

The matching agreement and the required report have been provided to the Office of Management and Budget and the Congress in accordance with 5 U.S.C. 552a(o)(2)(A) and (r). Inquiries may be addressed to Patricia E. Neely, Staff Assistant, Facilities and Administrative Services Staff, Justice Management Division, Department of Justice, room 529, 633 Indiana Avenue NW., Washington, DC 20530.

Dated: January 12, 1990.

Harry H. Flickinger,
Assistant Attorney General for
Administration.

IFR Doc. q4-1904 Filed 1-26-907 h:45 arij

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Amendments to Prohibited Transaction Exemption (PTE) 78-19 Involving Insurance Company Pooled Separate Accounts

AGENCY: Pension and Welfare Benefits
Administration, Department of Labor.

ACTION: Adoption of amendments to PTE
78-19, and redesignation of the exemption
as PTE 90-1.

SUMMARY: This document amends PET 78-19, a class exemption that permits insurance company pooled separate accounts, in which employee benefit plans have an interest, to engage in certain transactions, provided specified conditions are met. The amendments affect, among others, participants, beneficiaries and fiduciaries of plans that invest in pooled separate accounts, insurance companies, and other persons engaging in the described transactions. **EFFECTIVE DATE:** The amendments to section I(a) of PTE 78-19 are effective as of July 1, 1988. The amendment to action II(a)(3) is effective as of January 1, 1975.

FOR FURTHER INFORMATION CONTACT:

Paul Kelly of the Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 523-8194 (this is not a toll-free number); or Cynthia Hawkins of the Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-9592 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Or, July 26, 1989, notice was published in the *Federal Register* (54 FR 31092) of the Pendency before the Department of Mposed amendments to PTE 78-19 (43 FR 59915, December 22, 1978).¹ PM 7819 provides an exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and

from the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1988 (the Code) by reason of

certain provisions of section 4975(c)(1) of the Code.

The amendments to PTE 78-19 adopted by this notice were requested in an exemption application dated March 3, 1988, on behalf of the Prudential Insurance Company of America, the Equitable Life Assurance Society of the United States, John Hancock Mutual Life Insurance Company, Connecticut General Life Insurance Company, the Mutual Life Insurance Company of New York and the Principal Financial Group (the Applicants). The exemption application was submitted pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code² and in accordance with ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

Information collection requirements contained in PTE 78-19 have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB number 1210-0054 approved for use through February 28, 1990.

The notice of pendency gave interested persons an opportunity to comment on the proposal. Public comments were received pursuant to the provisions of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1.

For the sake of convenience, the entire text of PTE 78-19, as amended, has been reprinted with this notice. The Department has redesignated the exemption as PTE 90-1.

1. Description of the Exemption

PTE 78-19 consists of four parts. Section 1(a), the exemption's basic provision, permits an insurance company pooled separate account to engage in transactions, which otherwise might be prohibited by sections 406 and 407(a) of ERISA and section 4975(c)(1) of the Code, with persons who are parties

¹ On August 3, 1989, due to typesetting errors, certain corrections of the July 28 publication were published in the *Federal Register* (54 FR 32024).

² Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), transferred the authority of the Secretary of the Treasury to issue exemptions of this type to the Secretary of Labor.

In the discussion of the exemption, references to sections 406 and 408 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

in interest with respect to an employee benefit plan investing in the account. The plan's participation in the account, under section I(a), may not exceed .5 percent of the total assets in the pooled separate account.

Under section 11(a) of PTE 78-19, a party in interest with respect to a plan is permitted in certain cases to furnish goods to an insurance company pooled separate account in which the plan has an interest exceeding the section I limitation. Section 11(a) also allows both the leasing of real property and the incidental furnishing of goods by a pooled separate account to a party in interest. Section II(a) contains a

condition that the amount involved in the furnishing of goods or leasing of real property in any calendar year does not exceed the greater of \$25,000 or .025 percent of the fair market value of the assets of the pooled separate account.

Three amendments to PTE 78-19 are granted pursuant to this notice: (1) The percentage limitation in section I(a)(1) of PTE 78-19 is increased from 5 to 10 percent; (2) the percentage limitation in section II(a)(3) is increased from .025 percent to .5 percent; and (3) relief is included for investments by insurance company pooled separate accounts in short-term obligations issued by parties in interest.

The Department notes that all the relevant conditions contained in PTE 78-19, with the exception of those modified by these amendments, still must be met under the amended class exemption. These conditions, among others, include a requirement that the party in interest is not the insurance company (or an affiliate) which holds the plan assets in its pooled separate account or any other separate account of the insurance company. **In addition,** the terms of the transaction must be at least as favorable to the pooled separate account as those obtainable in a arm's-length transaction with an unrelated party, and the insurance company must maintain certain records for a period of six years from the date of the transaction.

2. Discussion of Comments Received

The Department received two letters commenting on the proposed amendments to PTE 78-19. The American Council of Life Insurance (ACLI), a trade association for the life insurance industry, expressed strong support for all three of the proposed amendments. The ACLI represents that, as of the end of 1988, member companies had over \$113 billion of separate account pension assets under management.

The ACLI represents that each of the proposed amendments to the class exemption will facilitate the ability of insurance companies to discharge their pooled separate account management responsibilities in a manner so as to obtain optimal performance commensurate with investment risk. The ACLI also believes the amendments to be consistent with the objectives of PTE 78-19.

The American Bankers Association (ABA) also submitted a comment letter concerning the proposed amendments. The ABA is a national trade association representing banks of all sizes, types and locations. Nearly 4,000 banks offer fiduciary services to employee benefit plans and others, according to the ABA, and over 500 banks operate more than 2,000 collective investment funds for employee benefit plans.

The ABA generally supports the granting of the proposed amendments so long as the Department provides comparable exemptive relief for all competing investment vehicles. In particular, the ABA believes that, if the percentage limitation for plans participating in pooled separate accounts of insurance companies is increased from 5 to 10 percent, concurrent relief should be granted to others similarly situated. For this reason, the ABA urges that the 5 percent limitation for plan participation contained in PTE 80-51, the class exemption for bank collective investment funds (45 49709, July 25, 1980), should be increased to 10 percent. In this regard, the Department notes that consideration of an amendment to PTE 80-51 is beyond the scope of this proceeding. However, the Department wishes to take the opportunity to state that the commentator may wish to consider filing an exemption application for comparable class relief under section 408(a) of ERISA. General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; nor does it affect the requirement of section 401(a)

of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of ERISA, the Department makes the following determinations:

(i) The amendments set forth herein are administratively feasible,

(ii) They are in the interests of plans and of their participants and beneficiaries, and

(iii) They are protective of the rights of the participants and beneficiaries of plans;

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The amendments are supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction. Exemption

Accordingly, PTE 78-19 is amended under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Section 1-Basic Exemption

Effective January 1, 1975, the restrictions of sections 406(a) 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A), (B), (C), or (D) of the Code, shall not apply to transactions described below if the applicable conditions set forth in section III are met.

(a) *General exemption.* Any transaction between a party in interest with respect to a plan and an insurance company pooled separate account in which the plan has an interest, or any acquisition or holding by the pooled separate account of employer securities or employer real property, if the party in interest is not the insurance company which holds the plan assets in its pooled separate account, any other separate account of the insurance company, or any affiliate of the insurance company, and if, at the time of the transaction, acquisition or holding, either.

(1) The assets of the plan (together with the assets of any other plans maintained by the same employer or employee organization) in the pooled separate account do not exceed

(i) 10 percent of the total of all assets in the pooled separate account, if the transaction occurs prior to February 20, 1979;

(ii) 5 percent of the total of all assets in the pooled separate account, if the transaction occurs on or after February 20, 1979, and on or before June 30, 1988; or

(iii) 10 percent of the total of all assets in the pooled separate account, if the transaction occurs on or after July 1, 1988, or

(2) On or after July 1, 1988, the pooled separate account is a specialized account that has a policy of investing, and invests, substantially all of its assets in short-term obligations (having a stated maturity date of one year or less or having a maturity date of one year or less from the date of acquisition by such specialized account), including but not necessarily limited to

(i) Corporate or governmental obligations or related repurchase agreements;

(ii) Certificates of deposit;

(iii) Bankers acceptances; or

(iv) Variable amount notes of borrowers of prime credit.

(b) *Multiple employer plans exemption.*

Any transaction between an employer (or an affiliate of an employer) of employees covered by a multiple employer plan and an insurance company pooled separate account in which the plan has an interest, or any acquisition or holding by the pooled separate account of employer securities or employer real property, if at the time of the transaction, acquisition or holding

(1) In the case of a transaction occurring prior to February 20, 1979, the employer is not a substantial employer with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(2) In the case of a transaction occurring on or after February 20, 1979,

(i) The assets of the multiple employer plan in the pooled separate account do not exceed 10 percent of the total assets in the pooled separate account, and the employer is not a substantial employer with respect to the plan (within the meaning of section 4001(a)(2) of the Act), or

(ii) The assets of the multiple employer plan in the pooled separate account exceed 10 percent of the total assets in the pooled separate account, but the employer is not a substantial employer and would not be a substantial employer with respect to the plan within the meaning of section 4001(a)(2) of the Act if "5 percent" were

Section III-General Conditions

(a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the insurance company, the terms of the transaction are not less favorable to the pooled separate account than the terms generally available in arm's-length transactions between unrelated parties.

(b) The insurance company maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (c) of this section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance company, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest shall be subject to the civil penalty which may be assessed under section 502(j) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (c) below.

(c) (1) Except as provided in subsection 2 of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(ii) Any fiduciary of a plan who has authority to acquire or dispose of the interests of the plan in the separate account, or any duly authorized employee or representative of such fiduciary,

(iii) Any contributing employer to any plan which has an interest in the pooled separate account or any duly authorized employee or representative of that employer,

(iv) Any participant or beneficiary of any plan which has an interest in the pooled separate account or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (ii) through (iv) of this paragraph shall be authorized to examine an insurance company's trade secrets or commercial or financial information which is privileged or confidential.

Section IV-Definitions and General Rules

For purposes of sections I through III above,

(a) The term "multiple employer plan" means an employee plan which satisfies at least the requirements of section 3(37)(A) (1), (ii) and (v) of the Act and section 414(f) (1)(A), (B), and (E) of the Code.

(b) An "affiliate" of a person includes

(1) Any person directly or indirectly, through one or more intermediaries,

controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee (including, in the case of an insurance company, an insurance agent thereof, whether or not the agent is a common law employee of the insurance company), or relative of, or partner in, any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

(e) *General.* (i) The time as of which any transaction, acquisition, or holding occurs for purposes of this exemption is the date upon which the transaction is entered into (or the acquisition is made) and the holding commences. Thus, for purposes of this exemption, if any transaction is entered into, or an acquisition is made, on or after January 1, 1975, or a renewal which requires the consent of the insurance company occurs on or after January 1, 1975, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered into, or holding commencing, prior to January 1, 1975, if either the requirements of this

exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975, if the transaction had been entered into, acquisition was made, or if the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a holding exempt by virtue of section I(a) above at such time as the interest of the plan in the pooled separate account exceeds the percentage interest limitation of section I(a), if the excess results solely from an increase in the amount of consideration allocated to the pooled separate account by the plan.

(ii) Each plan shall be considered to own the same fractional share of each asset (or portion thereof) in the pooled separate account as its fractional share of total assets in the pooled separate account on the most recent preceding valuation date of the account.

Signed at Washington, DC, this 23rd day of January 1990.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits

Administration, U.S.
Department of Labor.

[FR Doc. 90-1963 Filed 1-26-90; 8:45 am] BILLING CODE

4510-29-M

[Application No. D-7974 et al.]

Proposed Exemptions; Biological Science Textbooks, Inc. Employees Profit Sharing Plan, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 [the Act and/or the Internal Revenue Code of 1986 (the Code)].

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this Federal Register Notice. Comments and requests for a hearing should state the reasons for the writer's

interest in the pending exemption.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption and Determinations,

stituted ic. "10 percent" in that e
nition.

(c) *Excess holdings exemption for
employee benefit plans.* Arty acquisition
or holding of qualifying employer securities
or qualifying employer real property by a
plan (other than through a pooled separate
account) if

(i) The acquisition or holdin contravenes
the restrictions of sections 406(a)(1)(E),
406(a)(2) and 407(a) of the Act solely by
reason of being aggregated with employer
securities or employer real property held by
an insurance company pooled separate
account in which the plan has an interest,
and

(2) The requirements of either
paragraph (a) or paragraph (b) of this
section are met.

(d) *Employer securities and
real property.*

(1) Except as provided in subsection 2 of
this paragraph, any acquisition, sale or
lease of employer securities or real property
by the insurance company pooled separate
account in which a plan has an
interest and which does not meet the
requirements of paragraphs (a) or (b) of this
section, if no commission is paid to the
insurance company or to the employer
or any affiliate of the employer in
connection with the acquisition or sale
of employer securities or the acquisition,
sale or lease of employer real property,
and

(i) In the case of employer real
property

(a) Each parcel of employer real property
and the improvements thereon held by the
pooled separate account are suitable (or
adaptable without excessive cost) for use
by different tenants, and

(b) The property of the pooled
separate account, which is leased or

held for lease to others, in the aggregate,
is dispersed geographically.

(ii) In the case of employer
securities

(a) The employer security is (1) stock, or
(2) a bond, debenture, note, certificate, or
other evidence of indebtedness (the
security described in (2) is hereinafter
referred to as an "obligation"), and

(b) The insurance company in whose
pooled separate account the security is
held is not an affiliate of the issuer of the
security and, if the security is an
obligation of the issuer, either

(c) The pooled separate account already
owns the obligation at the time the plan
acquires an interest in the separate
account and interests in the pooled
separate account are offered and redeemed
in accordance with valuation procedures of
the pooled separate account applied on a
uniform or consistent basis, or

(d) Immediately after acquisition of the
obligation: (1) not more than 25 percent of
the aggregate amount of obligations issued
in the issue and outstanding at the time of
acquisition is held by such plan, and (2) in
the case of an obligation which is a
restricted security within the meaning of
rule 1-4 under the Securities Act of 1933, at
least 50 percent of the aggregate amount
referred to in (1) is held by persons
independent of the issuer. The insurance
company, its affiliates and any separate
account of the insurance company shall be
considered persons independent of the
issuer if the insurance company is not an
affiliate of the issuer.

(2) Provided that, in the case of a plan
which is not an eligible individual account
plan (as defined in section 407(d)(3) of the
Act), immediately after, such acquisition the
aggregate fair market value of employer
securities or employer real property owned
by the

plan does not exceed 10 percent of the fair
market value of the assets of the
plan.

(3) For the purposes of the definition
contained in subsection (1) of this
paragraph (d), the term "employer securities"
shall include securities issued by, and the term
"employer real property" shall include real
property leased to, a person who is a party in
interest with respect to a plan (which has an
interest in the separate account) by reason of
a relationship to the employer described in
section 3(14) (B), (G), (H), or (I) of the
Act.

Section hSpecific Exemption

Effective January 1, 1975, the restrictions
of sections 406(a)(1) (A), (B), (C), and (D),
and 406(b) (1) and (2) of the Act and the
taxes imposed by sections 4375 (a) and (b)
of the Code by reason of section 4975(c)(1)
(A), (B), (C), (D), or (E) of the Code shall
not apply to the transactions described
below provided that the conditions of
section III are met.

(a) *Certain leases and goods.* The
furnishing of goods to an insurance
company pooled separate account by a
party in interest with respect to the plan,
which plan has an interest in the pooled
separate account, or the leasing of real
property of the pooled separate account to
a party in interest and the incidental
furnishing of goods to the party in interest
by the insurance company separate
account, if

(1) In the case of goods, they are
furnished to or by the pooled separate
account in connection with the real
property investments of the pooled
separate account;

(2) The party in interest is not then
insurance company, any other pooled
separate account of the insurance

company, or an affiliate of the insurance
company: and

(3) The amount involved in the furnishing
of goods or leasing of real property in any
calendar year (including the amount
under any other lease or arrangement for
the furnishing of goods in connection with
the real property investments of the
pooled separate account with the same
party in interest, or any affiliate thereof)
does not exceed the greater of \$25,000 or 5
percent of the fair market value of the
assets of the pooled separate account on
the most recent valuation date of the
account prior to the transaction.

(b) *Transactions with persons who are
parties in interest to the plan solely by
virtue of being certain service providers
or certain affiliates of service providers.*

Any transaction between an insurance
company pooled separate account and a
person who is a party in interest with
respect to a plan, which plan has an
interest in the pooled separate account, if

(1) The person is a party in interest
including a fiduciary by reason of
providing services to the plan, or by
reason of a relationship to a service
provider described in section 3(11) (F), (G),
(I-1); or (I) of the Act, and the person
exercises no discretionary authority,
control, responsibility, or influence with
respect to the investment of plan assets in
the pooled separate account and has no
discretionary authority, control,
responsibility, or influence with respect to
the management or disposition of the
plan assets held in the pooled separate
account; and

(2) The person is not an affiliate of the
insurance company.

(c) *Management of real property.* Any
services provided to an insurance company
pooled separate account (in which a plan
has an interest) by the insurance company
or its affiliate in connection with the
management of the real property
investments of the pooled separate account,
if the compensation paid to the insurance
company or its affiliate for the services
does not exceed the cost of the services to
the insurance company or its affiliate.

(d) *Transactions involving places of
public accommodation.* The furnishing of
services, facilities and any goods incidental
to such services and facilities by a place of
public accommodation owned by an
insurance company pooled separate
account, to a party in interest with respect
to a plan, which plan has an interest in the
pooled separate account, if the services,
facilities and incidental goods are furnished
on a

comparable basis to the general public.