

On Friday, February 3, 2006, the Department of Labor (“DOL”) issued final amendments to two class exemptions commonly used in plan transactions involving the purchase or sale of mutual fund shares. 71 Fed. Reg. 5885, 5887 (Feb. 3, 2006).

Amendments to PTE 75-1

Part II of PTE 75-1 provides relief from ERISA section 406(a)’s party-in-interest prohibited transaction restrictions (and the Code’s corresponding excise tax provisions) for purchases and sales of securities between a plan and a broker dealer, reporting dealer or bank that meet certain conditions. Until now, the exemption also provided relief from the self-dealing restrictions of ERISA section 406(b) (and the corresponding provisions of the Code) for any purchase or sale by a plan of mutual fund shares, provided that no fiduciary of the plan was a principal underwriter or otherwise affiliated with a mutual fund company.

DOL finalized the amendments it had proposed in April of 2004 without change. DOL’s amendments reorganize the exemption by moving the portion that provides section 406(b) relief into its own new section and generally increase the number of transactions potentially covered. In this regard, the amendments clarify that the exemption’s self-dealing relief applies as long as the fiduciary of the plan who makes the decision to enter the transaction is not a principal underwriter or other affiliate of a mutual fund company. In addition, with respect to 406(a) relief, the amendment makes clear that the broker dealer, reporting dealer or bank may not have or exercise discretionary authority or provide investment advice with respect to the specific assets involved in the transaction. Importantly, the amendments made by DOL are retroactively effective as of January 1, 1975, the effective date of PTE 75-1.

In its proposed amendment, the DOL had requested comments on the “utility” of the exemption, suggesting that the agency was considering more significant changes. DOL indicated that it has received three such comments, including one filed by our firm, and is reviewing the issues raised by those comments. As noted in our comments, we believe that the exemption is widely utilized by fiduciaries effecting purchases and sales of unaffiliated mutual fund shares on behalf of plan clients. One of the modifications under review by the Department would involve a repositioning of Part II of PTE 75-1 into PTE 86-128, the so-called “Securities Exemption.” Pending further action by the Department, Part II of PTE 75-1 remains in effect.

DOL also finalized a corresponding amendment to Part V of PTE 75-1, the exemption for extensions of credit in connection with securities transactions. Part V of PTE 75-1 permits an extension of credit to a plan from a broker dealer in connection with securities transactions. Under the original exemption, the broker dealer could not be a fiduciary with respect to any assets of the plan, unless the fiduciary (and its affiliates) received no consideration in connection with the extension of credit. DOL’s final amendment relaxes this condition. Under the final

amendment, the broker dealer may not be a discretionary fiduciary or render investment advice with respect to the specific assets involved in the transaction.

Amendment to PTE 84-24

DOL finalized the amendment to PTE 84-24 it had proposed in September of 2004 without change. PTE 84-24 provides relief from ERISA's prohibited transaction rules for plan purchases of insurance and annuity contracts and shares of mutual funds, and for the receipt of sales commissions by insurance agents, pension consultants and mutual fund principal underwriters in connection with these transactions. Previously, PTE 84-24 was not available to an insurance agent, pension consultant or principal underwriter if such person was affiliated with a trustee with investment discretion over any plan assets. The amendment, which was requested by our firm, broadens the relief provided by PTE 84-24 by extending it to purchase transactions involving insurance agents, brokers, pension consultants and principal underwriters whose affiliates exercise investment discretion over plan assets that are not involved in the transaction.