



DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Exemption Application No. D-12097]

Proposed Exemption Involving The Abiomed Retirement Savings Plan

Located in Danvers, MA

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemption.

SUMMARY: This document provides a notice of proposed exemption that, if granted, would permit the Abiomed Retirement Savings Plan (the Plan) to acquire and hold certain “contingent value rights” (CVRs) and to receive certain payments in connection therewith. Absent an exemption, these transactions would violate the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and/or the Internal Revenue Code of 1986 (the Code).

DATES: *Exemption date:* If granted, the exemption will be in effect as of November 15, 2022.

Comments due: Written comments and requests for a public hearing on the proposed exemption must be received by the Department by [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: All written comments and requests for a hearing must be submitted to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. D-12097:

- via email to e-OED@dol.gov; or
- Electronically at <https://www.regulations.gov>. Follow the “Submit a Comment” instructions.

Any comments or requests must be received by the end of the scheduled comment period. The application and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, N.W., Washington, D.C. 20210, reachable by telephone at 1-866-444-3272. See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Blessed Chuksorji-Keefe of the Department at (202) 693-8540. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Comments: Persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments should state the nature of the person's interest in the proposed exemption and how the person would be adversely affected by the exemption, if granted. Any person who may be adversely affected by an exemption can request a hearing on the exemption if their request includes: (1) the name, address, telephone number, and email address of the person making the request; (2) the nature of their interest in the exemption and the manner in which they would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a hearing request made in accordance with the requirements above when it finds that a hearing is necessary to fully explore material factual issues identified by the requestor and the Department will publish a hearing notice in the *Federal Register*. The Department may decline to hold a hearing if it finds that: (1) the request for the hearing does not meet the requirements stated above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified in the request can be fully explored through the submission of evidence in written (including electronic) form.

Warning: The Department will include all comments received in the public record without change and will make them available online at <https://www.regulations.gov>. The Department notes that it will include any personal information provided in the public record and online, unless the commenter claims that any of the information included is confidential or the disclosure of such information is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential or otherwise protected (such as a Social Security number or an unlisted phone number) and confidential business information that you do not want publicly disclosed. If EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment.

Additionally, the <https://www.regulations.gov> website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide them in the body of your comment. If you send an email directly to EBSA without going through <https://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Internet.

The Department is proposing this exemption under the authority of ERISA section 408(a) and Code section 4975(c)(2) and in accordance with the Department’s exemption procedures regulation.¹ If granted, the exemption would not provide relief from any violation of law not expressly identified herein, including, but not limited to, ERISA section 404.

¹ 29 CFR part 2570, subpart B (76 FR 66644 (October 27, 2011)). Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue administrative exemptions under the Code Section 4975(c)(2) to the Secretary of Labor. Accordingly, the Department is proposing this exemption under its sole authority. Any references hereinafter to sections of ERISA shall be deemed to refer to the corresponding sections of the Code, unless indicated otherwise.

Benefits of the Exemption: The Department is proposing this exemption based, in part, on the Applicant's representations that the exemption will allow the Plan to acquire and hold the CVRs, and receive payments in connection therewith, on essentially the same terms as other holders of the CVRs.

SUMMARY OF FACTS AND REPRESENTATIONS²

The Plan

1. The Abiomed Retirement Savings Plan (the Applicant or the Plan) is a defined contribution plan covering employees of Abiomed, Inc. (Abiomed). As of November 15, 2022 (the effective date of this exemption, if granted), the Plan had \$154,574,378.85 in assets, including 73,816 shares of Abiomed common stock, which had a fair market value of \$29,040,462.55.

The Transactions

2. On November 1, 2022, Johnson & Johnson, Inc. (J&J) announced a tender offer (the Tender Offer) to purchase each share of Abiomed common stock for \$380.00 (the Offer Price), net to the seller, in cash, without interest, plus one non-tradeable CVR. The CVR provides each holder the right to receive contingent payments totaling up to \$35.00 per share of Abiomed common stock, without interest and less any required withholding taxes, upon the achievement of specified milestones. Shareholders of Abiomed common stock who didn't tender their stock were due the same proceeds.

The Plan's Participation in the Tender Offer

² The Summary of Facts and Representations is based on the Plan's representations in its exemption application and does not reflect factual findings or the Department's opinion, unless indicated otherwise. The Department notes that the availability of this exemption is subject to the express condition that the material facts and representations made by the Plan in Application D-12097 are true, complete, and accurately describe all material terms of the transaction(s) covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption may cease to be effective, with such determination made at Department's sole discretion. See 29 CFR 5570.49.

3. The Tender Offer opened on November 15, 2022, and participants had until December 21, 2022, to sell their shares.

4. *Tendering Participants.* In total, 43 participants tendered 7,289.356 shares of Abiomed stock in exchange for \$4,896,218.55 in cash and 7,289.356 CVRs. The cash was credited to participants' accounts on December 28, 2022, and the CVRs were received by the Plan on December 29, 2022. The CVRs are held in a Plan-level account with participant level recordkeeping, subject to the terms of each CVR.

5. *Non-tendering participants.* In total, 263 non-tendering Plan participants received \$23,549,664.73 cash and 35,060.022 CVRs. The cash was credited to participants' Plan accounts on December 29, 2022, and invested in the applicable BlackRock LifePath® Index Class S Fund based on the participant's date of birth. The CVRs were deposited in a Plan-level account with participant level recordkeeping, subject to the terms of each CVR.

Merits of the Exemption

6. This exemption allows the Plan to acquire and hold the CVRs, and receive payments in connection therewith, on essentially the same terms as other Abiomed shareholders/CVR holders, including several large, institutional investors. Without the ability to acquire, hold, and dispose of the CVRs, the Plan would receive less consideration for its shares of Abiomed common stock than other similarly situated Abiomed shareholders. The Plan did not pay any fees or commissions in connection with the acquisition or holding of the CVRs, nor will the Plan or its participants pay any fees or commissions in connection with the receipt of payments from the CVRs. The Plan's holding of the CVRs, and its receipt of cash payments in connection therewith, have been and will be in accordance with the provisions of the CVRs that are applicable to all other holders of the CVRs, with no discretion by the Committee.

7. According to the Applicant, the CVRs' governing instrument, the Contingent Value Rights Agreement, dated December 22, 2022, contained as an Exhibit to the Merger Agreement, was structured to ensure that CVR holders will be able to determine whether the CVR milestones have been met. If J&J provides notice that any of the CVR milestones have not been met or fails to pay the Plan amounts owed in respect of the CVRs, then J&J will cause an audit to be performed by an independent certified public accounting firm for the purpose of verifying whether the net sales milestones have been met. The results of the audit will be part of the record given to the Plan sponsor for the Plan sponsor to review and maintain under the recordkeeping provision of this exemption. If J&J fails to make a payment that a publicly available audit determines has become due under the terms of the CVRs, the relief under this exemption will cease as of the date the payment was due.

No Independent Fiduciary

8. The Committee did not engage a qualified independent fiduciary (QIF) to represent the Plan in connection with the transactions described in this proposed exemption. In this regard, the Committee determined that, because the decision to participate in or not participate in the Tender Offer was passed through to Plan participants in accordance with the terms of the Plan document, a QIF would have no fiduciary role and was not required.

ERISA Analysis

9. ERISA section 404 imposes the duties of prudence and loyalty on fiduciaries. This proposed exemption requires that the Committee acted prudently and loyally in accordance with ERISA section 404, with respect to the transactions described in this proposed exemption, including with respect to the Committee's decision to allow participants to decide whether or not to participate in the Tender Offer.

10. ERISA section 406(a)(1)(A) provides, in relevant part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that such transaction constitutes a direct or indirect sale or exchange of any property between a plan and a party in interest. The term “party in interest” is defined under ERISA Section 3(14)(C) to include an employer. J&J is the employer of employees in the Plan and is therefore a party in interest.

11. The payout of cash upon the attainment of a CVR milestone may be considered a sale or exchange transaction between the Plan and J&J under ERISA section 406(a)(1)(A), because the payment of cash by J&J would satisfy the Plan’s right to receive payments from a party in interest.

12. ERISA section 407(a)(1)(A) provides that a plan may not acquire or hold any “employer security” which is not a “qualifying employer security.” Under ERISA section 407(d)(1), “employer securities” are defined, in relevant part, as securities issued by an employer of employees covered by the plan, or by an affiliate of the employer. ERISA section 407(d)(5) provides, in relevant part, that “qualifying employer securities” are stocks or marketable obligations. The Plan represents that the CVRs are non-qualifying employer securities as they are not stock, marketable obligations, or interests in a publicly traded partnership. As a result, the Plan’s acquisition and holding of the CVRs violates ERISA section 407(a).

13. Further, ERISA section 406(a)(2) prohibits a plan fiduciary from permitting a plan to hold any employer security if he or she knows or should know that holding the security violates ERISA section 407(a). Because the CVRs are non-qualifying employer securities, the Plan’s current and continued holding of the CVRs violates ERISA section 406(a)(2).

14. ERISA section 406(a)(1)(E) prohibits a plan fiduciary from causing the plan to engage in a transaction if he or she knows or should know that the transaction

constitutes the acquisition, on behalf of the plan, of any employer security in violation of ERISA section 407(a). As outlined above, the acquisition and holding of the CVRs violates ERISA section 407(a). Therefore, the acquisition of the CVRs violated ERISA section 406(a)(1)(E).³

Statutory Findings

The Department has made the following required findings under ERISA section 408(a) and Code section 4975(c)(2) with respect to the proposed exemption.

15. “Administratively Feasible.” The Department has tentatively determined that the proposed exemption is administratively feasible for the Department because, among other things, the Plan participants received the CVRs pursuant to J&J’s independent corporate act and the exemption requires the Plan to maintain all records necessary to demonstrate the conditions have been satisfied and provide these documents to the Department within 30 days of the Department’s request.

16. “In the interest of the Plan.” The Department has tentatively determined that the proposed exemption is in the interest of the Plan and its participants and beneficiaries because, among other things, it would allow the Plan to receive the same consideration as all other holders of Abiomed common stock and the CVRs.

17. “Protective of the Plan.” The Department has tentatively determined that the proposed exemption is protective of the rights of the Plan’s participants and beneficiaries because, among other things, the Plan and its participants and beneficiaries retained the same rights as all other independent third-party holders of Abiomed stock and the CVRs.

³ ERISA section 406(b)(1) prohibits a plan fiduciary from dealing with the assets of a plan in his or her own interest and ERISA section 406(b)(2) prohibits a plan fiduciary from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan. The Applicant states that, because participant action or the consequence of the merger of Abiomed into a subsidiary of J&J under corporate law caused or will cause the Plan to acquire, hold, and dispose of the CVRs rather than an action by the Committee or other Plan fiduciary, ERISA section 406(b) should not have been violated. The Department is not taking a view whether a violation of ERISA section 406(b) has occurred, as such determination is necessarily a facts and circumstances-based inquiry that is outside the scope of this exemption.

Additionally, the Plan did not pay any fees or commission in connection with the acquisition or holding of the CVRs.

NOTICE TO INTERESTED PERSONS

Interested persons include participants and beneficiaries of the Plan. The Plan will provide notification to interested persons by first-class mail within fifteen (15) calendar days of the date of the publication of the Notice in the *Federal Register*. The mailing will contain a copy of the Notice, as it appears in the *Federal Register*, plus a copy of the supplemental statement that is required pursuant to 29 CFR 2570.43(a)(2), which advises interested persons of their right to comment and to request a hearing.

The Department will not consider comments or requests for a hearing received by the Department after forty-five (45) days from the date of the publication of the Notice in the *Federal Register*.

Comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments become part of the disclosable administrative record. Further, comments may be posted on the internet and can be retrieved by most internet search engines.

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 ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404, which, among other things,

require a fiduciary to discharge their duties respecting the plan solely in the interest of the plan and its participants and beneficiaries and in a prudent manner in accordance with ERISA section 404(a)(1)(B); nor does it affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption, if granted, would be 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; and

(4) The proposed exemption, if granted, would be subject to the express condition that the material facts and representations contained in the application are true and complete at all times and that the application accurately describes all material terms of the transactions which are the subject of the exemption.

PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of ERISA section 408(a) and Code section 4975(c)(2) in accordance with the Department's exemption procedures regulation.⁴ Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of

⁴ 29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)). For purposes of this proposed exemption, references to ERISA section 406, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code section 4975.

the Secretary of the Treasury to issue exemptions of the type requested by the Plan to the Secretary of Labor.

SECTION I. TRANSACTIONS

If the proposed exemption is granted, the restrictions of ERISA sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2) and 407(a)(1)(A), and the excise tax imposed by Code section 4975(a) and (b) will not apply, effective November 15, 2022, to: (1) the Plan's acquisition and holding of "contingent value rights" (CVRs)⁵ following the tender of Abiomed common stock or the cancellation of Abiomed common stock; and (2) the Plan's receipt of payments in connection the transactions described in (1). To receive this relief, the conditions in Section II must be met.

SECTION II. CONDITIONS

(a) The Plan's acquisition of the CVRs resulted solely from an independent corporate act of Johnson & Johnson, Inc. (J&J), without participation on the part of any Plan fiduciary, in accordance with the terms of the Agreement and Plan of Merger⁶ between J&J and Abiomed, dated November 15, 2022.

(b) The Plan's acquisition of CVRs was on essentially the same terms and in the same manner as the acquisition of CVRs by all other similarly situated shareholders of Abiomed common stock.

(c) Plan participants' acquisitions of the CVRs were consistent with the terms of the Plan.

⁵ The right to receive contingent payments of up to \$35.00 per share of Abiomed common stock in cash, without interest and less any required withholding taxes, in the aggregate, upon the achievement of specified milestones, and upon the terms and subject to the conditions set forth in the Contingent Value Rights Agreement.

⁶ The Merger Agreement dated November 15, 2022, that contemplated the acquisition of Abiomed by merging it into a wholly owned subsidiary of J&J. The Merger Agreement required the tender of a majority of the outstanding shares of Abiomed's common stock, as well as the receipt of applicable regulatory approvals and other customary closing conditions. A total of 38,961,427 shares of Abiomed common stock were tendered or 86.4% of the outstanding Abiomed shares of common stock.

(d) A Plan participant's decision whether or not to tender their shares had no impact on the amount of cash or the number of CVRs that they received.

(e) The Committee acted prudently and loyally in accordance with ERISA section 404, with respect to the transactions described in this proposed exemption, including with respect to the Committee's decision to allow participants to decide whether or not to participate in the Tender Offer.

(f) The Plan did not pay any fees or commissions in connection with its acquisition and holding of the CVRs, and its receipt of cash payments in connection therewith.

(g) Plan participants have the same rights with respect to the CVRs allocated to their accounts under the Plan as unrelated CVR holders have with respect to CVRs not held under the Plan.

(h) Plan participants receive payment of all amounts due under the terms of the CVRs. (i) The terms of the Plan's acquisition and holding of the CVRs, and the Plan's receipt of cash payments in connection therewith, will be the same as the terms applicable to all other holders of CVRs.

(j) In the event that J&J or Abiomed provides notice, or takes the position, that any CVR milestones have not been met, and/or fails to pay the Plan any amounts due under the terms of the CVRs, then J&J and/or Abiomed will submit to an audit, the cost of which will borne by J&J, to be performed by an independent certified public accounting firm for the purpose of verifying whether the relevant CVR milestones have been met, and the results of the audit will be provided to the Plan sponsor to review and maintain.

(k) The Plan maintains for a period of six (6) years from the date of publication of the exemption in the *FEDERAL REGISTER*, in a manner that is convenient and accessible for audit and examination, the records necessary to enable the persons described in paragraph (l)(1) below to determine whether conditions of this exemption, if

granted, have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Abiomed, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than Abiomed shall be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained, or are not available for examination as required by paragraph (l) below.

(l)(1) Except as provided in Section (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of ERISA section 504, the records referred to in paragraph (i) above shall be unconditionally available at their customary location during normal business hours to:

(A) any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Abiomed or any duly authorized representative of Abiomed;

(C) a Plan fiduciary or any duly authorized representative of a Plan fiduciary;

(D) any participant or beneficiary of the Plan, or any duly authorized representative of such participant or beneficiary;

(2) No person described in paragraph (l)(1)(B)-(D) is authorized to examine financial information which is privileged or confidential, and should the Applicant refuse to disclose information on the basis that such information is exempt from disclosure, the Applicant must, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

(m) The Plan provides the Department with the records necessary to demonstrate that the conditions of this exemption, if granted, have been met, within 30 days from the date the Department requests such records.

(n) All of the material facts and representations made by the Applicant that are set forth in the Summary of Facts and Representations are true and accurate at all times.

Exemption date: If granted, the exemption will be in effect as of November 15, 2022.

Signed at Washington, DC, this 27th day of May 2026.

Christopher Motta,

Acting Director, Office of Exemption Determinations,

Employee Benefits Security Administration,

U.S. Department of Labor

[FR Doc. 2026-11063 Filed: 6/2/2026 8:45 am; Publication Date: 6/3/2026]