, designates any information submitted in connection with an its exemption application). If an applicant designates as confidential any information required by these regulations or requested by the Department, the Department will determine whether the information is material to the exemption determination. If it determines the information to be material, the Department will not process the application unless and until the applicant withdraws the its claim of confidentiality. By submitting an exemption application, an applicant consents to public disclosure of the entire administrative record pursuant to § 2570.51.~~

~~(d) If for any reason the Department decides not to consider an exemption application, it will inform the applicant in writing of that decision and of the reasons therefore.~~ (d) The Department will not engage a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not:

(1) Identify and fully describe the exemption transaction; and

(2) Set forth the prohibited transactions that the applicant believes are applicable.

§ 2570.34 Information to be included in every exemption application.

(a) All applications for exemptions must contain the following information:

- (1) The name(s), address(es), phone number(s), and e-mail address(es) of the applicant(s);
- (2) A detailed description of the exemption transaction, including the identification of all the parties in interest involved, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the exemption transaction;
- (3) The identity, address, phone number, and e-mail address of any representatives for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) A description of:

~~(4i) The reasons a plan would have for entering into~~ reason(s) for engaging in the exemption transaction;

(ii) Any material benefit that may be received by a party in interest (or its affiliates) as a result of the exemption transaction (including the avoidance of any materially adverse outcome by a party in interest (or its affiliates) as a result of engaging in the exemption transaction); and

(iii) The costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible;

(5) A description of the alternatives to the exemption transaction that did not involve a prohibited transaction that were considered or evaluated by the applicant before submitting its exemption application and the reason(s) why those alternatives were not pursued;

(56) The prohibited transaction provisions from which exemptive relief is requested and the reason(s) why the exemption transaction would violate each such provision;

~~(6) Whether the exemption transaction is customary for the industry or class involved;~~

(7) A description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted;

(78) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department ~~or by~~, the Internal Revenue Service, **or any other regulatory authority**; and

(89) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.

(10) With respect to the exemption transaction's definition of affiliate, if applicable, either a statement that the definition of affiliate set forth in § 2570.31(a) is applicable or a statement setting forth why a different affiliate definition should be applied.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would ~~be~~ **meet the requirements of ERISA section 408(a) by being**—

(i) Administratively feasible **for the Department**;

(ii) In the interests of affected plans and their participants and beneficiaries; and

(iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) A statement that either:

(i)(A) The exemption transaction will be in the best interest of the plan and its participants and beneficiaries;

(B) That all compensation received, directly or indirectly, by a party in interest (and its affiliates) involved in the exemption transaction does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(C) That all statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters are not materially misleading at the time the statements are made; or

(ii) Explains why the exemption standards in paragraphs (b)(2)(i)(A) through (C) of this section are not applicable to the exemption transaction.

(iii) For purposes of this paragraph (b)(2), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the exemption transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party in interest, or any affiliate ahead of the interests of the plan or subordinate the plan's interests to itself, or any other party or affiliate.

(23) With respect to the notification of interested persons required by § 2570.43:

(i) A description of the interested persons to whom the applicant intends to provide notice;

(ii) The manner in which the applicant will provide such notice; and

(iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the *Federal Register*.

~~(3) If an advisory opinion has been requested by any party to the exemption transaction from the Department with respect to any issue relating to the exemption transaction—~~

(4) If any party to the exemption transaction has requested either an advisory opinion from the Department or any similar opinion or guidance from another Federal, state, or regulatory body with respect to any issue relating to the exemption transaction—

(i) A copy of the opinion, letter, or similar document concluding the Department's or other entity's action on the ~~advisory opinion~~ request; or

(ii) If the Department or other entity has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted ~~together and, solely~~ with ~~the Department's~~ respect to an advisory opinion request to the Department, the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect ~~of~~ the issuance of an advisory opinion by the Department or similar opinion or guidance from another Federal, state, or regulatory body would have upon the exemption transaction.

~~(45)~~ If the application is to be signed by anyone other than ~~an individual~~ the party in interest seeking exemptive relief on ~~his or her~~ their own behalf, a statement which —

(i) Identifies the individual signing the application and ~~his or her~~ their position or title; and

(ii) ~~Explains briefly~~ Briefly explains the basis of ~~his or her~~ their familiarity with the matters discussed in the application.

~~(56)~~(i) A declaration in the following form:

~~Under penalty of perjury,~~ I ~~declare~~ certify that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This ~~declaration~~ certification must be dated and signed by:

(A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on ~~his or her~~ their own behalf;

(B) A corporate officer or partner ~~where~~ if the applicant is a corporation or partnership;

(C) A designated officer or official ~~where~~ if the applicant is an association, organization, or other unincorporated enterprise; or

(D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction ~~where~~ if the applicant is a plan.

(7) If an applicant communicated with the Department either orally or in writing before submitting an exemption application for the exemption transaction, a statement setting forth the date(s) and with whom the applicant communicated before submitting the application.

(c) ~~Specialized statements, as applicable,~~ Statements and documents from a qualified independent appraiser ~~acting solely on behalf of the plan,~~ auditor, or accountant, such as appraisal reports ~~or,~~ analyses of market conditions,

audits, or financial documents submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser, auditor, or accountant acknowledging that the statement is being submitted to the Department as part of an ~~application for~~ exemption. ~~Such~~ application. The statements by the qualified independent appraiser, auditor, or accountant must also contain the following written information:

- (1) A signed and dated certification stating that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, the representations made in such statement are true and correct;
- (12) A copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake; ~~The letter or contract may not:~~
 - (i) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work. However, the letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the appraiser's, auditor's, or accountant's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work, provided that:
 - (A) The plan determines that the reimbursement is prudent following a good faith determination that the appraiser, auditor, or accountant likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work and will be able to repay the plan; and
 - (B) The letter or contract requires the appraiser, auditor, or accountant to repay all of the reimbursements, in a timely fashion, in the event the appraiser, auditor, or accountant enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the appraiser's, auditor's, or accountant's work; or
 - (ii) Waive any rights, claims, or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction;
- (23) A summary of the qualified independent appraiser's, auditor's, or accountant's qualifications to serve in such capacity;
- (34) A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party in interest ~~engaging~~involved in the exemption transaction ~~with the plan,~~ or its affiliates, that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant;
- (45) A written appraisal report prepared by the qualified independent appraiser, ~~acting solely on behalf of the plan, rather than, for example, on behalf of the plan sponsor, which satisfies the following requirements:~~which determines, to the best of the qualified independent appraiser's ability and in accordance with professional appraisal standards, the fair market value of the subject asset(s), without bias towards the plan's counterparty in the transaction or other interested parties:
 - (i) The report must describe the method(s) used in determining the fair market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

- (ii) The report must ~~take into account~~consider any special benefit that ~~the~~a party in interest ~~or its affiliate(s)~~involved in the exemption transaction may derive from control of the asset(s), such as from owning an adjacent parcel of real property or gaining voting control over a company; and
 - (iii) The report must be current and not more than one year old from the date of the exemption transaction, and ~~there must be~~ a written update must be prepared by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the exemption transaction. ~~If the appraisal report is a year old or more, a new appraisal shall be submitted to the Department by the applicant.;~~
- (56) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that ~~he or she is~~they are a member of a professional organization of appraisers that can sanction its members for misconduct;
- (67) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the appraiser's prior experience in valuing assets of the same type; and
- (78) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest ~~involved in the transaction~~ (or its affiliates) involved in the exemption transaction; in general, such percentage shall be computed with respect to the two separate disclosures by comparing, in fractional form:
- (i) The amount of the appraiser's projected revenues from the current ~~federal~~Federal income tax year (including amounts received from preparing the appraisal report) that will be derived from ~~the any~~ party in interest (or its affiliates) involved in the exemption transaction (expressed as a numerator); and
 - (ii) The appraiser's revenues from all sources for the prior ~~federal~~Federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent appraiser, the applicant must include:

- (1) A representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction;
- (2) A representation that the appraiser is independent within the meaning of § 2571.31(i); and
- (3) A representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction.

(e) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, the applicant must include:

- (1) A representation that an appropriate fiduciary, without material conflicts of interest, prudently selected the independent fiduciary after diligent review of the independent fiduciary's technical training and proficiency with respect to ERISA, the Code, and the specific details of the exemption transaction, as well as the sufficiency of the independent fiduciary's fiduciary liability insurance;
- (2) A representation that the fiduciary retained to act as the independent fiduciary is independent within the meaning of § 2570.31(j);

(3) A representation that the independent fiduciary has appropriate technical training and proficiency with respect to:

(i) ERISA and the Code; and

(ii) The specific details of the exemption transaction.

(ef) For ~~these~~ exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by such independent fiduciary that contains the following written information:

- (1) A signed and dated ~~declaration under penalty of perjury~~ certification that, to the best of the qualified independent fiduciary's knowledge and belief, all ~~of~~ the representations made in such statement are true and correct;
- (2) A copy of the qualified independent fiduciary's engagement letter and, if applicable, contract with the plan describing the fiduciary's specific duties; The letter or contract may not:

(i) Contain any provisions that violate ERISA section 410;

(ii) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work, except that the letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work, provided that:

(A) The plan determines that the provision is prudent following a good faith determination that the independent fiduciary likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work and will be able to repay the plan; and

(B) The letter or contract requires the independent fiduciary to repay all of the reimbursements, in a timely fashion, if the independent fiduciary enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal law, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the independent fiduciary's work; or

(iii) Waive any rights, claims, or remedies of the plan under ERISA, state, or Federal law against the independent fiduciary with respect to the exemption transaction;

(3)(i) A description of any fiduciary liability insurance policy maintained by the independent fiduciary that includes:

(A) The amount of coverage available to indemnify the plan for damages resulting from a breach by the independent fiduciary of either ERISA, the Code, or any other Federal or state law or its contract or engagement letter; and

(B) Whether the insurance policy contains an exclusion for actions brought by the Secretary or any other Federal, state, or regulatory body; the plan; or plan participants or beneficiaries;

(34) An explanation of the bases for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that person's or entity's qualifications to serve in such capacity; ~~as well as~~ and a description of any prior experience by that person or entity or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity

suitable to perform its duties as a qualified independent fiduciary on behalf of the plan with respect to the exemption transaction;

- (45) A detailed description of any relationship that the qualified independent fiduciary has had or may have with the plan and any party in interest ~~engaging~~involved in the exemption transaction ~~with the plan~~ (or its affiliates);
- (56) An acknowledgement by the qualified independent fiduciary that it understands its duties and responsibilities under ERISA ~~in; is~~ acting as a fiduciary ~~on behalf~~ of the plan ~~rather than, for example, acting on behalf of the plan sponsor;~~ with respect to the exemption transaction; has no material conflicts of interest with respect to the exemption transaction; and is not acting as an agent or representative of the plan sponsor;
- (67) The qualified independent fiduciary's opinion on whether the ~~proposed~~exemption transaction would be in the interests of the plan and ~~of its~~ participants and beneficiaries, ~~and~~ protective of the rights of participants and beneficiaries of ~~such~~the plan, and in compliance with the standards set forth in paragraphs (b)(2)(i)(A) through (C) of this section, if applicable, along with a statement of the reasons on which the opinion is based;
- (78) ~~Where the proposed~~If the exemption transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and ~~shall~~will, during the pendency of the exemption transaction:
- (i) Monitor the exemption transaction on behalf of the plan and its participants and beneficiaries on a continuing basis;
 - (ii) Ensure that the exemption transaction remains in the interests of the plan and its participants and beneficiaries and, if not, take any appropriate actions available under the particular circumstances; and
 - (iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the exemption transaction;~~and~~
- (89) The qualified independent fiduciary shall submit a written representation disclosing the percentage of ~~such fiduciary's~~sits current revenue that is derived from any party in interest involved in the exemption transaction (or its affiliates) with respect to both the prior Federal income tax year and current Federal income tax year; in general, such percentage shall be computed with respect to the two disclosures by comparing~~;~~ in fractional form:
- (i) The amount of the independent fiduciary's projected revenues from the current ~~federal~~Federal income tax year that will be derived from ~~the party~~parties in interest ~~or its~~involved in the exemption transaction and their affiliates (expressed as a numerator); and
 - ~~(ii) The fiduciary's revenues from all sources (excluding fixed, nondiscretionary retirement income) for the prior federal income tax year (expressed as a denominator).~~(ii) The independent fiduciary's revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior Federal income tax year (expressed as a denominator);
- (10) A statement that the independent fiduciary has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary;
- (11) Either:
- (i) A statement that, within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation, or a continuing controversy

with the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving:

(A) Compliance with provisions of ERISA or FERSA;

(B) Its representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(C) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(D) Income tax evasion; or

(E) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(ii) A statement describing the applicable investigation, examination, litigation, or controversy; and

(12)(i)(A) Either a statement that, within the last 13 years, the independent fiduciary has not been:

(1) Convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(2) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime that is substantially equivalent to an offense described in paragraph (f)(12)(i)(A)(1) of this section; or

(B) A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A) of this section.

(ii) For purposes of this paragraph (f), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal, and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

(eg) ~~Specialized statements~~**Statements**, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an **exemption** application ~~for exemption~~ must be accompanied by a statement of consent from such expert acknowledging that the statement prepared on behalf of the plan is being submitted to the Department as part of an **exemption** application ~~for exemption~~. Such statements must also contain the following written information:

- (1) A copy of the expert's engagement letter **and, if applicable, contract** with the plan describing the specific duties the expert will undertake;
- (2) A summary of the expert's qualifications to serve in such capacity; and
- (3) A detailed description of any relationship that the expert has had or may have with any party in interest ~~engaging in the transaction with the plan, (or its affiliates),~~ **involved in the exemption transaction** that may influence the actions of the expert.

(fh) An application for exemption may also include a draft of the requested exemption which describes the **exemption** transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

§ 2570.35 Information to be included in applications for individual exemptions only.

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34 ~~of this subpart~~, the following information:

- (1) The name, **address, e-mail** address, telephone number, and type of plan or plans to which the requested exemption applies;
- (2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department **(individuals should not submit Social Security numbers)**;

- (3) Whether any plan or trust affected by the requested exemption is currently under investigation for violation of, or has ever been found by the Department, the Internal Revenue Service, or by a court to have violated, the exclusive benefit rule of Code section 401(a) ~~of the~~ Code, section 4975(c)(1) ~~of the Code, section~~, ERISA sections 406 or 407(a) ~~of ERISA,~~ or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;
- (4) Whether any relief under ERISA section 408(a) ~~of ERISA,~~ Code section 4975(c)(2) ~~of the Code,~~ or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any ~~of the~~ parties on behalf of whom in interest (or their affiliates) involved in the exemption ~~is sought~~ transaction and, if so, the exemption application number or the prohibited transaction exemption number;
- (5) Whether the applicant or any ~~of the parties~~ party in interest (or its affiliates) involved in the exemption transaction is currently, or has been within the last five years, a defendant in any ~~lawsuit~~ lawsuits or criminal ~~action~~ actions concerning ~~such person's~~ sits conduct as a fiduciary or party in interest with respect to any plan (other than ~~a lawsuit~~ lawsuits with respect to a routine claim for benefits), and a description of the circumstances of ~~such lawsuit~~ the lawsuits or criminal ~~action~~ actions;
- (6)(i) Whether the applicant (including any person described in § 2570.34(b)(5)(ii)) or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been ~~either convicted or released from imprisonment, whichever is later, as a result of:~~
- ~~(A) Convicted or released from imprisonment, whichever is later, as a result of~~ any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; ~~(B) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; (C) income tax evasion; (D) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; (E) conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or (F) any other crime described in section 411 of ERISA, and a description of the circumstances of any such conviction.~~
- (B) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i)(A) of this section and a description of the circumstances of any such conviction in paragraph (a)(6)(i)(A) or this paragraph (a)(6)(i)(B); and
- (ii) For purposes of this ~~section~~ paragraph (a), a person shall be deemed to have been ~~“convicted”~~ from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal;
- (7) Whether, within the last five years, any plan affected by the exemption transaction, the applicant, or any party in interest (or its affiliates) involved in the exemption transaction, has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, ~~or the Federal Retirement Thrift Investment Board,~~ or any other regulatory body involving compliance with provisions of ERISA, ~~provisions of FERSA,~~ the Code ~~relating to employee benefit plans, or provisions of FERSA relating to the,~~ or any other Federal ~~Thrift Savings Fund~~ or state law involving:
- (i) Compliance with provisions of ERISA or FERSA;

(ii) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(iii) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(iv) Income tax evasion; or

(v) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities. If so, the applicant must provide a brief statement describing the investigation, examination, litigation, or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the ~~above~~ matters in this paragraph (a)(7). In this regard, a denial of the exemption application ~~will~~may result from ~~a~~an applicant's failure to provide additional information requested by the Department.;

- (8) Whether any plan affected by the requested exemption has experienced a reportable event under ERISA section 4043 ~~of ERISA~~, and, if so, a description of the circumstances of any such reportable event;
- (9) Whether a notice of intent to terminate has been filed under ERISA section 4041 ~~of ERISA~~ respecting with respect to any plan affected by the requested exemption, and, if so, a description of the circumstances for the issuance of ~~such~~the notice;
- (10) Names, addresses, ~~and taxpayer identifying~~phone numbers, and e-mail addresses of all parties in interest (or their affiliates) involved in the ~~subject~~exemption transaction;
- (11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;
- (12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction. If the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the fraction;
- (13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;
- (14) If the exemption transaction has already been consummated:
- (i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the exemption transaction before obtaining an exemption from the Department;
 - (ii) Whether the exemption transaction has been terminated;
 - (iii) Whether the exemption transaction has been corrected as defined in Code section 4975(f)(5);
 - (iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the exemption transaction; and
 - (v) Whether any excise taxes due under Code section 4975(a) and (b) ~~of the Code~~, or any civil penalties due under ERISA section 502(i) or (l) ~~of ERISA~~ by reason of the exemption transaction have been paid. If so, the applicant should submit documentation (e.g., a canceled check) demonstrating that the excise taxes or civil penalties were paid.;

(15) The name of every person who has authority or investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether the assets of the affected plan(s) are invested, directly or indirectly, in:

(i) loans to any party in interest (or its affiliates) involved in the exemption transaction;

(ii) Property leased to any party in interest (or its affiliates) involved in the exemption transaction; or

~~(16) Whether or not the assets of the affected plan(s) are invested in loans to~~ (iii) Securities issued by any party in interest (or its affiliates) involved in the exemption transaction, ~~in property leased to any such party in interest, or in securities issued by any such party in interest,~~ and, if such investments exist, a statement for each of these three types of investments which indicates:

~~(i)~~ (iA) The type of investment to which the statement pertains;

~~(ii)~~ (iiB) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

~~(iii)~~ (iiiC) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

~~(iv)~~ (ivD) The statutory or administrative exemption covering these investments, if any;

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) or entity who will bear the costs of ~~the exemption application and of notifying:~~

(i) The exemption application;

(ii) Any commissions, fees, or costs associated with the exemption transaction, and any related transaction; and

(iii) Notifying interested persons; ~~and~~

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable ~~to such fiduciary;~~ to such fiduciary; and

(20) Any prior transaction between:

(i) The plan or plan sponsor; and

(ii) Any party in interest (or its affiliates) involved in the exemption transaction.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are ~~reflected in these documents and an analysis of~~ reflected in the documents listed in paragraph (b)(1) of this section and an analysis of their bearing on the requested exemption;

(3) A copy of the most recent financial statements of each plan affected by the requested exemption; and

(4) A net worth statement with respect to any party ~~in interest~~ that is providing a personal guarantee with respect to the exemption transaction.

(c) Special ~~rule~~rules for applications for individual exemption involving pooled funds ~~are as follows:~~

(1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds;

(2) The information required by paragraphs (a)(1) through (7) and ~~(a)(13)~~ through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph ~~(c)(2)~~, the information required by paragraph (a)(16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.);

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual ~~exemption~~exemptions involving pooled funds in which certain plans participate ~~are as follows:~~

(i) This paragraph ~~(c)(4)~~ applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20% percent of the total assets of the pooled fund; or

(B) Covers employees of:

(1) The party sponsoring or maintaining the pooled fund, or any affiliate of such party; or

(2) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), ~~(a)(5)~~ through (7), ~~(a)(10)~~, ~~(a)(12)~~ through (16), ~~and (a)(18)~~, and (19) of this section. The information required by this paragraph ~~(c)(4)(ii)~~ must be furnished in reference to the plan's investment in the pooled fund (e.g., the names, addresses ~~and taxpayer identifying~~, phone numbers, and email addresses of all fiduciaries responsible for the plan's investment in the pooled fund (~~§ 2570.35~~paragraph (a)(10) of this section), the percentage of the assets of the plan invested in the pooled fund (~~§ 2570.35~~paragraph (a)(12) of this section), whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted (~~§ 2570.35~~paragraph (a)(13) of this section, etc.)).

(iii) The information required by this paragraph (c)(4) ~~of this section~~ is in addition to the information required by paragraphs (c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

~~(d) Retroactive exemptions:~~ (d)(1) Generally, the Department will favorably consider exemption requests for retroactive relief, ~~in all exemption applications,~~ only ~~where the~~ when:

(i) The safeguards necessary for the grant of a prospective exemption were in place at the time ~~at which~~ the parties entered into the exemption transaction; and

(ii) The plan and its participants and beneficiaries have not been harmed by the exemption transaction. An applicant for a retroactive exemption must ~~have~~ demonstrate that the responsible plan fiduciaries acted in good faith by taking ~~reasonable and all~~ appropriate steps necessary to protect the plan from abuse, loss, and ~~unnecessary~~ risk at the time of the exemption transaction. An applicant should further explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the transaction could have been achieved through an alternative transaction that served the aims of the plan equally well.

(2) Among the factors that the Department ~~would take into account~~ will consider in making a finding that an applicant acted in good faith include the following:

(i) The ~~participation~~ involvement of an independent fiduciary ~~acting before an exemption transaction~~ occurs who acts on behalf of the plan ~~who and~~ is qualified to negotiate, approve, and monitor the exemption transaction; provided, however, the Department may consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

(iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;

(iv) That the applicant has submitted an accurate and complete ~~application for~~ exemption containing application that contains documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, ~~additional~~ the Department will accord appropriate weight ~~will be given~~ to facts and representations which are prepared and certified by a source independent of the applicant;

(v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction ~~knowing that such act or transaction~~ with respect to which the fiduciary should have known, consistent with its ERISA fiduciary duties and responsibilities, was prohibited under ERISA section 406 ~~of ERISA~~ and/or Code section 4975 ~~of the Code~~. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before ~~entering~~ engaging in the act or transaction;

(vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant ~~with regard to the~~ about the exemption transaction upon discovery of the violation;

(vii) That the applicant has submitted a statement, prepared and certified by an independent person familiar with the types of transactions for which relief is requested, demonstrating that the terms and conditions of the exemption transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable to the plan as that obtainable in a similar transaction with an unrelated party; and

(viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the criteria under [ERISA](#) section 408(a) ~~of ERISA~~ and [Code](#) section 4975(c)(2) ~~of the Code~~.

(3) The Department, as a general matter, will not ~~favorably~~ consider requests for retroactive exemptions ~~whereif~~ transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan, as determined pursuant to the facts existing at the time of the exemption application. In addition, the Department will not ~~favorably~~ consider requests for exemptions ~~whereif~~ the transactions are inconsistent with the general fiduciary responsibility provisions of [ERISA](#) sections 403 or 404 ~~of ERISA~~ or the exclusive benefit requirements of [Code](#) section 401(a) ~~of the Code~~.

§ 2570.36 Where to file an application.

The Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by ~~these procedures may be mailed~~ this subpart may be e-mailed to the Department at e-OED@dol.gov. The applicant is not required to submit a paper copy if an electronic copy is submitted. An applicant may submit a paper copy of the application by mailing it via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S.

Department of Labor, ~~Room N-5700~~, 200 Constitution Avenue NW, Suite 400 Washington, DC 20210. ~~Alternatively, applications may be emailed to the Department at e-OED@dol.gov or transmitted via facsimile at (202) 219-0204. Notwithstanding the foregoing methods of transmission, applicants are also required to submit one~~ or via private carrier service to Employee Benefit Security Administration, U.S. Department of Labor, Office of Exemption Determinations, 122 C Street NW, Suite 400, Washington, DC 20001-2109. The mail or private carrier service addresses, however, are subject to change, and the applicant should confirm the address with the Office of Exemption Determinations before submitting a paper copy of ~~the exemption an~~ application ~~for the Department's file.~~

§ 2570.37 Duty to amend and supplement exemption applications.

(a) ~~While~~ During the Department's consideration of an exemption application ~~is pending final action with~~ and following any grant by the Department of an exemption request, an applicant must promptly notify the Department in writing if ~~he or she discovers~~ they discover that any material fact or representation contained in the application or in any documents or testimony provided in support of the application ~~is was~~ inaccurate, ~~if any such at the time it was provided to the Department in support of the application. If any material~~ fact or representation changes during this period, or if, ~~during the pendency of the application,~~ anything occurs that may affect the continuing accuracy of any such fact or representation, the applicant must promptly notify the Department in writing of the change. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, ~~or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund,~~ the applicant must promptly notify the, or any other Federal or state governmental entity involving:

(1) Compliance with provisions of ERISA or FERSA;

(2) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(3) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(4) Income tax evasion; or

(5) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide any documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

§ 2570.38 Tentative denial letters.

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing. At the same time the Department provides the notification, the Department will also provide a brief statement of the reasons for its tentative denial. Note 1 to paragraph (a). As referenced in § 2570.33(a)(1), the Department will not hold a conference with, or issue a tentative denial letter to, an applicant who does not submit a complete application, or an applicant who does not provide current information.

(b) An applicant will have 20 days from the date of a tentative denial letter, unless the Department extends the time period at its sole discretion, to request a conference under § 2570.40 ~~of this subpart~~ and/or to notify the Department of its intent to submit additional information under § 2570.39 ~~of this subpart~~. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

~~(c) The Department need not issue a tentative denial letter to an applicant before issuing a final denial letter where the Department has conducted a hearing on the exemption pursuant to either § 2570.46 or § 2570.47.~~

§ 2570.39 Opportunities to submit additional information.

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application ~~either by telephone or~~, by letter sent to the address furnished in the applicant's tentative denial letter, or electronically to the email e-mail address provided in the applicant's tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) The additional information an applicant intends to provide in support of the application must be in writing and ~~be~~ received by the Department within 40 days from the date of the Department issues the tentative denial letter unless the Department extends the time period at its sole discretion. All such information must be accompanied by a ~~declaration under penalty of perjury attesting to the truth and correctness of the certification that all~~ information provided, which is to the Department is true and correct, and the certification must be dated and signed by a person qualified under § 2570.34(b)(5) ~~of this subpart~~ to sign such a declaration. The information may be submitted either electronically or by mail to the address specified in the letter.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information ~~he or she intends they intend~~ to provide in support of his their application within the ~~40-day~~ period described in paragraph (b) of this section, ~~he or she they~~ may request an extension of time to furnish the information. Such requests must be made before the expiration of the ~~40-day~~ time period described in paragraph (b), and the request will be granted, in the Department's sole discretion, only in unusual circumstances and for a limited period as determined by the Department. The request may be made by telephone, mail, or electronically. a limited period as determined, respectively, by the Department in its sole discretion. ~~(d) If an applicant is unable to submit all of the additional information he or she intends to provide within the 40-day period specified in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) withdraw the exemption application before expiration of the applicable time period and reinstate it later pursuant to § 2570.44.~~

~~(ed)~~ The Department will issue, without further notice, either by mail or electronically, a final denial letter denying the requested exemption pursuant to § 2570.41 ~~where if~~—

(1) The Department has not received the additional information that the applicant stated ~~his or her their~~ intention to submit within the ~~40-day~~ period described in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section; and

(2) The applicant did not request a conference pursuant to § 2570.38(b) ~~of this subpart; and,~~

~~(3) The applicant has not withdrawn the application as permitted by paragraph (d) of this section.~~

§ 2570.40 Conferences.

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone or electronic conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. The Department may hold additional conferences at its sole discretion if it determines additional conference(s) are appropriate. An applicant will not be entitled to a conference, however, whereif the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47 ~~of this subpart.~~

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present whereif:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information, it ~~is still~~ is not prepared to propose the requested exemption or a later date determined at the Department's sole discretion. If, for reasons beyond its control, the applicant cannot attend a conference within the ~~20-day~~ time limit described in this paragraph (d), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the ~~20-day~~ time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period ~~as determined, respectively, by the Department in its sole discretion.~~

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the ~~40-day~~ time limit described in this paragraph (e), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the ~~40-day~~ time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period ~~as determined, respectively, by the Department in its sole discretion.~~

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b) ~~of this subpart, has,~~ notified the Department of its intent to submit additional information pursuant to § 2570.39, and ~~has~~ failed to furnish such information within 40 days ~~from~~ after the date of issuance of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date as determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the ~~60-day~~ time limit described in this paragraph (f), the applicant may request an extension of time ~~for the scheduling of a~~ to schedule a conference, provided that such request is made before the expiration of the ~~60-day~~ time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period ~~as determined, respectively, by the Department in its sole discretion.~~

(g) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to this section, the applicant will be deemed to have waived its right to a conference.

(h) Within 20 days after the date of any conference held under this section, or a later date determined at the sole discretion of the Department, the applicant may submit to the Department (electronically or in paper form) any additional written data, arguments, or ~~precedents~~legal authorities discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this ~~20-day~~time limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the ~~20-day~~time limit described in this paragraph (h). The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period ~~as determined, respectively, by the Department in its sole discretion~~.

(i) The Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties involved in the exemption transaction, or their representatives. Any such conferences may occur in addition to the conference with the applicant described in paragraph (b) of this section.

§ 2570.41 Final denial letters.

The Department will issue a final denial letter denying a requested exemption ~~where~~, either by mail or electronically, if:

(a) Before issuing a tentative denial letter under § 2570.38 or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, the Department determines at its sole discretion that:

(1) The applicant has failed to submit information requested by the Department in a timely manner;

(2) The information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or

(3) A conference was held between the Department and the applicant before the Department issued a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38;

(ab) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39~~(ed)~~ of this subpart are satisfied;

(bc) After issuing a tentative denial letter under § 2570.38 ~~of this subpart~~ and considering the entire record in the case, including all written information submitted pursuant to §§ 2570.39 and 2570.40 ~~of this subpart~~, the Department decides not to propose an exemption or to withdraw an exemption it already proposed; ~~or~~

(ed) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 ~~of this subpart~~ and after considering the entire record in the case, including the record of the hearing and any public comments, the Department decides to withdraw the proposed exemption; ~~or~~

(e) The applicant either:

(1) Requests for the Department to withdraw the exemption application; or (2) Communicates to the Department that it is not interested in continuing the application process.

§ 2570.42 Notice of proposed exemption.

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the *Federal Register*. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) ~~Whereif~~ the proposed exemption includes relief from the prohibitions of ERISA section 406(b) ~~of ERISA,~~ Code section 4975(c)(1)(E) or (F) ~~of the Code,~~ or FERSA section 8477(c)(2) ~~of FERSA,~~ inform interested persons who are materially affected by the grant of the exemption of their right to request a hearing under § 2570.46 ~~of this subpart~~ and establish a deadline for receipt of hearing requests ~~for such hearings~~ to be submitted.

§ 2570.43 Notification of interested persons by applicant.

(a) If a notice of proposed exemption is published in the *Federal Register* in accordance with § 2570.42 ~~of this subpart~~, the applicant must notify interested persons of the pendency of the exemption in the manner and within the time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the Department's consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the *Federal Register*; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption, and described in greater detail in the accompanying] ² Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date]. ³ [If you may be adversely materially affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].] ⁴

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room ~~2022~~ ⁵ N-5461,⁴ U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, ATTENTION: Application No. ~~2022~~ ⁶ _____.⁵ Comments and hearing requests may also be transmitted to the Department electronically at ~~e-oed@dol.gov or at http://www.regulations.gov~~ e-OED@dol.gov or at https://www.regulations.gov (follow instructions for submission), and should prominently reference the application number listed above. ~~In addition, comments and hearing requests may be transmitted to the Department via facsimile at (202) 219-0204.~~

Individuals submitting comments or requests for a hearing on this matter are advised not to disclose sensitive personal data, such as social security numbers or information that they consider confidential or otherwise protected.

¹ To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in paragraph (d) of this section.

² The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

³ To be added in the case of an exemption that provides relief from ERISA section 406(b) or corresponding sections of the Code or FERSA.

⁴ The applicant will fill in the room number of the Office of Exemptions Determinations. As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the room number of the Office of Exemption Determinations is N-5461.

⁵ The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

The Department will make no final decision on the proposed exemption until it reviews the comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, ~~he or she~~they must provide satisfactory proof ~~of electronic delivery to~~that the entire class of interested persons will be able to receive the notice.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the ~~foregoing~~ requirements in paragraph (b) of this section. This statement must be accompanied by a ~~declaration under penalty of perjury attesting to the truth of~~certification that the information provided in the statement and signed by a person qualified under § 2570.34(b)(~~56~~) ~~of this subpart~~ to sign such a declaration is true and correct. No exemption will be granted until ~~such a statement and its accompanying declaration have been furnished~~the applicant furnishes such a certification to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its sole discretion, may also require an applicant to furnish interested persons with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

- (1) The exemption transaction and the parties in interest thereto;
- (2) Why ~~such~~the exemption transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;
- (3) The reasons why the plan seeks to engage in the exemption transaction; and
- (4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval ~~prior to~~before its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

§ 2570.44 Withdrawal of exemption applications.

(a) An applicant may withdraw an application for an exemption at any application for an exemption at any time by oral or written (including electronic) notice to the Department. A ~~withdrawn application generally shall not prejudice any subsequent applications for the same exemption transaction submitted by an applicant.~~ withdrawn application generally shall not prejudice any subsequent applications for an exemption submitted by an applicant.

(b) Upon receiving an applicant's notice of withdrawal regarding an application for an individual exemption, the Department will ~~issue a final denial letter in accordance with § 2570.41(e) and will terminate all exemption, the Department will confirm by letter the applicant's withdrawal of the application and will terminate all proceedings~~ relating to the application. If a notice of proposed exemption has been published in the *Federal Register*, the Department will publish a notice in the *Federal Register* withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of withdrawal regarding an ~~notice of withdrawal regarding an~~ application for a class exemption or ~~for an individual exemption that is being considered with other applications as a~~ request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will ~~continue to process other applications~~ Department will inform any other applicants for the exemption of the withdrawal. The Department will ~~continue to process other applications~~ for the same exemption. If all applicants for a particular class for a particular class ~~exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own~~ exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, they may contact the Department in writing (including electronically) to request the Department to reinstate the application. The applicant should refer to the application number exemption application, an applicant decides to reapply for the same exemption, he or she may contact the Department in writing (including electronically) to request that the application be reinstated. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information required withdrawn, any additional information to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. The applicant must also update all previously furnished information to the Department in connection with a withdrawn application. § 2570.39 was outstanding, that information must accompany the request for reinstatement of the 2 To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in § 2570.43(d). 3 The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption. 4 To be added in the case of an exemption that provides relief from section 406(b) of ERISA or corresponding sections of the Code or FERSA. 5 The applicant will fill in the room number of the Office of Exemptions Determinations. As of the date of this final regulation, the room number of the Office of Exemption Determinations is N-5700. 6 The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application. application. However, the applicant need not resubmit information previously furnished to the Department in connection with a withdrawn application unless reinstatement of the application is requested more than two years after the date of its withdrawal.

(e) Any request for reinstatement of a withdrawn application submitted in withdrawn application submitted, in accordance with paragraph (d) of this section will be granted by the Department, and the Department will take whatever steps remained to process the application when the applicant withdrew the application.

(f) Following the withdrawal of an exemption application, the administrative record will remain subject to public inspection and copy pursuant to § 2570.51. section, will be granted by the Department, and the Department will take whatever steps remained at the time the application was withdrawn to process the application.

§ 2570.45 Requests for reconsideration.

(a) The Department will entertain one request for reconsideration of an exemption application that the Department has ~~request for reconsideration of an exemption application that has been finally~~ denied pursuant to § 2570.41 if the applicant either: ~~the applicant presents in support of the application significant new facts or~~

(1) Presents significant new facts or arguments in support of the application, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application; or

(2) The applicant received a final denial letter pursuant to § 2570.41(a) before the Department issued a tentative denial letter under § 2570.38 or conducted a hearing on the exemption under either § 2570.46 or § 2570.47.

~~could not have been submitted for the Department's consideration during its initial review of the exemption application.~~

(b) ~~An applicant must submit a~~ request for reconsideration of a previously denied application ~~previously denied application must be made~~ within 180 days after the issuance of the final denial letter and must be include with the request a copy of the Department's final denial letter and a statement setting forth ~~accompanied by a copy of the Department's final letter denying the exemption and a statement setting forth~~ the new information and/or arguments that provide the basis for ~~that provide the basis for~~ reconsideration.

(c) A request for reconsideration must also be accompanied by a declaration certification that the new information provided to the Department is true and correct, ~~under penalty of perjury attesting to the truth of the new information provided,~~ which is signed by a person qualified under § 2570.34(b)(56) to sign such a the certification ~~declaration~~.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented ~~reconsideration, the Department decides that the facts and arguments presented~~ do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides to reconsider its final denial letter based on the new facts and arguments submitted by the applicant, it will notify the ~~reconsideration, the Department decides, based on the new facts and arguments submitted, to reconsider its final denial letter, it will notify the~~ applicant of its intent to reconsider the application in light of the new information presented. The Department ~~application in light of the new information presented. The Department~~ will then take whatever steps remained to be completed to process the exemption application when it issued its final denial letter. ~~at the time it issued its final denial letter to process the exemption application.~~

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is ~~subsequent processing of the application, the Department decides again that the exemption is~~ unwarranted, it will issue a letter to the applicant affirming its final denial. ~~affirming its final denial.~~

(g) The Department does not consider a request for reinstatement of an exemption application pursuant to § 2570.44(d) as a request for reconsideration governed by this section.

(h) If an applicant whose application was finally denied pursuant to § 2570.41(a)(1) or (2) cures the application by providing all required and requested information upon submission for reconsideration, the Department will reconsider the application under paragraph (e) of this section. If, upon reconsideration, the Department concludes that an exemption is not warranted, the Department will either hold a conference with the applicant under § 2570.40 or issue a tentative denial pursuant to the procedures in § 2570.38.

§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing and conflicts of interest.
~~exemptions from restrictions on fiduciary self-dealing.~~

~~(a) Any interested person who may be adversely~~ (a) Any person who may be **materially** affected by an exemption which the Department proposes to grant from the restrictions of ERISA section 406(b) ~~of ERISA, Code~~ section 4975(c)(1)(E) or (F) ~~of the~~, or FERSA section 8477(c)(2) ~~Code, or section 8477(c)(2) of FERSA~~ may request a hearing before the Department within the time period ~~of time~~ specified in the *Federal Register* notice of the proposed exemption. ~~Any such of the proposed exemption. Any such~~ request must state:

- (1) The name, address, telephone number, and email address of the person making the request;
- (2) The nature of the person's interest in the exemption and how the person would be materially ~~in the exemption and the manner in which the person would be adversely~~ affected by the exemption; and
- (3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. ~~the the evidence to be presented at the hearing.~~

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this request ~~for a hearing made in accordance with paragraph (a) of this section~~ **whereif** a hearing is necessary to fully explore material factual issues with respect to the proposed exemption identified by the person requesting the hearing. ~~The Department will publish a notice of such hearing in the~~ *Federal Register*. ~~The Department may identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the~~ **Federal Register.** ~~The Department may~~ decline to hold a hearing **whereif**:

- (1) The request for the hearing **does is not timely, or otherwise fails to include the information required by paragraph (a) of this section;** ~~not meet the requirements of paragraph (a) of this section;~~
- (2) The only issues identified for exploration at the hearing are matters of law; or (3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption **must notify interested persons if the Department schedules a hearing on the exemption.** ~~Such must notify interested persons in the event that the Department schedules a hearing on the exemption. Such notification must be given provided~~ in the form, time, and manner prescribed by the Department. ~~Ordinarily, however, adequate notification can be given by providing to interested persons a copy~~ Department. ~~Ordinarily, however, adequate notification can be given by providing to interested persons a copy~~ of the notice of hearing published by the Department in the Federal Register ~~Department in the~~ **Federal Register** within 10 days ~~of after~~ its publication, using any of the methods approved in § 2570.43(b). ~~any of the methods approved in § 2570.43(b).~~

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a **certification that the information provided in the statement is true and correct,** ~~which is declaration under penalty of perjury attesting to the truth~~ of the information provided in the statement, ~~which is~~ signed by a person qualified under **§ 2570.34(b)(6) to sign a certification** ~~§ 2570.34(b)(5) to sign such a declaration.~~

§ 2570.47 Other hearings.

(a) In its **sole** discretion, the Department may schedule a hearing on its own **motion if it determines that issues** ~~motion where it determines that issues~~ relevant to the exemption can be most fully or expeditiously explored at a hearing. **The Department shall publish a notice of such hearing in the Federal Register.**

~~(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a certification subscribed as true and correct like that required in § 2570.46(d). fully or expeditiously explored at a hearing. A notice of such hearing shall be published by the Department in the Federal Register. (b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a statement subscribed as true under penalty of perjury like that required in § 2570.46(d).~~

§ 2570.48 Decision to grant exemptions.

~~(a) The Department may not grant an~~ (a) The Department may not grant an exemption under ERISA section 408(a) ~~of Code section 4975(c)(2), ERISA, section 4975(c)(2) of the Code,~~ or 5 U.S.C. 8477(c)(3) ~~(C)~~ unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the ~~record of~~ record of any hearing held in connection with the proposed exemption), it finds that the exemption meets the statutory requirements by being: exemption is:

- (1) Administratively feasible for the Department;
- (2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and ~~FERSA) and of its participants and~~ beneficiaries; and
- (3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the ~~Department determines to grant an~~ Department determines to grant an exemption, it shall publish a notice in the Federal Register which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available. ~~the Federal Register which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.~~

§ 2570.49 Limits on the effect of exemptions.

(a) An exemption does not take effect with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete at the time of the submission of such material.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an ~~an exemption grants relief may rely on~~ exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For exemption transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the exemption transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met. ~~(d) For transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met.~~

(e) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department in its sole discretion. ~~circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department.~~

§ 2570.50 Revocation or modification of exemptions.

(a) If, after an exemption takes effect, material changes in facts, circumstances, or representations occur, including whether a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. If the qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the applicant must notify the Department within 30 days of the resignation, termination, or conviction, and the Department reserves the right to request the applicant to provide the Department with any of the information required pursuant to § 2570.34(e) and (f) pursuant to a time determined by the Department at its sole discretion.

~~(a) If, after an exemption takes effect, changes in circumstances, including changes in law or policy, occur which call into question the continuing validity of the Department's original findings concerning the exemption, the Department may take steps to revoke or modify the exemption.~~

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the *Federal Register* and provide interested persons with an opportunity to comment on the proposed revocation or modification. Before the Department publishes such notice, it will notify the applicant ~~modification. Prior to the publication of such notice, the applicant will be notified~~ of the Department's proposed action and the reasons therefore. After the publication of the notice, the applicant will have the opportunity to comment on the ~~Subsequent to the publication of the notice, the applicant will have the opportunity to comment on the~~ proposed revocation or modification.

~~(c) Ordinarily the revocation or~~ (c) The revocation or modification of an exemption will have prospective effect only. ~~prospective effect only.~~

§ 2570.51 Public inspection and copies.

~~(a) The administrative record of each~~ (a) From the date the administrative record of each exemption is established pursuant to § 2570.32(d), the administrative record of each exemption will be open ~~to public for~~

public inspection and copying at the EBSA Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page; or, at the discretion of the Department, provide the administrative record electronically for a specified charge. ~~for a specified charge per page.~~

§ 2570.52 Effective date.

This subpart ~~B~~ is effective with respect to all exemptions filed with or initiated by the Department under ERISA section 408(a) ~~of ERISA, Code~~ section 4975(c)(2) ~~of the Code~~, and/or 5 U.S.C. 8477(c)(3) at any time on or after [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Applications for 8477(c)(3) ~~at any time on or after December 27, 2011. Applications for~~ exemptions under ERISA section 408(a) ~~of, Code~~ section 4975(c)(2), ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3) filed on or after December 27, 2011, but before [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION OF IN THE FEDERAL REGISTER], are governed by

29 after September 10, 1990, but before December 27, 2011 are governed by part 2570 of chapter XXV of title 29 of the Code of Federal Regulations (title 29 CFR part 2570 as ~~(revised July 1, 1991~~effective December 27, 2011).

TAB 2

DOL Prohibited Transaction Exemption Procedures: March 2022 Proposal vs. January 2024 Final

PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

1. The authority citation for part 2570 continues to read as follows:

Authority: 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App at 672 (2006); Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010). Subpart I is also issued under 29 U.S.C. 1132(c)(8).

2. Revise subpart B to read as follows:

Subpart B - Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Sec.

2570.30 Scope of ~~rules~~this subpart.

2570.31 Definitions.

2570.32 Persons who may apply for exemptions and the administrative record.

2570.33 Applications the Department will not ordinarily consider.

2570.34 Information to be included in every exemption application.

2570.35 Information to be included in applications for individual exemptions only.

2570.36 Where to file an application.

2570.37 Duty to amend and supplement exemption applications.

2570.38 Tentative denial letters.

2570.39 Opportunities to submit additional information.

2570.40 Conferences.

2570.41 Final denial letters.

2570.42 Notice of proposed exemption.

2570.43 Notification of interested persons by applicant.

2570.44 Withdrawal of exemption applications.

2570.45 Requests for reconsideration.

2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing~~g~~and conflicts of interest.

2570.47 Other hearings.

2570.48 Decision to grant exemptions.

2570.49 Limits on the effect of exemptions.

2570.50 Revocation or modification of exemptions.

2570.51 Public inspection and copies.

2570.52 Effective date.

§ 2570.30 Scope of ~~rules~~this subpart.

(a) The rules of procedure set forth in this subpart apply to applications for prohibited transaction exemptions issued by the Department under the authority of:

- (1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);
- (2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code);¹⁴³ or
- (3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under ~~thesethe~~ rules of procedure in this subpart, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by ERISA section 406 and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under ~~thesethe~~ rules in this subpart are ordinarily prospective in nature, it is possible that an applicant may obtain retroactive relief for past prohibited transactions if, among other things, the Department determines that appropriate safeguards were in place at the time the exemption transaction was consummated, and no plan participants or beneficiaries were harmed by the exemption transaction.

(c) ~~These~~The rules in this subpart govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation, and public inspection of the administrative record, and modification or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under ~~thesethe~~ procedural rules in this subpart does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA, if applicable, which require, among other things, ~~that a fiduciary~~fiduciaries to discharge ~~his or her~~their duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the ~~requirement~~requirements of Code section 401(a), including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries, or the rules with respect to other Code provisions, including that an administrative exemption with respect to a contribution to a pension plan does not affect the deductibility of the contribution under Code section 404.

(e) The Department will not propose or issue exemptions upon oral request alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral feedback from Department employees in preparing an exemption application, which will not be binding on the Department in its processing of an exemption application or in its examination or audit of a plan. ~~Such feedback will become part of the administrative record as set forth in § 2570.32(c).~~

(f) The Department will generally treat any exemption application that is filed solely under ERISA section 408(a) or solely under Code section 4975(c)(2) as an exemption request filed under both ERISA section 408(a) and

¹ See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 310 (1974), and also section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332, reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective December 31, 1978, which generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department.

Code section 4975(c)(2) if it relates to a plan that is subject to both ERISA and the Code and the exemption transaction would be prohibited by both ~~by~~ ERISA and the corresponding Code provisions ~~of the Code~~.

(g) The ~~Department's issuance of~~ Department issues an administrative exemption ~~is~~ at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). The existence of previously issued administrative exemptions is not determinative of ~~whether~~ future exemption the Department will propose future exemptions for applications with the same or similar facts ~~will be proposed~~, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption. Previously issued administrative exemptions, however, may inform the Department's determination of whether to propose future exemptions based on the unique facts and circumstances of each application. § 2570.31 Definitions.

For purposes of ~~these~~ the procedures in this subpart, the following definitions apply:

(a) An *affiliate of a person* means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (a)(1), the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person;
or

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner.

(b) A *class exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies to any transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or ~~his or her~~ their delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest and exemption transactions named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in ERISA section 3(14) or 5 U.S.C. 8477(a)(4) and includes a disqualified person, as defined in Code section 4975(e)(2).

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that:

(1) ~~is~~ is prepared ~~solely on behalf of the plan~~ by a qualified independent appraiser; and

(2) ~~satisfies~~ Satisfies all ~~of~~ the requirements set forth in § 2570.34(c)(~~4~~)5.

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report ~~on behalf of the plan~~ regarding the particular asset or property appraised in the report, that is independent of and unrelated to ~~(1) any party involved in interest engaging in the exemption transaction (as defined in subsection (f)) and (2) the qualified independent fiduciary, if one is present with respect to the exemption transaction; in general, the determination as to the independence of the appraiser is made by the Department on the basis of~~ and their affiliates). In general, the Department determines an appraiser's independence based on all relevant facts and circumstances. ~~In making this, such as the extent to which the plan's~~

counterparty in the transaction participated in or influenced the selection of the appraiser. In making the independence determination, the Department will ~~take into account~~ consider the amount of the appraiser's appraiser's revenues and projected revenues for the current federal Federal income tax year (including amounts received for preparing the appraisal report) that will be derived from parties involved in the exemption transaction in interest (and their affiliates) relative to the appraiser's appraiser's revenues from all sources for the appraiser's prior federal Federal income tax year and the . The Department generally will not conclude that an appraiser's projected revenue for the current federal income tax year as well as the appraiser's related business interests. An appraiser will not be treated as independent if independence is compromised solely based on the revenues it receives or is projected to receive, within the current federal income tax year, from from the parties involved in interest (and their affiliates) that engaged in the exemption transaction are, to the extent that the appraiser neither receives nor is projected to receive more than two (2) percent of such appraiser's annual revenues from all sources based upon either its prior federal income tax year or the appraiser's projected its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, an appraiser may be considered independent based upon other facts and circumstances provided that the appraiser neither receives nor is projected to receive more than five (5) percent of its revenues for within the current federal Federal income tax year, unless, in its sole discretion, the Department determines otherwise from parties in interest (and their affiliates) participating in the exemption transaction.

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to: any party involved in interest engaging in the exemption transaction (~~as defined in sub-section (f)) and any other party involved in the development of the exemption request and its affiliates~~). In general, the Department will make the determination as to the independence of of whether a fiduciary will be made by the Department on the basis of is independent based on all relevant facts and circumstances. ~~Among other things, the Department will consider whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the fiduciary.~~ In making this determination, the Department will also take into account, among other things, the amount of both the fiduciary's fiduciary's revenues and projected revenues for the current federal Federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from parties involved in interest engaging in the exemption transaction (and their affiliates) relative to the fiduciary's fiduciary's revenues from all sources for the prior federal income tax year or the fiduciary's projected revenues from all sources for the current federal income tax year. ~~A fiduciary will not be treated as independent if~~ Federal income tax year. The Department generally will not conclude that a fiduciary's independence is compromised solely based on the revenues it receives ~~or is projected to receive, within the current federal income tax year,~~ from parties in interest (and their affiliates) involved that engaged in the exemption transaction ~~are, to the extent that the fiduciary neither receives nor is projected to receive~~ more than two (2) percent of ~~either the fiduciary's annual its revenues from all sources based upon its prior federal income tax year or the fiduciary's projected revenue for within~~ the current federal income tax year, unless, in its sole discretion, the Department determines otherwise.

Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, a fiduciary may be considered independent based upon other facts and circumstances provided that the fiduciary neither receives nor is projected to receive more than five (5) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates) that engaged in the exemption transaction.

(k) A *pre-submission applicant* is a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. A party that contacts the Department to inquire broadly, without reference to a specific fact pattern, about prohibited transaction exemptions is not a pre-submission applicant.

~~(l) A party involved in the exemption transaction includes (i) a party in interest (as defined in sub-section (f)), (ii) any party that is engaged in the exemption transaction or an affiliate of the party that is engaged in the exemption transaction, and (iii) any party providing services to either the plan or a party described in (i) or (ii) with respect to the exemption transaction or its affiliates.~~

§ 2570.32 Persons who may apply for exemptions and the administrative record. (a) The following persons may apply for exemptions:

~~(a) Persons who may apply for exemptions:~~

- (1) Any party in interest to a plan who is or may be a party to the exemption transaction;
- (2) Any plan which is a party to the exemption transaction; or
- (3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section, may be submitted by the applicant or by an authorized representative. An application submitted by an authorized representative of the applicant must include proof of authority in the form of:

- (1) A power of attorney; or
- (2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an exemption application ~~for an exemption~~ to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

~~(d) Administrative record.~~

(d)

- (1) The administrative record is ~~open~~ for public inspection, pursuant to § 2570.51(a), from the date an applicant submits an application ~~or pre-submission applicant provides any information or documentation~~ to the Office of Exemption Determinations.
- (2) The administrative record includes, but is not limited to: ~~any documents submitted to, and accepted by, the Department before the initial application, whether provided in writing by the applicant or pre-submission applicant or as notes taken at a pre-submission conference;~~ the initial exemption application and any modifications or supplements to the application thereto; all correspondence with the applicant ~~or pre-submission applicant, whether before or after the applicant's submission~~ of applicant submits the exemption application; and any ~~supporting~~ information provided by the applicant ~~or pre-submission applicant~~ in connection with the exemption application, whether provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

(3) Although the administrative record is open and available to the public only after an applicant submits an exemption application, the record includes any material documents or supporting information that was submitted to the Department in connection with the subject transaction of the application, whether orally or in writing, before formal submission of the application. The administrative record does not include records of communications with the Department which were either not with respect to the subject transaction of the application or not followed by the submission of an exemption application related to those communications.

(34) If documents are required to be provided in writing, by either the applicant or the Department, the documents may be provided either by mail or electronically, unless otherwise indicated by the Department at its sole discretion.

§ 2570.33 Applications the Department will not ordinarily consider.

(a) The Department ordinarily will not consider:

~~an (1) An~~ application that fails to include all the information required by §§ 2570.34 and 2570.35 (or fails to include current information) or otherwise fails to conform to the requirements ~~of these procedures; or~~ in this subpart.

~~(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of ERISA, the Code, FERSA, or any other federal or state law; or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department, the Internal Revenue Service, or any other regulatory entity to enforce ERISA, the Code, FERSA, or any other federal or state laws.~~

(b) An application for an individual exemption relating to a specific exemption transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions. Notwithstanding the ~~foregoing~~ preceding sentence, the Department may consider such an application if the issuance of the final class exemption ~~may~~ is not ~~be~~ imminent, and the Department determines that time constraints necessitate consideration of the exemption transaction on an individual basis.

(c) If a party, excluding a ~~federal~~ Federal, state, or other governmental entity, designates ~~as confidential~~ any information submitted in connection with its exemption ~~request~~ application as confidential, the Department will not process the application unless and until the applicant withdraws its claim of confidentiality. By submitting an exemption application, an applicant consents to public disclosure, ~~pursuant to § 2570.51,~~ of the entire administrative record pursuant to § 2570.51.

(d) The Department will not engage a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not:

(1) ~~identify~~ Identify and fully describe the exemption transaction; and

(2) ~~identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction; and (3) set~~ Set forth the prohibited transactions that the applicant believes are applicable.

§ 2570.34 Information to be included in every exemption application.

(a) All applications for exemptions must contain the following information:

(1) The name(s), address(es), phone number(s), and e-mail address(es) of the applicant(s);

(2) A detailed description of the exemption transaction, including the identification of all the parties in interest involved ~~in the exemption transaction~~, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the exemption transaction;

(3) The identity, address, phone number, and e-mail address of any ~~representatives~~ for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) A description of:

~~(A) the~~ i) The reason(s) for engaging in the exemption transaction;

~~(B) any~~ ii) Any material benefit that may be received by a party ~~involved in the exemption transaction~~ in interest (or its affiliates) as a result of the ~~subject~~ exemption transaction (including the avoidance of any materially adverse outcome by a party in interest (or its affiliates) as a result of engaging in the exemption transaction); and

~~(C) the~~ iii) The costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible;

- (5) A ~~detailed~~ description of the alternatives to the exemption transaction that did not involve a prohibited transaction ~~and~~ that were considered or evaluated by the applicant before submitting its exemption application and the reason(s) why those alternatives were not pursued;
 - (6) The prohibited transaction provisions from which exemptive relief is requested and the reason(s) why the exemption transaction would violate each such provision;
 - (7) A description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted;
 - (8) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, or any other regulatory authority; and
 - (9) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.
 - (10) With respect to the exemption transaction's definition of affiliate, if applicable, either a statement that the definition of affiliate set forth in § 2570.31(a) is applicable or a statement setting forth why a different affiliate definition should be applied.
- (b) All applications for exemption must also contain the following:
- (1) A statement explaining why the requested exemption would meet the requirements of ERISA section ~~40-8408~~ 408(a) by being—
 - (i) Administratively feasible for the Department;
 - (ii) In the interests of affected plans and their participants and beneficiaries; and
 - (iii) Protective of the rights of participants and beneficiaries of affected plans.
 - (2) A statement that ~~the exemption transaction~~ either:
 - (i)(A) The exemption transaction will be in the best interest of the plan and its participants and beneficiaries;
 - (B) ~~that~~ That all compensation received, directly or indirectly, by a party in interest (and its affiliates) involved in the exemption transaction does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and
 - (C) ~~that~~ That all ~~of the~~ statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters are not, materially misleading at the time the statements are made, ~~materially misleading~~; or
 - (ii) Explains why the exemption standards in ~~§ 2570.34~~ paragraphs (b)(2)(i)(A) through (C) ~~should not be of this section are not~~ applicable to the exemption transaction.
 - (iii) For purposes of ~~§ 2570.34~~ this paragraph (b)(2), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the exemption transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party ~~to the exemption transaction~~ in interest, or any affiliate ahead of the interests of the plan, or subordinate the ~~plan's~~ plan's interests to itself, or any other party or affiliate.

- (3) With respect to the notification of interested persons required by § 2570.43;
- (i) A description of the interested persons to whom the applicant intends to provide notice;
 - (ii) The manner in which the applicant will provide such notice; and
 - (iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the *Federal Register*.
- (4) If any party to the exemption transaction has requested either an advisory opinion from the Department or any similar opinion or guidance from another ~~federal~~Federal, state, or regulatory body with respect to any issue relating to the exemption transaction—
- (i) A copy of the opinion, letter, or similar document concluding the ~~Department's~~Department's or other entity's action on the request; or
 - (ii) If the Department or other entity has not yet concluded its action on the request:
 - (A) A copy of the request or the date on which it was submitted and, solely with respect to an advisory opinion request to the Department, the ~~Department's~~Department's correspondence control number as indicated in the acknowledgment letter; and
 - (B) An explanation of the effect ~~of~~ the issuance of an advisory opinion by the Department or similar opinion or guidance from another ~~federal~~Federal, state, or regulatory body would have upon the exemption transaction.
- (5) If the application is to be signed by anyone other than the party in interest seeking exemptive relief on ~~his or her~~their own behalf, a statement which —
- (i) Identifies the individual signing the application and ~~his or her~~their position or title; and
 - (ii) ~~Explains briefly~~Briefly explains the basis of ~~his or her~~their familiarity with the matters discussed in ~~the~~the application.
- (6)(i) A declaration in the following form:
- ~~Under penalty of perjury,~~ I ~~declare~~certify that I am familiar with the matters discussed in ~~this~~this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.
- (ii) This ~~declaration~~certification must be dated and signed by:
 - (A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on ~~his or her~~their own behalf;
 - (B) A corporate officer or partner ~~where~~if the applicant is a corporation or partnership;
 - (C) A designated officer or official ~~where~~if the applicant is an association, organization, or other unincorporated enterprise; or
 - (D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction ~~where~~if the applicant is a plan.

(7) If an applicant communicated with the Department either orally or in writing before submitting an exemption application for the exemption transaction, a statement setting forth the date(s) and with whom the applicant communicated before submitting the application.

- (c) Statements and documents from a qualified independent appraiser, auditor, or accountant ~~acting solely on behalf of the plan~~, such as appraisal reports, analyses of market conditions, audits, or financial documents

submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser, auditor, or accountant acknowledging that the statement is being submitted to the Department as part of an exemption application ~~for exemption. Such. The~~ statements by the qualified independent appraiser, auditor, or accountant must also contain the following written information:

- (1) A signed and dated ~~declaration under penalty of perjury~~certification stating that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, ~~all of~~ the representations made in such statement are true and correct;
- (2) A copy of the qualified independent ~~appraiser's~~appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake. The letter or contract may not:
 - (i) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or accountant by the plan or another party for any failure to adhere to its contractual obligations or to ~~federal~~Federal and state laws applicable to the appraiser's, auditor's, or accountant's work; ~~or. However, the letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the appraiser's, auditor's, or accountant's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work, provided that:~~
 - (A) The plan determines that the reimbursement is prudent following a good faith determination that the appraiser, auditor, or accountant likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work and will be able to repay the plan; and
 - (B) The letter or contract requires the appraiser, auditor, or accountant to repay all of the reimbursements, in a timely fashion, in the event the appraiser, auditor, or accountant enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the appraiser's, auditor's, or accountant's work; or
 - (ii) Waive any rights, claims, or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other ~~federal~~Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction;
- (3) A summary of the qualified independent ~~appraiser's~~appraiser's, auditor's, or accountant's qualifications to serve in such capacity;
- (4) A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party in interest involved in the exemption transaction, ~~or with any party~~ or its affiliates ~~involved in the development of the exemption request~~ that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant;
- (5) A written appraisal report prepared by the qualified independent appraiser, ~~acting solely on behalf of the plan, rather than, for example, on behalf of the plan sponsor, must satisfy the following requirements:~~which determines, to the best of the qualified independent appraiser's ability and in accordance with professional appraisal standards, the fair market value of the subject asset(s), without bias towards the plan's counterparty in the transaction or other interested parties:
 - (i) The report must describe the method(s) used in determining the fair market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

- (ii) The report must ~~take into account~~consider any special benefit that a party in interest involved in the exemption transaction may derive from control of the asset(s), such as from owning an adjacent parcel of real property or gaining voting control over a company; and
- (iii) The report must be current and not more than one year old from the date of the exemption transaction, and ~~there must be~~ a written update must be prepared by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the exemption transaction;

(6) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that ~~he or she is~~they are a member of a professional organization of appraisers that can sanction its members for misconduct;

(7) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the ~~appraiser's~~appraiser's prior experience in valuing assets of the same type; and

(8) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest (or its affiliates) involved in the exemption transaction ~~with respect to both the prior federal income tax year and current federal income tax year~~; in general, such percentage shall be computed with respect to the two separate disclosures by comparing, in fractional form:

- (i) The amount of the ~~appraiser's~~appraiser's projected revenues from the current ~~federal~~Federal income tax year (including amounts received from preparing the appraisal report) that will be derived from ~~the parties~~any party in interest (or its affiliates) involved in the exemption transaction (expressed as a numerator); and
- (ii) The ~~appraiser's~~appraiser's revenues from all sources for the prior ~~federal income tax year (expressed as a denominator) or the appraiser's projected revenues from all sources for the current federal~~Federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent appraiser, the applicant must include:

(1) A representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction;

~~(12) A statement describing the process by which the independent~~representation that the appraiser ~~was~~is independent within the meaning of § 2571.31(i); and selected, including the due diligence performed, the potential independent appraiser candidates reviewed, and the references contacted; and

~~(23) A statement~~representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction;

(e) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the ~~interest~~interests of the plan, the applicant must include:

~~(1) A statement describing the process by which the independent fiduciary was selected, including the due diligence performed, the potential independent fiduciary candidates reviewed, and the references contacted; and~~

~~(21) A statement that~~representation that an appropriate fiduciary, without material conflicts of interest, prudently selected the independent fiduciary ~~has appropriate~~after diligent review of the independent fiduciary's technical training and proficiency with respect to ~~(A) ERISA and~~, the Code,

and ~~(B)~~ the specific details of the exemption ~~transaction~~, as well as the sufficiency of the independent fiduciary's fiduciary liability insurance;

(2) A representation that the fiduciary retained to act as the independent fiduciary is independent within the meaning of § 2570.31(j);

(3) A representation that the independent fiduciary has appropriate technical training and proficiency with respect to:

(i) ERISA and the Code; and

(ii) The specific details of the exemption transaction.

(f) For exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by ~~the~~such independent fiduciary that contains the following written information:

(1) A signed and dated ~~declaration under penalty of perjury~~certification that, to the best of the qualified independent ~~fiduciary's~~fiduciary's knowledge and belief, all ~~of~~ the representations made in such statement are true and correct;

(2) A copy of the qualified independent ~~fiduciary's~~fiduciary's engagement letter and, if applicable, contract with the plan describing the ~~fiduciary's~~fiduciary's specific duties. The letter or contract may not:

(i) Contain any provisions that ~~violates~~violate ERISA section 410;

(ii) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or ~~federal~~Federal laws applicable to the independent fiduciary's work; ~~or,~~ except that the letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work, provided that:

(A) The plan determines that the provision is prudent following a good faith determination that the independent fiduciary likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work and will be able to repay the plan; and

(B) The letter or contract requires the independent fiduciary to repay all of the reimbursements, in a timely fashion, if the independent fiduciary enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal law, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the independent fiduciary's work; or

(iii) Waive any rights, claims, or remedies of the plan under ERISA, state, or ~~federal~~Federal law against the independent fiduciary with respect to the exemption transaction;

(3)(i) A description of any fiduciary liability insurance policy maintained by the independent fiduciary that includes:

~~(3) A statement that the independent fiduciary maintains fiduciary liability insurance in an amount that is sufficient)~~ The amount of coverage available to indemnify the plan for damages resulting from a breach by the independent fiduciary of either ~~(i)~~ ERISA, the Code, or any other ~~federal~~Federal or state law or ~~(ii)~~ its contract or engagement letter. ~~The ; and~~

(B) Whether the insurance ~~may not contain~~ policy contains an exclusion for actions brought by the Secretary or any other ~~federal~~ Federal, state, or regulatory body; the plan; or plan participants or beneficiaries;

- (4) An explanation of the bases for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that ~~person's~~ person's or entity's qualifications to serve in such capacity, ~~as well as~~ and a description of any prior experience by that person or entity or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity suitable to perform its duties as a qualified independent fiduciary on behalf of the plan with respect to the exemption transaction;
- (5) A detailed description of any relationship that the qualified independent fiduciary has had or may have with the plan and any party in interest involved in the exemption transaction (or its affiliates);
- (6) An acknowledgement by the qualified independent fiduciary that it understands its duties and responsibilities under ERISA; is acting as a fiduciary of the plan with respect to the exemption transaction; has no material conflicts of interest with respect to the exemption transaction; and is not acting as an agent or representative of the plan sponsor;
- (7) The qualified independent ~~fiduciary's~~ fiduciary's opinion on whether the exemption transaction would be in the interests of the plan and its participants and beneficiaries, protective of the rights of participants and beneficiaries of the plan, and in compliance with the standards set forth in § 2570.34 paragraphs (b)(2)(i)(A) through (C) of this section, if applicable, along with a statement of the reasons on which the opinion is based;
- (8) Where if the exemption transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and will, during the pendency of the exemption transaction:
 - (i) Monitor the exemption transaction on behalf of the plan and its participants and beneficiaries on a continuing basis;
 - (ii) Ensure that the exemption transaction remains in the interests of the plan and its participants and beneficiaries and, if not, take any appropriate actions available under the particular circumstances; and
 - (iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the exemption transaction;
- (9) The qualified independent fiduciary shall submit a written representation disclosing the percentage of ~~the independent fiduciary's~~ sits current revenue that is derived from any party in interest involved in the exemption transaction (or its affiliates) with respect to both the prior ~~federal~~ Federal income tax year and current ~~federal~~ Federal income tax year; in general, such percentage shall be computed with respect to the two disclosures by comparing in fractional form:
 - (i) The amount of the independent ~~fiduciary's~~ fiduciary's projected revenues from the current ~~federal~~ Federal income tax year that will be derived from ~~the~~ parties in interest involved in the exemption transaction and their affiliates (expressed as a numerator); and
 - (ii) The independent ~~fiduciary's~~ fiduciary's revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior ~~federal income tax year (expressed as a denominator) and the independent fiduciary's projected revenue from all sources (excluding fixed, non-discretionary retirement income) for the current~~ ~~federal~~ Federal income tax year (expressed as a denominator);
- (10) A statement that the independent fiduciary has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary;

(11) Either:

~~(11) Either~~ (i) ~~a~~A statement that, within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation, or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other ~~federal~~Federal or state entity involving ~~compliance with provisions of ERISA, the Code, FERSA, or other federal or state law;~~ or ~~(~~:

(A) Compliance with provisions of ERISA or FERSA;

(B) Its representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(C) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(D) Income tax evasion; or

(E) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(ii) ~~a~~A statement describing the applicable investigation, examination, litigation, or controversy; and

(12)~~(i)~~(A) Either a statement that, within the last 13 years, the independent fiduciary has not been ~~either convicted;~~

(1) Convicted or released from imprisonment, whichever is later, as a result of ~~(i)~~ any felony involving abuse or misuse of such ~~person's~~person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime ~~described~~identified in ERISA section 411 ~~or~~, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

~~(ii)~~2 ~~convicted~~Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, ~~however denominated by the laws of the relevant foreign government,~~ that is substantially equivalent to an offense described in ~~(i) and a description of the circumstances of any such conviction; or a statement describing a conviction or release from imprisonment described in (i) or (ii).~~ ~~For purposes of this section, a person shall be deemed to have been "convicted" from the date of the judgment of the trial court,~~paragraph (f)(12)(i)(A)(1) of this section; or

(B) A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A) of this section.

(ii) For purposes of this paragraph (f), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal, and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

(g) Statements, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an exemption application must be accompanied by a statement of consent from such expert acknowledging that the statement prepared on behalf of the plan is being submitted to the Department as part of an exemption application. Such statements must also contain the following written information:

- (1) A copy of the ~~expert's~~expert's engagement letter and, if applicable, contract with the plan describing the specific duties the expert will undertake;
- (2) A summary of the ~~expert's~~expert's qualifications to serve in such capacity; and
- (3) A detailed description of any relationship that the expert has had or may have with any party in interest (or its affiliates) involved in the exemption transaction that may influence the actions of the expert.

(h) An application for exemption may also include a draft of the requested exemption which describes the exemption transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

§ 2570.35 Information to be included in applications for individual exemptions only.

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34 ~~of this subpart~~, the following information:

- (1) The name, address, e-mail address, telephone number, and type of plan or plans to which the requested exemption applies;
- (2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department (individuals should not submit ~~social security~~Social Security numbers);
- (3) Whether any plan or trust affected by the requested exemption is currently under investigation for violation of, or has ever been found by the Department, the Internal Revenue Service, or by a court to have violated, the exclusive benefit rule of Code section 401(a), Code section 4975(c)(1), ERISA sections 406 or 407(a), or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;
- (4) Whether any relief under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any ~~of the parties~~ in interest (or their affiliates) involved in the exemption transaction and, if so, the exemption application number or the prohibited transaction exemption number;
- (5) Whether the applicant or any ~~of the parties~~ party in interest (or its affiliates) involved in the exemption transaction ~~are~~is currently, or ~~have~~has been within the last five years, ~~defendants~~a defendant in any lawsuits or criminal actions concerning ~~their~~its conduct as a fiduciary or party in interest with respect to any plan (other than lawsuits with respect to a routine claim for benefits), and a description of the circumstances of the lawsuits or criminal actions;
- (6) (i) Whether the applicant (including any person described in § 2570.34(b)(6)(ii)) or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been ~~either convicted~~
:

(A) Convicted or released from imprisonment, whichever is later, as a result of: ~~(i)~~ any felony involving abuse or misuse of such ~~person's~~person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery,

counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime ~~described~~identified in ERISA section 411-~~or~~, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(~~ii~~B) ~~convicted~~Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i)(A) of this section and a description of the circumstances of any such conviction in ~~(i) or (~~paragraph (a)(6)(i)(A) or this paragraph (a)(6)(i)(B); and

~~(ii)~~ For purposes of this ~~section~~paragraph (a), a person shall be deemed to have been “convicted” from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal;

(7) Whether, within the last five years, any plan affected by the exemption transaction, the applicant, or any party in interest (or its affiliates) involved in the exemption transaction, has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other regulatory body involving compliance with provisions of ERISA, FERSA, the Code, ~~FERSA~~, or any other ~~federal~~Federal or state law involving:

(i) Compliance with provisions of ERISA or FERSA;

(ii) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(iii) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(iv) Income tax evasion; or

(v) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities. If so, the applicant must provide a brief statement describing the investigation, examination, litigation, or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the ~~above~~ matters in this paragraph (a)(7). In this regard, a denial of the exemption application ~~will~~may result from ~~an applicant's~~ failure to provide additional information requested by the Department.;

(8) Whether any plan affected by the requested exemption has experienced a reportable event under ERISA section 4043, and, if so, a description of the circumstances of any such reportable event;

(9) Whether a notice of intent to terminate has been filed under ERISA section 4041 ~~respecting~~with respect to any plan affected by the requested exemption, and, if so, a description of the circumstances for the issuance of ~~such~~the notice;

(10) Names, addresses, phone numbers, and e-mail addresses of all parties in interest (or their affiliates) involved in the ~~subject~~exemption transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

- (12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction. If the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the fraction;
- (13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;
- (14) If the exemption transaction has already been consummated:
- (i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the exemption transaction before obtaining an exemption from the Department;
 - (ii) Whether the exemption transaction has been terminated;
 - (iii) Whether the exemption transaction has been corrected as defined in Code section 4975(f)(5);
 - (iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the exemption transaction; and
 - (v) Whether any excise taxes due under Code section 4975(a) and (b), or any civil penalties due under ERISA section 502(i) or (l) by reason of the exemption transaction have been paid. If so, the applicant should submit documentation (e.g., a canceled check) demonstrating that the excise taxes or civil penalties were paid.;
- (15) The name of every person who has authority or investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;
- (16) Whether ~~or not~~ the assets of the affected plan(s) are invested, directly or indirectly, in ~~loans to any party involved in the exemption transaction, in property leased to any party involved in the exemption transaction, or in securities~~ :
- (i) loans to any party in interest (or its affiliates) involved in the exemption transaction;
 - (ii) Property leased to any party in interest (or its affiliates) involved in the exemption transaction;
or
 - (iii) Securities issued by any party in interest (or its affiliates) involved in the exemption transaction, and, if such investments exist, a statement for each of these three types of investments which indicates:
 - (iA) The type of investment to which the statement pertains;
 - (iiB) The aggregate fair market value of all investments of this type as reflected in the ~~plan's~~plan's most recent annual report;
 - (iiiC) The approximate percentage of the fair market value of the ~~plan's~~plan's total assets as shown in such annual report that is represented by all investments of this type; and (D) The statutory or administrative exemption covering these investments, if any;
 - ~~(iv) The statutory or administrative exemption covering these investments, if any.~~
- (17) The approximate aggregate fair market value of the total assets of each affected plan;
- (18) The person(s) or entity who will bear the costs of:

- (i) The exemption application;
 - (ii) Any commissions, fees, or costs associated with the exemption transaction, and any related transaction; and
 - (iii) Notifying interested persons; ~~provided, in each case, that the plan may not bear the costs of the exemption application, commissions, fees, and costs incurred to notify interested persons unless the Department determines, at its sole discretion, that a compelling circumstance exists that necessitates the payment of these expenses by the plan; and~~
- (19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary; ~~and~~ and
- (20) Any prior transaction between:
- (i) ~~the~~The plan or plan sponsor; ~~and (iii) a party~~
 - (ii) Any party in interest (or its affiliates) involved in the exemption transaction.
- (b) Each application for an individual exemption must also include:
- (1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;
 - (2) A discussion of the facts relevant to the exemption transaction that are ~~reflected in these documents and an analysis of~~ reflected in the documents listed in paragraph (b)(1) of this section and an analysis of their bearing on the requested exemption;
 - (3) A copy of the most recent financial statements of each plan affected by the requested exemption; and
 - (4) A net worth statement with respect to any party that is providing a personal guarantee with respect to the exemption transaction.
- (c) Special ~~rule~~rules for applications for individual exemption involving pooled funds: ~~are as follows:~~ are as follows:
- (1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds; ~~;~~
 - (2) The information required by paragraphs (a)(1) through (7) and ~~(a)(1-3)~~13 through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph (c)(2), the information required by paragraph (a)(16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.); ~~;~~
 - (3) The following information must also be furnished—
 - (i) The estimated number of plans that are participating (or will participate) in the pooled fund; and
 - (ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.
 - (4) Additional requirements for applications for individual exemptions involving pooled funds in which certain plans participate: are as follows:
 - (i) This paragraph (c)(4) applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20 percent of the total assets of the pooled fund;~~z~~ or

(B) Covers employees of:

(1) The party sponsoring or maintaining the pooled fund, or any affiliate of such party;~~z~~ or

(2) Any fiduciary with investment discretion over the pooled ~~fund's~~fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), ~~(a)(5) through (7), (a)(10), (a)(12) through (16), and (a)(18)(1-8),~~ and (19)~~,~~ of this section. The information required by this paragraph (c)(4)(ii) must be furnished in reference to the ~~plan's~~plan's investment in the pooled fund (e.g., the names, addresses, phone numbers, and email addresses of all fiduciaries responsible for the ~~plan's~~plan's investment in the pooled fund (~~§ 2570.3-5 paragraph (a)(10) of this section~~), the percentage of the assets of the plan invested in the pooled fund (~~§ 2570.3-5 paragraph (a)(12) of this section~~), whether the ~~plan's~~plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted (paragraph (a)(13) of this section, etc.). (~~§ 2570.3-5(a)(13), etc.~~).

(iii) The information required by this paragraph (c)(4) ~~of this section~~ is in addition to the information required by paragraphs (c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

(d) Retroactive exemptions:

(d)(1) Generally, the Department will ~~consider~~ exemption requests for retroactive relief only when:

(i) ~~the~~The safeguards necessary for the grant of a prospective exemption were in place at the time ~~at which~~ the parties entered into the exemption transaction;~~z~~ and

(ii) ~~the~~The plan and its participants and beneficiaries have not been harmed by the exemption transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the exemption transaction. An applicant should further explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the transaction could have been achieved through an alternative transaction that served the aims of the plan equally well.

(2) Among the factors that the Department will ~~take into account~~consider in making a finding that an applicant acted in good faith include the following:

(i) The involvement of an independent fiduciary before ~~a~~an exemption transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the exemption transaction; provided, however, the Department may consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

- (iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;
 - (iv) That the applicant has submitted an accurate and complete exemption application that contains documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, the Department will accord appropriate weight to facts and representations which are prepared and certified by a source independent of the applicant;
 - (v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction with respect to which the fiduciary should have known, consistent with its ERISA fiduciary duties and responsibilities, was prohibited under ERISA section 406 and/or Code section 4975. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before engaging in the act or transaction;
 - (vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant ~~with regard to~~ the about the exemption transaction upon discovery of the violation;
 - (vii) That the applicant has submitted a statement, prepared and certified by an independent person familiar with the types of transactions for which relief is requested, demonstrating that the terms and conditions of the exemption transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable to the plan as that obtainable in a similar transaction with an unrelated party; and
 - (viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the criteria under ERISA section ~~40-8~~408(a) and Code section 4975(c)(2).
- (3) The Department, as a general matter, will not consider requests for retroactive exemptions whereif transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan, as determined pursuant to the facts existing at the time of the exemption application. In addition, the Department will not consider requests for exemptions whereif the transactions are inconsistent with the general fiduciary responsibility provisions of ERISA sections 403 or 404 or the exclusive benefit requirements of Code section 401(a).

§ 2570.36 Where to file an application.

The ~~Department's~~Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by ~~these procedures~~this subpart may be e-mailed to the Department at e-OED@dol.gov. The applicant is not required to submit a paper copy if an electronic copy is submitted. ~~If the~~An applicant ~~wants to~~may submit a paper copy of the application, by mailing it ~~may be mailed~~ via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400 Washington, DC 20210 or via private carrier service to Employee Benefit Security Administration, U.S. Department of Labor, Office of Exemption Determinations, 122 C Street NW, Suite 400, Washington, DC 20001-2109. The mail or private carrier service addresses, however, may be subject to change, and the applicant should confirm the address with the Office of Exemption Determinations before submitting a paper copy of an application.

§ 2570.37 Duty to amend and supplement exemption applications.

(a) During the Department's consideration of an exemption ~~request,~~application and following any grant by the Department of an exemption request, an applicant must promptly notify the Department in writing if ~~he or she~~ discoversthey discover that any material fact or representation contained in the application or in any documents or testimony provided in support of the application was inaccurate at the time it was provided to the Department in support of the application. If any material fact or representation changes during this period, or if anything occurs

that may affect the continuing accuracy of any such fact or representation, the applicant must promptly notify the Department in writing of the change. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other ~~federal~~Federal or state governmental entity involving ~~compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund,;~~

(1) Compliance with provisions of ERISA or FERSA;

(2) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(3) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(4) Income tax evasion; or

(5) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide any documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

§ 2570.38 Tentative denial letters.

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing, ~~except as provided in (c) below.~~¹⁴ At the same time the Department provides the notification, the Department will also provide a brief statement of the reasons for its tentative denial.

Note 1 to paragraph (a). As referenced in § 2570.33(a)(1), the Department will not hold a conference with, or issue a tentative denial letter to, an applicant who does not submit a complete application, or an applicant who does not provide current information.

(b) An applicant will have 20 days from the date of a tentative denial letter, unless the Department extends the time period ~~is extended by the Department~~ at its sole discretion, to request a conference under § 2570.40 and/or to notify the Department of its intent to submit additional information under § 2570.39. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

§ 2570.39 Opportunities to submit additional information.

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application by telephone, by letter sent to the address furnished in the ~~applicant's~~applicant's tentative denial letter, or electronically to the e-mail address provided in the applicant's tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

~~¹⁴As referenced above, the Department will not hold a conference with, or issue a tentative denial letter to, an applicant who does not submit a complete application, or an applicant who does not provide current information.~~

(b) The additional information an applicant intends to provide in support of the application must be in writing and ~~be~~ received by the Department within 40 days from the date the Department issues the tentative denial letter unless the Department extends the time period ~~is extended by the Department~~ at its sole discretion. All such information must be accompanied by a ~~declaration under penalty of perjury attesting to the truth and correctness~~

~~of the certification that all~~ information provided, ~~which is~~ to the Department is true and correct, and the certification must be dated and signed by a person qualified under § 2570.34(b)(6) ~~of this subpart~~ to sign such a declaration. The information may be submitted either electronically or by mail to the address specified in the letter.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information ~~he or she intends~~they intend to provide in support of ~~his~~their application within the period described in paragraph (b) of this section, ~~he or she~~they may request an extension of time to furnish the information. Such requests must be made before the expiration of the time period described in paragraph (b), and the request will be granted, in the Department's sole discretion, only in unusual circumstances and for a limited period as determined by the Department. The request may be made by telephone, mail, or electronically.

(d) The Department will issue, without further notice, either by mail or electronically, a final denial letter denying the requested exemption pursuant to § 2570.41 ~~whereif~~—

(1) The Department has not received the additional information that the applicant stated ~~his or her~~their intention to submit within the period described in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section; and

(2) The applicant did not request a conference pursuant to § 2570.38(b) ~~of this subpart~~

§ 2570.40 Conferences.

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone or electronic conference will be held at the ~~applicant's~~applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. The Department may hold additional conferences at its sole discretion if it determines additional conference(s) are appropriate. An applicant will not be entitled to a conference, however, ~~whereif~~ the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47 ~~of this subpart~~.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present ~~whereif~~:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information, it ~~is~~ still is not prepared to propose the requested exemption or a later date determined at the Department's sole discretion ~~of the Department~~. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (d), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § ~~2570.3-8~~2570.38(a) or a later date determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend

a conference within the time limit described in this paragraph (e), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b) ~~of this subpart, has~~, notified the Department of its intent to submit additional information pursuant to § 2570.39, and ~~has~~ failed to furnish such information within 40 days ~~from~~after the date of issuance of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 days after the date of the issuance of the tentative denial letter described in § ~~2570.3-8~~2570.38(a) or a later date as determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (f), the applicant may request an extension of time ~~for the scheduling of a~~to schedule a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(g) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to this section, the applicant will be deemed to have waived its right to a conference.

(h) Within 20 days after the date of any conference held under this section, or a later date determined at the sole discretion of the Department, the applicant may submit to the Department (electronically or in paper form) any additional written data, arguments, or ~~precedents~~legal authorities discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this time limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the time limit described in this paragraph (h). The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(i) The Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties ~~to~~involved in the exemption transaction, or their representatives. Any such conferences may occur in addition to the conference with the applicant described in paragraph (b) of this section.

~~§ 2570.40(b)~~ **§ 2570.41 Final denial letters.**

The Department will issue a final denial letter denying a requested exemption, either by mail or electronically, ~~where~~if:

(a) ~~Prior to~~Before issuing a tentative denial letter under § 2570.38 ~~of this subpart~~ or conducting a hearing on the exemption under either § 2570.46 or § 2570.47 ~~of this subpart~~, the Department determines, at its sole discretion, that:

- (1) ~~the~~The applicant has failed to submit information requested by the Department in a timely manner;
- (2) ~~the~~The information provided by the applicant does not meet the requirements of § 2570.34 and § 2570.35; or
- (3) ~~if a~~A conference ~~has been~~was held between the Department and the applicant ~~prior to~~before the ~~issuance of~~Department issued a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38 ~~of this subpart~~;

(b) The conditions for issuing a final denial letter specified in § ~~2570.3-8~~2570.38(b) or § ~~2570.3-9~~2570.39(d) ~~of this subpart~~ are satisfied;

(c) After issuing a tentative denial letter under § 2570.38 ~~of this subpart~~ and considering the entire record in the case, including all written information submitted pursuant to §§ 2570.39 and 2570.40 ~~of this subpart~~, the Department decides not to propose an exemption or to withdraw an exemption it already proposed;

(d) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 ~~of this subpart~~ and after considering the entire record in the case, including the record of the hearing and any public comments, the Department decides to withdraw the proposed exemption; or

(e) The applicant either:

(e1) ~~The applicant either (i) asks~~ **Requests for the Department** to withdraw the exemption application; ~~or (ii)~~ **communicates** **Communicates** to the Department that it is not interested in continuing the application process.

§ 2570.42 Notice of proposed exemption.

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the *Federal Register*. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) ~~Where~~**if** the proposed exemption includes relief from the prohibitions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2), inform interested persons **who are materially affected by the grant of the exemption** of their right to request a hearing under § 2570.46 ~~of this subpart~~ and establish a deadline for ~~receipt of~~**hearing** requests ~~for such hearings~~**to be submitted**.

§ 2570.43 Notification of interested persons by applicant.

(a) If a notice of proposed exemption is published in the *Federal Register* in accordance with § 2570.42 ~~of this subpart~~, the applicant must notify interested persons of the pendency of the exemption in the manner and within the time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the ~~Department's~~**Department's** consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the *Federal Register*; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption, and described in greater detail in the accompanying]¹⁴⁵ Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].¹⁴⁶ [If you may be materially affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].]¹⁴⁷

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room ~~---~~¹⁴⁸ **N-5461**,⁴ U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, **ATTENTION: Application No.**⁵ **Comments and hearing requests may also be transmitted to the Department electronically at e-OED@dol.gov or at https://www.regulations.gov (follow instructions for submission), and should prominently reference the application number listed above. Individuals submitting comments or requests for a hearing on this matter**

are advised not to disclose sensitive personal data, such as social security numbers or information that they consider confidential or otherwise protected.

⁴⁵⁻¹ To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in ~~§ 2570.43~~paragraph (d) of this section.

⁴⁶² The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

⁴⁷³ To be added in the case of an exemption that provides relief from ERISA section 406(b) ~~of ERISA~~ or corresponding sections of the Code or FERSA.

⁴⁸⁴ The applicant will fill in the room number of the Office of Exemptions Determinations. As of ~~the date of this final regulation~~[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the room number of the Office of Exemption Determinations is N-~~5700-5461~~.

ATTENTION: Application No. ____⁴⁹ ~~Comments and hearing requests may also be transmitted to the Department electronically at e-OED@dol.gov or at http://www.regulations.gov (follow instructions for submission), and should prominently reference the application number listed above. Individuals submitting comments or requests for a hearing on this matter are advised not to disclose sensitive personal data, such as social security numbers or information that they consider confidential or otherwise protected.~~

⁵ The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application. The Department will make no final decision on the proposed exemption until it reviews the comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, ~~he or she~~they must provide satisfactory proof that the entire class of interested persons will be able to receive the notice.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the ~~foregoing~~ requirements in paragraph (b) of this section. This statement must be accompanied by a ~~declaration under penalty of perjury attesting to the~~certification that ⁴⁹ ~~The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.~~truth of the information provided in the statement and signed by a person qualified under § 2570.34(b)(6) of this subpart to sign such a declaration is true and correct. No exemption will be granted until ~~such a statement and its accompanying declaration have been furnished~~he applicant furnishes such a certification to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its sole discretion, may also require an applicant to furnish interested persons with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

- (1) The exemption transaction and the parties in interest thereto;
- (2) Why ~~such~~the exemption transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;
- (3) The reasons why the plan seeks to engage in the exemption transaction; and
- (4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval ~~prior to~~before its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

§ 2570.44 Withdrawal of exemption applications.

(a) An applicant may withdraw an application for an exemption at any time by oral or written (including electronic) notice to the Department. A withdrawn application generally shall not prejudice any subsequent applications for ~~an~~the same exemption transaction submitted by an applicant.

(b) Upon receiving an ~~applicant's~~applicant's notice of withdrawal regarding an application for an individual exemption, the Department will issue a final denial letter in accordance with § 2570.41(e) and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the *Federal Register*, the Department will publish a notice in the Federal Register withdrawing the proposed exemption.

(c) Upon receiving an ~~applicant's~~applicant's notice of withdrawal regarding an application for a class exemption or ~~for~~ an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, ~~he or she~~they may contact the Department in writing (including electronically) to request ~~that~~the Department to reinstate the application ~~be reinstated~~. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information required to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. The applicant must also update all previously furnished information to the Department in connection with a withdrawn application.

(e) Any request for reinstatement of a withdrawn application submitted ~~in~~ accordance with paragraph (d) of this section ~~will~~ be granted by the Department, and the Department will take whatever steps remained ~~at the time the application was withdrawn~~ to process the application when the applicant withdrew the application.

(f) Following the withdrawal of an exemption application, the administrative record will remain subject to public inspection and copy pursuant to § 2570.51.

§ 2570.45 Requests for reconsideration.

(a) The Department will entertain one request for reconsideration of an exemption application that the Department has ~~been finally~~ denied pursuant to § 2570.41 if the applicant ~~presents in support of the application~~ either:

(1) Presents significant new facts or arguments in support of the application, which, for good reason, could not have been submitted for the ~~Department's~~Department's consideration during its initial review of the exemption application; or

(2) The applicant received a final denial letter pursuant to § 2570.41(a) before the Department issued a tentative denial letter under § 2570.38 or conducted a hearing on the exemption under either § 2570.46 or § 2570.47.

(b) ~~A~~An applicant must submit a request for reconsideration of a previously denied application ~~must be made~~ within 180 days after the issuance of the final denial letter and ~~must be accompanied by~~include with the request a copy of the ~~Department's~~Department's final denial letter ~~denying the exemption~~ and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a ~~declaration under penalty of perjury attesting to the truth of~~certification that the new information provided to the Department is true and correct, which is signed by a person qualified under § 2570.34(b)(6) to sign ~~such a declaration~~the certification.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides ~~to reconsider its final denial letter~~ based on the new facts and arguments submitted, ~~to reconsider its final denial letter~~ by the applicant, it will notify the applicant of its intent to reconsider the application in light of the new information presented. The Department will then take whatever steps remained ~~at the time to be completed to process the exemption application~~ when it issued its final denial letter ~~to process the exemption application~~.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter to the applicant affirming its final denial.

(g) ~~A~~The Department does not consider a request for reinstatement of an exemption application pursuant to § 2570.44(d) ~~is not~~as a request for reconsideration governed by ~~§ 2570.45~~this section.

(h) If an applicant whose application was finally denied pursuant to § 2570.41(a)(1) or (2) cures the application by providing all required and requested information upon submission for reconsideration, the Department will reconsider the application under paragraph (e) of this section. If, upon reconsideration, the Department concludes that an exemption is not warranted, the Department will either hold a conference with the applicant under § 2570.40 or issue a tentative denial pursuant to the procedures in § 2570.38.

§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing and conflicts of interest.

(a) Any person who may be materially affected by an exemption which the Department proposes to grant from the restrictions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) may request a hearing before the Department within the time period ~~of time~~ specified in the *Federal Register* notice of the proposed exemption. Any such request must state:

- (1) The name, address, telephone number, and email address of the person making the request;
- (2) The nature of the ~~person's~~person's interest in the exemption and ~~the manner in which~~how the person would be materially affected by the exemption; and
- (3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section ~~whereif~~ a hearing is necessary to fully explore material factual issues with respect to the proposed exemption identified by the person requesting the hearing. ~~A~~The Department will publish a notice of such hearing ~~shall be published by the Department~~ in the *Federal Register*. The Department may decline to hold a hearing ~~whereif~~:

- (1) The request for the hearing is not timely, or otherwise fails to include the information required by paragraph (a) of this section;
- (2) The only issues identified for exploration at the hearing are matters of law; or
- (3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption must notify interested persons ~~in the event that~~if the Department schedules a hearing on the exemption. Such notification must be ~~given~~provided in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested

persons a copy of the notice of hearing published by the Department in the *Federal Register* within 10 days ~~of~~after its publication, using any of the methods approved in § 2570.43(b).

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a ~~declaration under penalty~~certification that the information provided in the statement is true and correct, which is of perjury attesting to the truth of the information provided in the statement, which is signed by a person qualified under § 2570.34(b)(6) to sign ~~such a declaration~~a certification.

§ 2570.47 Other hearings.

(a) In its sole discretion, the Department may schedule a hearing on its own motion ~~where~~if it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing. ~~A~~The Department shall publish a notice of such hearing ~~shall be published by the Department~~ in the *Federal Register*.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a ~~statement~~certification subscribed as true ~~under penalty of perjury~~and correct like that required in § 2570.46(d).

§ 2570.48 Decision to grant exemptions.

(a) The Department may not grant an exemption under ERISA section ~~40-8~~408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3)(C) unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the record of any hearing held in connection with the proposed exemption), it finds that the exemption meets the statutory requirements by being:

- (1) Administratively feasible for the Department;
- (2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and beneficiaries; and
- (3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the Department determines to grant an exemption, it shall publish a notice in the *Federal Register* which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.

§ 2570.49 Limits on the effect of exemptions.

(a) An exemption does not take effect with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete at the time of the submission of such material.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For exemption transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the exemption transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the ~~exemption's~~exemption's conditions cease to be met.

(e) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department in its sole discretion.

§ 2570.50 Revocation or modification of exemptions.

(a) If, after an exemption takes effect, material changes in facts, circumstances, or representations occur, including whether a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. ~~In the event that~~if the qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the applicant must notify the Department within 30 days of the resignation, termination, or conviction, and the Department reserves the right to request ~~that~~ the applicant to provide the Department with any of the information required pursuant to § ~~2570.3-4~~2570.34(e) and (f) pursuant to a time determined by the Department at its sole discretion.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the *Federal Register* and provide interested persons with an opportunity to comment on the proposed revocation or modification. ~~Prior to the publication of~~Before the Department publishes such notice, it will notify the applicant ~~will be notified~~ of the ~~Department's~~Department's proposed action and the reasons therefore. ~~Subsequent to~~After the publication of the notice, the applicant will have the opportunity to comment on the proposed revocation or modification.

(c) The revocation or modification of an exemption will have prospective effect only.

§ 2570.51 Public inspection and copies.

(a) From the date the administrative record of each exemption is established pursuant to § 2570.32(d), the administrative record of each exemption will be open ~~to~~for public inspection and copying at the EBSA Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page; or, at the discretion of the ~~staff~~Department, provide the administrative record electronically for a specified charge.

§ 2570.52 Effective date.

This subpart ~~B~~ is effective with respect to all exemptions filed with or initiated by the Department under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) at any time on or after ~~the 90th day after the date of publication in the Federal Register~~ [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Applications for exemptions under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) filed on or after December 27, 2011, but before ~~the 90th day after the date of publication in the Federal Register~~ [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION OF IN THE FEDERAL REGISTER], are governed by ~~part 2570 of chapter XXV of title 29 of the Code of Federal Regulations (title 29 CFR part 2570 as~~ (revised on ~~effective~~ effective December 27, 2011).