

January 7, 2013

2012 in Review: ERISA Individual Prohibited Transaction Exemptions

In 2012, the Department of Labor (DOL) continued a fairly active program of issuing individual exemptions from the prohibited transaction rules of ERISA. These rules generally prohibit, among other things:

- Sale and lending transactions between (i) certain retirement and other plans specified in ERISA and/or the Internal Revenue Code and (ii) a “party in interest” or “disqualified person” to that plan; and
- Self-dealing or conflicted interests on the part of a plan “fiduciary.”

DOL is, however, authorized to grant a conditional or unconditional exemption for an otherwise prohibited transaction if DOL determines that the exemption is (i) administratively feasible, (ii) in the interests of the plan and of its participants and beneficiaries, and (iii) protective of the rights of plan participants and beneficiaries.

DOL published [20 individual prohibited transaction exemptions](#) (PTEs) in 2012, the same number as in 2011. Under DOL’s [“EXPRO” procedure](#), which permits expedited consideration of transactions substantially similar to other transactions for which exemptions have been recently provided, DOL has reported [15](#), which is more than the eight exemptions granted in 2011.

A number of the 2012 exemptions permitted a plan’s acquisition of various types of securities or other assets. These included purchase options, rights and warrants (PTE 2012-05, PTE 2012-19); LLC and hedge fund interests (PTE 2012-10, PTE 2012-15); contingent value rights (PTE 2012-07); ADS rights (PTE 2012-05); and employer stock rights (PTE 2012-02, PTE 2012-07, PTE 2012-17). Many of these exemptions contained common conditions. Typically, the terms of the acquisition with respect to the plan were required to be the same as those of all other shareholders. No fees or commissions were permitted to be paid in connection with the transaction. In the case of participant-directed accounts, approval was conditioned on the acquisition (and the continued holding) of the asset being made in accordance with the terms of the plan governing individual investment discretion. Where rights to employer or related party securities were obtained, typically a representation was required stating that the offering resulted from an independent act by the issuer as a corporate entity. Additional conditions were imposed in each of these exemptions based on the nature of the individual transaction being approved.

The DOL also approved three exemptions involving the contribution of assets in-kind to a plan. These exemptions include a contribution of shares of common stock of a company in which the employer had a substantial interest (PTE 2012-01); a bundle of assets that included royalty interests (PTE 2012-12); and a Guaranteed Investment Contract (PTE 2012-06). In these exemptions, the DOL required the involvement of an independent fiduciary to determine, among other things, that the contribution was in the best interest of the plan and its participants and that the terms of the transaction were fair. The exemptions also contained conditions ensuring that the assets were appropriately valued. No fees or commissions could be paid in connection with the transaction. In each case, the DOL also considered the percentage of plan assets involved. Additional conditions were imposed based on the asset type and the facts and circumstances surrounding the transaction.

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Some unique exemptions in 2012 involved the provision of services to and payment of fees by plans. An exemption was issued to Delaware Charter Guarantee & Trust Co., d/b/a/ Principal Trust Co., covering various transactions relating to investments in affiliated funds where Principal also provided investment allocation advice. (PTE 2012-11). The DOL also issued an exemption permitting a plan and its participants to pay a party in interest for providing medical services. (PTE 2012-4). Similarly, another exemption permitted the purchase of health insurance from a wholly owned subsidiary of the plan sponsor. (PTE 2012-20). An umbrella exemption was granted to BlackRock, Inc. which covered a number of otherwise prohibited transactions arising out of BlackRock's acquisition of BGI, N.A., from Barclays PLC. (PTE 2012-09).

Other exemptions included the redemption of auction rate securities (PTE 2012-14); the sale of plan assets to the plan sponsor (PTE 2012-18); a captive reinsurance transaction (PTE 2012-03); an employer stock consent dividend election (PTE 2012-13); the purchase and leaseback of real property (PTE 2012-16); and (QPAM)-type exemptions (PTE 2012-08, PTE 2012-12).

The attached chart is an index with brief descriptions of the 2012 individual exemptions.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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2012 Individual PTEs

| Transaction | Requesting Party | Citation |
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| Asset Allocation Advice/Investment Allocation Advice | | |
| <p>(1) The receipt of a fee by Principal from affiliated open-end investment companies in connection with the direct investment in shares of any such affiliated fund by an employee benefit plan where Principal serves as a fiduciary with respect to such plan, and where Principal: (a) provides investment advisory services, or similar services to any such affiliated fund; and (b) provides to any such affiliated fund other secondary services;</p> <p>(2) in connection with the indirect investment by a plan in shares of an affiliated fund through investment in a pooled investment vehicle, where Principal serves as a fiduciary with respect to such plan, the receipt of fees by Principal from: (a) an affiliated fund for the provision of investment advisory services, or similar services by Principal to any such affiliated fund; and (b) an affiliated fund for the provision of secondary services by Principal to any such affiliated fund.</p> | <p>Delaware Charter Guarantee & Trust Co., d/b/a Principal Trust Co.</p> | <p>PTE 2012-11 77 FR 32673 (06/01/12)</p> |
| Auction Rate Securities | | |
| <p>Sale by a plan of an auction rate security to JPMorgan Chase, where such sale is related to or unrelated to a settlement agreement.</p> | <p>JPMorgan Chase</p> | <p>PTE 2012-14 77 FR 45690 (08/01/12)</p> |
| Captive Reinsurance | | |
| <p>The reinsurance of risks, and receipt of premiums related therefrom, by Royal Assurance, Inc., in connection with insurance contracts sold by Unum Life Insurance Company to provide group life, short-term disability, and accidental death and dismemberment insurance benefits to employees of the R+L Companies under an employee welfare benefit plan sponsored by R+L.</p> | <p>R+L Carriers Shared Services, LLC</p> | <p>PTE 2012-03 77 FR 2763 (01/19/12)</p> |
| Consent Dividend | | |
| <p>The personal holding company consent dividend election with respect to Sammons Enterprises, Inc., by the trustee of the ESOP.</p> | <p>Sammons Enterprises, Inc. Employee Stock Ownership Plan</p> | <p>PTE 2012-13 77 FR 32685 (06/01/12)</p> |

| Hedge Funds | | |
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| <p>(1) The direct or indirect acquisition by the IRA of a Renaissance employee participant (or the spouse of such participant) of interests in a Renaissance-established Medallion Master Fund through the IRA's investment in the New Medallion Feeder Fund or New Kaleidoscope (another feeder fund), which will be created to hold plan assets;</p> <p>(2) the acquisition by the participant's or spouse's IRA of additional interests in the New Medallion Vehicles;</p> <p>(3) the redemption, by the participant's or spouse's IRA of all or a portion of their respective interests in the New Medallion Vehicles.</p> | <p>Renaissance Technologies LLC</p> | <p>PTE 2012-10 77 FR 23756 (04/20/12)</p> |
| Holding of Employer Securities by Plans | | |
| <p>(1) The acquisition of certain stock rights by the plan in connection with, and under the terms and conditions of, a rights offering by the plan sponsor and a party in interest with respect to the Plan;</p> <p>(2) the holding of the rights by the plan during the subscription period of the offering.</p> | <p>TIB Financial Corp. Employee Stock Ownership Plan</p> | <p>PTE 2012-17 77 FR 45694 (08/01/12)</p> |
| <p>(1) The acquisition of certain rights by the plan in connection with an offering of shares of the common stock of First Federal Bancshares of Arkansas, Inc., a party in interest with respect to the Plan;</p> <p>(2) the holding of the rights received by the plan during the subscription period of the offering.</p> | <p>First Federal Bancshares of Arkansas, Inc.</p> | <p>PTE 2012-02 77 FR 2763 (01/19/12)</p> |
| Holding of LLC Interests by Plans | | |
| <p>(1) The acquisition and holding by the plan of LLC interests in SPFI Investment Group, LLC, a former wholly owned subsidiary of the plan sponsor, South Plains Financial, Inc. (SPF), which were distributed as dividends to the plan as a shareholder of SPF;</p> <p>(2) the proposed redemption by the LLC of the LLC Interests held by the plan.</p> | <p>South Plains Financial, Inc. Employee Stock Ownership Plan</p> | <p>PTE 2012-15 77 FR 45692 (08/01/12)</p> |

| Holding by Plans of Other Securities | | |
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| <p>The acquisition by the plan of contingent value rights (CVRs) as a result of the plan's ownership of certain common stock in Genzyme Corporation, the plan sponsor, in connection with (a) the purchase of shares of Genzyme Common Stock pursuant to an exchange offer and a subsequent offer to the exchange offer by GC Merger Corp., a wholly-owned subsidiary of sanofi-aventis (Sanofi), a party in interest with respect to the Plan, and (b) the "short-form" merger of the purchaser into Genzyme;</p> <p>(2) the continued holding of CVRs by the Plan;</p> <p>(3) the resale of the CVRs by the Plan to Sanofi, pursuant to the exercise of repurchase rights available under certain circumstances specified in the Contingent Value Rights Agreement.</p> | <p>Genzyme Corporation 401(k) Plan</p> | <p>PTE 2012-07 77 FR 19342 (03/30/12)</p> |
| <p>(1) The acquisition of certain rights in American depository shares (the ADS Rights) by the plan in connection with an offering of shares of stock in HSBC Holding, plc by HSBC Holding, psc, a party in interest with respect to the Plan;</p> <p>(2) the holding of the ADS Rights received by the plan during the subscription period of the offering.</p> | <p>HSBC-North America (U.S.) Tax Reduction Investment Plan</p> | <p>PTE 2012-05 77 FR 19341 (3/30/12)</p> |
| <p>The acquisition and holding of certain warrants to purchase the class P common stock of Kinder Morgan Inc. (KMI) by the plan, a participant directed defined contribution plan sponsored by El Paso Corporation, a party in interest with respect to the plan, in connection with a planned merger of El Paso and KMI.</p> | <p>El Paso Corporation Retirement Savings Plan</p> | <p>PTE 2012-19 77 FR 68832 (11/16/12)</p> |
| In-Kind Contributions to Plans | | |
| <p>The in-kind contribution by Weyerhaeuser, a party in interest with respect to the plan, of a bundle of assets owned by Weyerhaeuser Asset Management LLC, a wholly-owned subsidiary of Weyerhaeuser, including potential royalty payments.</p> | <p>Weyerhaeuser Company and Federalway Asset Management LP</p> | <p>PTE 2012-12 77 FR 32682 (06/01/12)</p> |
| <p>The in kind contribution to the plan of a guaranteed investment contract, issued by the Metropolitan Life Insurance Company, an unrelated party, by EnPro Industries, Inc.</p> | <p>Retirement Program for Employees of EnPro Industries</p> | <p>PTE 2012-06 77 FR 19342 (03/30/12)</p> |
| <p>The one-time, in kind contribution of shares of the common stock of Intermec, Inc. to the plan by the Kemper Corporation, a party in interest with respect to the plan.</p> | <p>The Kemper Corporation Pension Plan</p> | <p>PTE 2012-01 77 FR 2761 (01/19/12)</p> |

| Provision of Services to Plans | | |
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| <p>(1) The receipt of a fee by Principal, from affiliated open-end investment companies in connection with the direct investment in shares of any such affiliated fund by an employee benefit plan where Principal serves as a fiduciary with respect to such plan, and where Principal: (a) provides investment advisory services, or similar services to any such affiliated fund; and (b) provides to any such affiliated fund other services (Secondary Service(s));</p> <p>(2) in connection with the indirect investment by a plan in shares of an affiliated fund through investment in a pooled investment vehicle, where Principal serves as a fiduciary with respect to such plan, the receipt of fees by Principal from: (a) an affiliated fund for the provision of investment advisory services, or similar services by Principal to any such affiliated fund; and (b) an affiliated fund for the provision of secondary services by Principal to any such affiliated fund.</p> | <p>Delaware Charter Guarantee & Trust Co., d/b/a Principal Trust Co.</p> | <p>PTE 2012-11 77 FR 32673 (06/01/12)</p> |
| <p>(1) The payment by the plan to Basin Occupational & Urgent Care, LLC (BOUC), a party in interest with respect to the Plan, for the on-site provision to the Plan of urgent medical care and wellness services by a nurse-practitioner and a wellness coordinator employed by BOUC;</p> <p>(2) the payment by the plan's participants to BOUC for medical services provided as a result of the inclusion of BOUC's clinic, located in Farmington, New Mexico, as a network provider in the BlueCross BlueShield of New Mexico (BCBSNM) Network of Health Care Providers; and the payment by the Plan to BCBSNM of the difference between BOUC's fee and the participant's co-pay, which difference is then transmitted by BCBSNM to BOUC.</p> | <p>Aztec Well Servicing Company & Related Companies Medical Plan Trust</p> | <p>PTE 2012-04 77 FR 19340 (03/30/12)</p> |
| <p>The purchase of health insurance by a plan from an HMO that is wholly owned by the plan's sponsor through a non-profit membership interest; and the continued purchase of health care coverage by the Plan from the HMO, where PTE 79-41 technically is inapplicable due to the nature of the affiliation.</p> | <p>Sharp HealthCare and Dental Plan</p> | <p>PTE 2012-20 77 FR 68833 (11/16/12)</p> |
| Purchases (or Acquisitions) of Partnership or LLC Interests by Plans | | |
| <p>The acquisition and holding by the plan of LLC interests in SPFI Investment Group, LLC, a former wholly owned subsidiary of the plan sponsor, South Plains Financial, Inc. (SPF), which were distributed as dividends to the plan as a shareholder of SPF;</p> <p>(2) the proposed redemption by the LLC of the LLC interests held by the plan.</p> | <p>South Plains Financial, Inc. Employee Stock Ownership Plan</p> | <p>PTE 2012-15 77 FR 45692 (08/01/12)</p> |

| Purchase of Real Property and Leaseback by Plans | | |
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| The proposed purchase by the plan from JMG Property, LLC, a party in interest with respect to the plan, of a 52% beneficial interest in a parcel of real property, and (2) the lease by the plan of a 52% beneficial interest in the property to Meridian Medical Associates, S.C., the sponsor of the plan (the Employer), where the plan also holds a 100% beneficial ownership interest in the adjacent original facility which is leased to the Employer, pursuant to PTE 2001-25 and formerly pursuant to PTE 81-96. | Meridian Medical Associates, S.C. Employees' Retirement Plan and Trust | PTE 2012-16 77 FR 45693 (08/01/12) |
| QPAM | | |
| Citigroup and its current and future affiliates are not to be precluded from functioning as a "qualified professional asset manager" (QPAM), pursuant to Prohibited Transaction Exemption 84-14, solely because of a failure to satisfy section I(g) of PTE 84-14, as a result of Citigroup's affiliation with Citibank Belgium SA, an entity convicted of six counts of criminal activity in Belgium. | Citigroup Inc. | PTE 2012- 08 77 FR 19344 (03/30/12) |
| For a period of five (5) years, QPAM-like relief for any transactions between a master trust in which the plan invests and: (a) parties in interest with respect to the plan and any other employee benefit plans sponsored by Weyerhaeuser whose assets are invested in the master trust in which such plans participate in the future, and (b) any transactions between a party in interest and any employee benefit plan or any employee benefit plans (the Client Plan(s)), where such Client Plan is invested in an account separately managed by Federalway Asset Management LP (Newco), or in a collective investment vehicle managed by Newco whose assets are treated as plan assets under section 3(42) of the Act. | Weyerhaeuser Company and Federalway Asset Management LP | PTE 2012-12 77 FR 32682 (06/01/12) |
| Sales of Employer and Other Securities by Plans | | |
| The sale by the plan to the plan sponsor of securities in an unrelated entity which has made an election from a C corporation to an S corporation. | Ed Laur Defined Benefit Plan (stock) | PTE 2012-18 77 FR 45695 (08/01/12) |
| Sales (or Redemptions) of Partnership or LLC Interests by Plans | | |
| (1) The acquisition and holding by the plan of certain LLC interests in SPFI Investment Group, LLC, a former wholly owned subsidiary of the plan sponsor, South Plains Financial, Inc. (SPF), which were distributed as dividends to the plan as a shareholder of SPF; (2) the proposed redemption by the LLC of the LLC Interests held by the Plan. | South Plains Financial, Inc. Employee Stock Ownership Plan | PTE 2012-15 77 FR 45692 (08/01/12) |

Umbrella Exemptions

The exemption is a successor to temporary relief previously granted by the DOL in connection with BlackRock’s acquisition of BGI, N.A. (BGI) from Barclays (Temporary Relief). The overarching structure of the exemption is founded upon compliance with five sets of general conditions: (a) modified conditions derived from PTE 84-14 (sometimes referred to as the QPAM Exemption); (b) restrictions on the compensation of BlackRock managers; (c) the establishment and implementation of policies and procedures; (d) the appointment by BlackRock of an Exemption Compliance Officer; and (e) the retention by BlackRock of an Independent Monitor. This unique overarching structure constitutes a comprehensive compliance function and an independent monitor, each of which work together for the benefit of plans and their participants and beneficiaries.

The overarching structure sits on top of an agreed upon twenty three specific transaction types (each a Covered Transaction). Each Covered Transaction has its own set of additional conditions deemed suitable for it in light of the nature of the transaction. Many of the conditions for individual Covered Transactions are derived from statutory exemptions, administrative class exemptions or administrative individual exemptions frequently relied upon by fiduciaries and parties in interest (sometimes affiliated and sometimes not) to exempt similar transactions. The Covered Transactions range from relatively mechanical transactions such as securities lending to more complex transactions such as syndicated loans. The subject transactions are basically the same as those described in the temporary exemption, except that several exemptions designed to undo previously entered into transactions were not carried over into this new exemption.

BlackRock, Inc. et al

PTE
2012-09
[77 FR](#)
[19836](#)
[\(04/02/12\)](#)