


## Document Management

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§2570.35(d)(2)(v) provides "[T]hat the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction knowing that such act or transaction was prohibited under section 406 of ERISA and/or 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 the act or

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I would like to comment on the proposed regulations under §2570.35(d) regarding retroactive exemptions.

§2570.35(d)(2)(v) provides that the Department would take into account in finding that an applicant acted in good faith include “[T]hat the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction knowing that such act or transaction was prohibited under section 406 of ERISA and/or 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 the act or transaction”

Pendency of a request for a prohibited transaction exemption can take six month to over a year to consummate. Some transactions have elements that would cause the transaction to either fail or become less attractive if they cannot be accomplished within a certain amount of time. Case in point would be the effective date of changes in tax laws which would give one party to the transaction favorable tax treatment if consummated by a certain time. While this concern would not affect the reasonableness of the transaction from the standpoint of the plan or fiduciary, it would have a significant impact on the other party.

Assuming that otherwise proper safeguards and procedures were in place protecting the plan and assuming that but for the earlier consummation of the transaction, the exemption could be approved, it seems unreasonably harsh to deny relief to a transaction that had a time sensitivity shorter than the time-frame in which the Department could respond. In this instance although the parties knew that the transaction was prohibited, they might have reasonable reliance that the transaction was such that it otherwise could be exempt. This could happen even during the pendency of a prohibited transaction application, where the matter was sufficiently explored, but that the timing was such that the transaction had to occur prior to the final grant.

We would suggest that the regulations be tempered to allow for a grant of exemption consistent with this set of circumstances.