

January 5, 2012

2011 in Review: ERISA Individual Prohibited Transaction Exemptions

In 2011, 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. (On October 27, 2011, DOL published updated procedures for filing and processing individual prohibited transaction exemptions. See Sutherland’s [Legal Alert](#) for more information.)

DOL published [20 individual prohibited transaction exemptions](#) (PTEs) in 2011, as compared to 34 individual PTEs issued in both 2009 and 2010. Exemptions for the sale of assets (particularly illiquid or underperforming assets and real property) continued to be most prevalent, although DOL also granted a variety of other exemptions including (i) three exemptions for stock rights offerings and (ii) exemptions for BlackRock following its acquisition of BGI, for Wasatch Advisors with respect to the qualified professional asset manager (QPAM) exemption, and for Bank of America with respect to its stable value program following its acquisition of Merrill Lynch. These PTE’s are summarized in the chart below.

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 [eight exemptions](#), which is more than the four exemptions granted in 2010, but less than the 22 and 17 exemptions granted in 2008 and 2009, respectively. In addition to exemptions for familiar asset sale and captive reinsurance transactions and updates to the underwriter exemptions, two exemptions provide relief for a credit facility arrangement.

2011 Individual PTEs

| Transaction | Requesting Party | Citation |
|--|------------------------------------|--------------------------|
| Acquisition of Stock Rights | | |
| Acquisition of stock rights by the plan, issued by the plan sponsor and a party in interest, under the terms of a rights offering; the holding of the rights by the plan until their expiration, during the subscription period of the offering. | The West Coast Bancorp 401(k) Plan | PTE 2011-03 (76 FR 3164) |

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| Transaction | Requesting Party | Citation |
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| <p>Acquisition of stock rights by the plans, in connection with their holding shares of common stock of a party in interest on the record date established pursuant to an offering of such rights, in accordance with a rights plan by a party in interest with respect to the plans, and/or the acquisition of stock and the attached rights by the plans in the future pursuant to the offering; the holding of the rights by the plans until the date the plans exercise or otherwise dispose of the rights or the expiration of such rights in accordance with the terms and conditions of the rights plan, whichever is the earlier; the exercise or other disposition of the rights by the plans.</p> | <p>Citigroup Inc. and Its Affiliates and the Citigroup 401(k) Plan, et al.</p> | <p>PTE 2011-04 (76 FR 9362)</p> |
| <p>Acquisition of stock rights by the plan in connection with an offering of shares of the common stock by a party in interest; the holding of the rights received by the plan during the subscription period of the offering.</p> | <p>Pacific Capital Bancorp Amended and Restated Incentive and Investment and Salary Savings Plan</p> | <p>PTE 2011-20 (76 FR 59434)</p> |
| Asset Management | | |
| <p>Provides exemptive relief to BlackRock as a result of its acquisition of BGI, N.A. (BGI) from Barclays PLC. The post-acquisition shareholders of BlackRock are Bank of America/Merrill Lynch, The PNC Financial Services Group and Barclays PLC (the Passive Shareholders). While none of the Passive Shareholders control BlackRock/BGI or otherwise are deemed BlackRock affiliates, there was a concern that potential prohibited transactions might still occur in the course of BlackRock's asset management activities given the collective economic and ownership interests of the Passive Shareholders.</p> <ul style="list-style-type: none"> ▪ The exemption relies upon an overarching compliance structure. The overarching structure of the exemption is founded upon compliance with five sets of general conditions: (a) modified conditions derived from PTE 84-14; (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. ▪ The PTE provides relief for 25 specific transaction types (each a Covered Transaction), each of which is subject to its own set of additional conditions. The Covered Transactions range from relatively mechanical transactions such as securities lending to more complex transactions such as over-the-counter derivative trades. 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. | <p>BlackRock, Inc. and Its Investment Advisory, Investment Management and Broker-Dealer Affiliates and Their Successors</p> | <p>PTE 2011-17 (76 FR 50632)</p> |

| Transaction | Requesting Party | Citation |
|---|---|------------------------------|
| Auction Rate Securities | | |
| Sale/exchange of auction rate securities by a plan to its sponsor/affiliate; lending of money or other extension of credit to a plan in connection with the holding of auction rate securities by the plan. | Morgan Stanley & Co., Inc. | PTE 2011-02 (76 FR 3162) |
| Sale of auction rate securities by individual retirement accounts (IRAs) and employee benefit plans to their broker, where the first sale is <i>related</i> to, and made in connection with, a settlement agreement and where the second sale is <i>unrelated</i> to, and not made in connection with, a settlement agreement. | TD Ameritrade, Inc. | PTE 2011-05 (76 FR 9364) |
| Sale of auction rate securities by a plan to its sponsor/affiliate, where the first sale is <i>unrelated</i> to, and not made in connection with, a settlement agreement, and the second sale is <i>related</i> to, and made in connection with, a settlement agreement. | Wachovia Corporation | PTE 2011-06 (76 FR 27356) |
| Cash sale of auction rate securities by a plan to its sponsor/affiliate, pursuant to a written offer. | Robert W. Baird and Co. Incorporated | PTE 2011-07 (76 FR 27358) |
| Sale by a plan of auction rate securities to its sponsor/affiliate. | Northern Trust Corporation | PTE 2011-18 (76 FR 59426) |
| Automobile Manufacturers' Retiree Medical Obligations | | |
| Amendment to PTE 2010-08 involving, <i>inter alia</i> , the acquisition and holding of employer securities by a retiree medical trust resulting from the transfer of responsibility to provide retiree medical benefits from the employer to the trust. Amendment permits employer to prepay a note at a discounted price over the next three years; in exchange for prepayment rights, employer agreed to prepay a second note in its entirety in cash and to pay the first note's June 30, 2010, scheduled principal payment in cash (as opposed to shares). (DOL took the position that the modification of the note to allow the prepayment rights would constitute a material modification of PTE 2010-08, thus requiring an amendment.) | Ford Motor Company | PTE 2011-13 (76 FR 34256) |
| Captive Reinsurance | | |
| Reinsurance of risks and the receipt of premiums by a wholly owned subsidiary of the plan sponsor in connection with an insurance contract sold by an unrelated insurer that would pay for certain benefits under the sponsor's welfare benefit plan. | Verizon Communications, Inc. and Cellco Partnership, doing business as Verizon Wireless | PTE 2011-16 (76 FR 49790) |
| Demutualization | | |
| Receipt of cash or policy credits, by or on behalf of a policy owner of a life insurance company that is an eligible member, which is an employee benefit plan or retirement arrangement, other than a plan maintained by the holding company and/or its affiliates, in exchange for an extinguishment of such eligible member's interest in the holding company, in accordance with the terms of a plan of demutualization and dissolution in accordance with state insurance law. | Security Benefit Mutual Holding Company and Security Benefit Life Insurance Company | PTE 2011-08 (76 FR 27359) |

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| Meals and Lodging | | |
| Payment for lodging and meals by the plan to the union, a party in interest with respect to the plan, in a residence hall owned by the union through its wholly owned entity. | The International Union of Painters and Allied Trades Finishing Trades Institute | PTE 2011-12 (76 FR 34255) |
| QPAM | | |
| Adviser can qualify as a “qualified professional asset manager” (QPAM) pursuant to PTE 84-14 from April 19, 2006, through July 13, 2007, notwithstanding its failure to satisfy the shareholders’ equity requirement of that exemption, provided that certain conditions were met, including obtaining a letter of credit to protect the interests of employee benefit plans to which the entity provides investment management services. | Wasatch Advisors Inc. | PTE 2011-01 (76 FR 3161) |
| Release of Claims/Litigation Settlement | | |
| Release by the plans of their claims against the plan sponsor and a party in interest, in exchange for cash, shares of common stock, warrants issued by the parent of the plan sponsor and also a party in interest, in settlement of certain litigation between the plans and the plan sponsor; the holding of the warrants by the plans. | The Krispy Kreme Doughnut Corporation Retirement Savings Plan and the Krispy Kreme Profit Sharing Stock Ownership Plan | PTE 2011-14 (76 FR 49788) |
| Sale of Real Property | | |
| Cash sale by the plan of a parcel of improved real property to the 100% owners of the plan sponsor and parties in interest. | The Parvin Nahvi, M.D., Inc. 401(k) Profit Sharing Plan and Trust | PTE 2011-09 (76 FR 27363) |
| Sale by the IRA to disqualified persons with respect to the IRA, of the IRA’s 80% interest in certain residential real property. | William W. Etherington IRA | PTE 2011-10 (76 FR 34253) |
| Cash sale by the plan of certain real property to the company, a party in interest with respect to the plan. | H-E-B Brand Savings and Retirement Plan and H. E. Butt Grocery Company | PTE 2011-11 (76 FR 34254) |
| Sale of a parcel of real property, which is part of a larger holding, from a plan-owned LLC to a party in interest with respect to the plan. | The United Brotherhood of Carpenters Pension Fund | PTE 2011-15 (75 FR 49790) |
| Stable Value Agreements | | |
| Various operations and transactions arising in its stable value program following Bank of America’s acquisition of Merrill Lynch, affiliates of which acted as stable value investment manager or directed trustee of plans invested in stable value accounts. | Bank of America, N.A., et al. | PTE 2011-19 (76 FR 59428) |



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

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