

Secretary has made a preliminary finding that the four Intertek Testing Services NA, Inc. facilities for which expansion of its recognition was requested can meet the requirements as prescribed in 29 CFR 1910.7.

All interested members of the public are invited to supply detailed reasons and evidence supporting or challenging the sufficiency of the applicant's having met the requirements for expansion of its recognition as a Nationally Recognized Testing Laboratory, as required by 29 CFR 1910.7 and Appendix A to 29 CFR 1910.7. Submission of pertinent written documents and exhibits shall be made no later than October 7, 1997, and must be addressed to the NRTL Recognition Program, Office of Variance Determination, Room N3653, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210. Copies of the ITS applications, the laboratory survey reports, the notification of change of ownership and name, and all submitted comments, as received (Docket No. NRTL-1-89), are available for inspection and duplication at the Docket Office, Room N2634, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address.

The Assistant Secretary's final decision on whether the applicant (Intertek Testing Services NA Inc.) satisfies the requirements for expansion of its recognition as an NRTL will be made on the basis of the entire record including the public submissions and any further proceedings that the Assistant Secretary may consider appropriate in accordance with Appendix A to Section 1910.7.

Signed at Washington, D.C. this 30th day of July 1997.

**Greg Watchman,**

*Acting Assistant Secretary.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 97-41; Exemption Application No. D-09988]

#### Class Exemption for Collective Investment Fund Conversion Transactions

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

**ACTION:** Grant of class exemption.

**SUMMARY:** This document contains a final exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act or ERISA) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits an employee benefit plan (the Client Plan) to purchase shares of a registered investment company (the Fund), the investment adviser for which is a bank (the Bank) or plan adviser (the Plan Adviser) registered under the Investment Advisers Act of 1940 (the Advisers Act), that also serves as a fiduciary of the Client Plan, in exchange for plan assets transferred in-kind to the Fund from a collective investment fund (the CIF) maintained by the Bank or Plan Adviser, in connection with a complete withdrawal of a Client Plan's assets from the CIF. The exemption affects participants and beneficiaries of the Client Plans that are involved in such transactions as well as the Bank or Plan Adviser and the Fund.

**EFFECTIVE DATE:** Section I of this exemption is effective for transactions occurring from October 1, 1988 until August 8, 1997. Section II of the exemption is effective for transactions occurring after August 8, 1997.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady or Mr. E.F. Williams, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210 at (202) 219-8881 or (202) 219-8194, respectively, or Ms. Susan E. Rees, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210 at (202) 219-4600, ext. 105. (These are not toll-free numbers.)

#### Paperwork Reduction Act Analysis

Pursuant to the Paperwork Reduction Act of 1995 (PRA 95), Pub. L. 104-13, 44 U.S.C. Chapter 35 and 5 CFR Part 1320, the information collection request (the ICR) in this class exemption was published for public comment on November 13, 1996 (61 FR 58224). No comments were received from the public regarding the ICR. However, as discussed below, because the Department of Labor (the Department) has modified the class exemption in response to suggestions by commenters, the estimated information collection burden has been adjusted (see **RESPONDENTS AND PROPOSED FREQUENCY OF RESPONSE** and **ESTIMATED ANNUAL BURDEN**, below). The Office of Management and Budget (OMB) has approved this ICR with the control number OMB 1210-

0104, which expires on July 31, 2000. Persons are not required to respond to this ICR unless it displays a currently valid OMB control number.

**Respondents and Proposed Frequency of Response:** Following the publication on November 13, 1996 of the notice of proposed exemption (61 FR 58224), based upon one of the comments received, the Department determined to modify the final exemption to include relief for certain non-Bank Plan Advisers. Consequently, the Department has recalculated estimates of the information collection burden in the final exemption. Based upon this recalculation, the Department staff estimates that approximately 75 parties will seek to take advantage of the class exemption in any given year. The respondents will be banks, non-bank advisers, and trust companies acting as fiduciaries of plans investing in collective investment funds maintained by such entities.

**Estimated Annual Burden:** The Department staff estimates the annual burden for preparing the materials required under the class exemption to be 1767 hours. The total annual burden cost (operating/maintenance) is estimated to be \$221,247.

**SUPPLEMENTARY INFORMATION:** On November 13, 1996, the Department published a notice in the **Federal Register** (61 FR 58224) of the pendency of a proposed class exemption from the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code.

The Department proposed the class exemption in response to an application dated March 28, 1995 which was submitted on behalf of Federated Investors (Federated) pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B, (55 FR 32836, August 10, 1990).<sup>1</sup>

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. In this regard, the Department received four comments, one of which contained a request for a public hearing. Upon consideration of the record as a whole, the Department

<sup>1</sup> Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

In the discussion of the exemption, references to specific provisions of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

has determined to grant the proposed class exemption, subject to certain modifications suggested by the commenters. These modifications and the comments are discussed below.

### I. Discussion of Comments

A commenter requested certain specific modifications to the proposal in the following areas:

1. *Definition of the term "Fund."* The commenter noted that, with respect to the description of investment companies covered under the proposal, the term "Fund" at the beginning of section I and section II, and the definition of a "Fund" in section IV(e) of the proposal, all define a "Fund" as a diversified open-end management investment company registered under the Investment Company Act of 1940 (the 1940 Act). According to the commenter, the 1940 Act does not by its terms require that an investment company subject to its provisions be diversified. In addition, Prohibited Transaction Exemption (PTE) 77-4 (42 FR 18732, April 8, 1977), to which the subject class exemption relates, does not require that an open-end investment company be diversified. Therefore, for consistency with PTE 77-4, the commenter requests that the term "diversified" be deleted in the three paragraphs where it appears in the proposal. The Department concurs with this comment and, accordingly, has deleted references in the final exemption to the "diversified" status of the investment companies.

2. *Fee Disclosure Conditions.* Sections I(e)(2) and II(e)(2) of the proposal require that Banks disclose, among other things, the fees to be charged to, or paid by, the Client Plan and the Funds to the Bank "\* \* \* or any unrelated third party," including the nature and extent of any differential between the rates of the fees. The commenter stated that such disclosure is required in addition to the disclosure in the Fund prospectus required by sections I(e)(1) and II(e)(1) of the proposal. According to the commenter, this language differs, in part, from the wording of the parallel condition in PTE 77-4 and in the individual exemptions granted by the Department.<sup>2</sup> As a result, the commenter urged the Department to delete the requirement that the Bank

disclose fees charged to Client Plans by unrelated third parties in the final exemption. The commenter argued that: (a) the prospectuses for the Funds will disclose the identities of the third-party service providers to the Funds and the total level of fees paid to those providers, which should be sufficient to fully inform the Client Plan's Independent Fiduciary of the third-party fees paid by the Fund; and (b) the Bank would have no reason to know about the fees charged to the Client Plans by third parties outside the Funds or the arrangements under which such fees are paid, and as such may not be in a position to make such disclosures. Furthermore, the Bank would have no basis for disclosing the differential between the rates of fees by a third party, as required by this condition. Thus, the commenter requested that the Department clarify that the delivery of the prospectuses will satisfy the fee disclosure condition with regard to fees charged by third parties to the Funds. The Department concurs with the commenter and has determined to delete the phrase "\* \* \* or any unrelated third party" from sections I(e)(2) and II(e)(2) of the exemption.

One commenter requested that the exemptive relief contained in the proposal be modified to include in-kind transfers of plan assets to mutual funds in exchange for shares of the funds where an investment adviser registered under the Advisers Act is an investment manager or investment adviser to a Client Plan and also an investment adviser to the mutual fund. The commenter represented that many investment advisers may wish to convert all or a portion of their directly managed Client Plan portfolios (the Portfolios) into mutual funds. Under the modifications contemplated by the commenter, the investment adviser would have to comply with many of the same terms and conditions contained in the proposal, such as valuations of the securities in accordance with SEC Rule 17a-7 (Rule 17a-7).<sup>3</sup> However, the conditions described in sections I(c) and II(c) of the proposal which generally require that the transferred assets constitute a Client Plan's *pro rata* portion of the assets held in the CIF would not be met under the commenter's suggested modification. According to the commenter, the proposed in-kind transfers to the mutual funds would be made with plan assets selected by the investment adviser and

*pro rata* allocations of such assets would not be necessary. Lastly, the commenter requested that the Department hold a public hearing prior to any decision by the Department to issue the final exemption without expanding the proposal as requested.

In this regard, the Department notes that the proposal was developed in response to the prohibited transaction issues raised by transactions involving the conversion of Bank collective investment funds. The conditions applicable to such CIF conversions have been developed based on the exemption application submitted by Federated on March 28, 1995. Accordingly, the Department does not believe that it has sufficient information regarding other types of in-kind transfers of plan assets involving investment advisers to make the findings necessary to grant exemptive relief. Moreover, the Department does not believe that a sufficient showing has been made that the conditions suggested by the commenter would adequately protect the interests of a plan's participants and beneficiaries involved in such transactions.

However, the Department has decided to modify the final exemption to include relief for "Plan Advisers", provided that all of the terms and conditions of the final exemption are met. In this regard, the Department has added section IV(m) to the exemption to define Plan Adviser to mean any investment adviser registered under the Advisers Act of 1940, and any "affiliate" (as defined in section IV(b)) of such Plan Adviser. The Department also has modified the definition of the term "collective investment fund" under section IV(d) to include a common or collective trust fund or pooled investment fund maintained by a Plan Adviser for the collective investment of the assets attributable to two or more plans maintained by unrelated employers. The Department has defined the term "unrelated employers" in section IV(o) to mean persons which are not, directly or indirectly, affiliates, as defined in section IV(b)(1). Finally, references throughout the proposal to a "Bank" have been modified under the final exemption to also include references to a "Plan Adviser."

With respect to the commenter's request for a public hearing on the proposal, the Department believes that the issues raised by the commenter relating to investment advisers generally appear to be outside the scope of the proposed exemption. In this regard, the Department notes that the proposed exemption requested by Federated related to the conversion of collective

<sup>2</sup> See, for example, PTE 94-82 involving Marshall & Ilsley Trust Company (59 FR 62422, December 5, 1994); PTE 94-86 involving The Bank of California, N.A. (59 FR 65403, December 19, 1994); PTE 95-33 involving Bank South, N.A. (60 FR 20773, April 27, 1995); PTE 95-48 involving Mellon Bank, N.A. (60 FR 32995, June 26, 1995); PTE 96-64 involving Society National Bank (61 FR 44081, August 27, 1996); and PTE 96-74 involving Chicago Trust Company (61 FR 51464, October 2, 1996).

<sup>3</sup> The commenter further represented that all disclosures and the form of independent fiduciary approval will be designed to meet the requirements of PTE 77-4.

funds by Banks. The safeguards and conditions developed under that proposal were designed to address the ERISA issues raised by those transactions that were the subject of exemptive relief. Accordingly, the Department has determined that no issues relating to the proposed exemption were identified that would require the convening of a hearing and has determined not to hold a public hearing. Of course, the Department would be prepared to consider individual exemptive relief upon proper demonstration that the findings can be made under section 408(a) of the Act.

Another commenter submitted a comment in general support of the exemption. However, the commenter noted that sections I(g) and II(g) of the proposal require that the Bank send confirmations, by regular mail, to the Independent Fiduciary of each Client Plan that purchases shares in connection with the in-kind transfer, no later than 105 days after the completion of each purchase. The commenter stated that some Banks have indicated that it is not uncommon to deliver such confirmations by personal delivery, rather than by mail. Therefore, the commenter has requested that the Department modify the final exemption to permit distributions of the confirmation statements by personal delivery, as well as delivery by any other means reasonably anticipated to ensure receipt by the Client Plan's Independent Fiduciary (e.g., private express courier or facsimile). Upon consideration of this comment, the Department has modified sections I(g) and II(g) to permit a Bank or Plan Adviser to deliver the information required under these sections by either regular mail or personal delivery. The Department has also prospectively modified section II(g) to permit the delivery of such information by facsimile or electronic mail. In this regard, the Department has modified section II(f) to require that the Independent Fiduciary, in connection with the dissemination of confirmation statements by either facsimile or electronic mail, specifically agree, at the time of the approval of the in-kind transfer, to the receipt of such statements in that form. In addition, the Department has defined the term "personal delivery" in section IV(p) to mean the delivery of the information described in sections I(g) and II(g) to an individual or individuals designated by the Client Plan to act on behalf of the Independent Fiduciary.

A commenter noted that the proposal does not include exemptive relief for purchases of Fund shares by employee

benefit plans that are sponsored by the Bank for its own employees. In this regard, the commenter suggested that issues related to providing such relief should be considered by the Department apart from the proposal in order not to delay the publication of the final exemption. The Department agrees with the commenter and intends to separately consider the issues arising in connection with transactions involving the purchase of Fund shares by plans sponsored by a Bank, or for that matter a Plan Adviser, for its own employees.

A commenter noted that the second sentence of section II(c) of the proposal contains a mistaken cross-reference to section II(b). In this regard, section II(c) of the proposal provided that the transferred assets constitute the Client Plan's *pro rata* portion of such assets that were held by the CIF immediately prior to the transfer. The second sentence in section II(c) contained an exception to this general rule and provided that the allocation of fixed-income securities held by a CIF on the basis of each Client Plan's *pro rata* share of the aggregate value of such securities will not fail to meet the requirements of section II(b) if certain additional requirements are met. The Department concurs with the commenter and has revised the cross-reference to section II(b) in the second sentence of section II(c) to refer back to the general rule under that section.

The commenter also has requested a clarification of the disclosure requirements in section II(e) of the proposal. Section II(e)(5) requires that the Client Plan's Independent Fiduciary receive advance written notice concerning the identity of securities that will be valued in accordance with Securities and Exchange Commission (SEC) Rule 17a-7(b)(4) and allocated pursuant to section II(c) of the proposal. The commenter noted that section II(e)(6) of the proposal also requires that information be provided about the identity of any fixed-income securities allocated pursuant to section II(c). The commenter believed that each of these requirements is intended to require disclosure of two different lists of securities, i.e., (a) securities valued based on dealer quotations or pricing services, and (b) fixed-income securities allocated between the CIF and the Fund on the basis of each Client Plan's *pro rata* share of the aggregate value of such securities. Nonetheless, the commenter believed that the references in both subsections to section II(c) may confuse the intended scope of the second requirement (as stated in section II(e)(6) of the proposal) which could be construed to cover all fixed-income

securities involved in the in-kind transfer, even those not allocated on an aggregate value basis. In response to the comment, the Department has modified section II(e)(6) in the final exemption to require disclosure of any fixed-income securities which are allocated on the basis of each Client Plan's *pro rata* share of the aggregate value of such securities.

A commenter noted that section IV(a) of the proposal defines the term "Bank" to include any affiliate thereof as defined in section IV(b). However, the commenter further noted that sections IV(h) and IV(k) of the proposal also contain references to the Bank or an affiliate thereof. For purposes of clarity, the commenter requested that references in these sections to the term "affiliate" be deleted in order to avoid the anomalous result of such references being interpreted to include an affiliate of an affiliate of a Bank. The Department has adopted this suggestion and deleted references to an "affiliate" of the Bank in sections IV(h) and IV(k) of the final exemption.

## II. Description of the Exemption

The class exemption consists of four sections. Section I provides conditional exemptive relief for transactions occurring from October 1, 1988 until the date of the notice granting the final exemption is published in the **Federal Register**. Section II provides prospective relief for transactions which must meet certain additional conditions which are described below. Section III provides that a transaction that meets the applicable conditions of the exemption will be deemed a purchase by the Client Plan of shares of an open-end investment company registered under the 1940 Act for purposes of PTE 77-4. Accordingly, a Bank or Plan Adviser that complies with the terms of this exemption and with the terms of PTE 77-4 is able to receive investment management and investment advisory fees from the Fund and the Client Plan with respect to the plan's assets invested in shares of the Fund to the extent permitted under PTE 77-4. Section III also provides that compliance with the exemption will constitute compliance with paragraphs (a), (d) and (e) of section II of PTE 77-4. Finally, Section IV contains definitions for certain terms used in the exemption.

Specifically, the class exemption set forth in Section I provides retroactive relief from the restrictions of sections 406(a) and 406 (b)(1) and (b)(2) of the Act for the purchase of Fund shares by an employee benefit plan, where a Bank or Plan Adviser that serves as investment adviser to the Fund is also

a fiduciary with respect to the plan, in exchange for plan assets transferred in-kind to the Fund from a CIF maintained by the Bank or Plan Adviser. The exemption is generally similar to a number of individual exemptions that have been granted by the Department for such transactions, but the operative language of this exemption differs from that of the individual exemptions in two major respects.<sup>4</sup> First, the operative language has been revised to make it more comprehensible to the user. Second, the operative language emphasizes that the class exemption does not provide relief for any prohibited transactions that may arise in connection with terminating a CIF, permitting certain plans to withdraw from a CIF that is not terminating, or liquidating or transferring any plan assets held by the CIF. Thus, the class exemption provides relief only for the purchase of Fund shares by a Client Plan in exchange for assets that are transferred in-kind from a CIF. Although the Department interprets the individual exemptions as being similarly limited in their scope, the language of the class exemption is intended to clarify this limitation.

The Department believes that the scope of the class exemption is consistent with the applicant's request for relief based on the applicant's mistaken reliance on PTE 77-4. In addition, the Department notes that the class exemption defines the term "Client Plan" in section IV so as to exclude exemptive relief for purchases of Fund shares by plans sponsored by the Bank or a Plan Adviser for its own employees.

The conditions applicable to the retroactive exemption set forth in Section I of the exemption are described below.

Under section I(a) of the exemption, no sales commissions or other fees are paid by the Client Plan in connection with the transaction.

Section I (b) and (c) of the exemption requires that the transferred assets be securities for which market quotations are readily available (or cash) and consist of the Client Plan's *pro rata* portion of all assets held by the CIF immediately prior to the transfer.<sup>5</sup>

<sup>4</sup> See the list of exemptions cited in Footnote 2.

<sup>5</sup> The Department notes that the Bank or Plan Adviser retains ongoing responsibilities under ERISA's general standards of fiduciary conduct with respect to plans electing to remain as investors in the CIF and with respect to other aspects of the transfers. In this regard, the applicant represents that all nontransferable assets of a CIF are liquidated prior to an in-kind transfer with respect to a partial or a complete termination of the CIF. The applicant further notes that transferable assets

Under section I(d), the Client Plan must have received shares of a Fund to which the CIF assets have been transferred that have a total net asset value that is equal to the value of the Client Plan's transferred assets on the date of the transfer. The value of any securities transferred in-kind will be based on the current market value of such assets, as determined in a single valuation for each asset, with all valuations performed in the same manner at the close of the same business day (defined in section IV(n) to mean a banking day as defined by federal or state banking regulations), in accordance with Rule 17a-7 of the 1940 Act (using sources independent of the Bank or Plan Adviser) and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets. The same valuation must be used for each asset in determining the amount transferred from the CIF and the amount received by the Fund.

Section I(e) provides that an Independent Fiduciary must receive advance written notice of the transaction, as well as the following written information concerning the Funds: (a) A current prospectus for each Fund in which a Client Plan is considering investing; (b) full and detailed written disclosure of the investment advisory and other fees charged to, or paid by, the Client Plan (and by such Fund) to the Bank or Plan Adviser, including the nature and extent of any differential between the rates of the fees;<sup>6</sup> (c) the reasons why the Bank or Plan Adviser may consider an exchange of the Client Plan's CIF assets for investments in the Fund to be appropriate for the Client Plan; and (d) a statement describing whether there are any limitations applicable to the Bank or Plan Adviser with respect to which assets of the Client Plan may be invested in the Fund, and, if so, the nature of such limitations.

Moreover, under section I(f), the Independent Fiduciary gives prior approval in writing of each in-kind transfer of the Client Plan's CIF assets to a Fund in exchange for shares of the Fund, on the basis of the information disclosed to the Independent Fiduciary. In addition, section I(g) requires that the Independent Fiduciary receive written confirmation of the transaction no later than 105 days after the transaction, which may be sent by regular mail or

of a CIF may consist of securities or a combination of cash and securities.

<sup>6</sup> The Department has clarified section II(e) to indicate that a Client Plan should receive disclosures which would allow it to compare the rates of CIF-level fees to the rates of Fund-level fees that are paid to the Bank or Plan Adviser.

personal delivery. This written confirmation must disclose the number of CIF units held by the Client Plan immediately before the transaction and the number of Fund shares held by the Client Plan immediately following the transaction, the related per unit and per share values, and the dollar amounts of the CIF units and the Fund shares involved in the transaction.

Section I(h) requires that, for each Client Plan, the combined total of all fees received by the Bank or Plan Adviser for the provision of services to the Client Plan, and in connection with the provision of services to a Fund in which a Client Plan invests, must not exceed "reasonable compensation" within the meaning of section 408(b)(2) of the Act. Finally, section I(i) provides that all dealings between a Client Plan and a Fund are on a basis no less favorable to the Client Plan than such dealings are with other shareholders of the Fund.

On a prospective basis, Section II of the exemption requires that the transactions meet certain conditions in addition to those described in Section I of the exemption. These additional conditions are described below.

Section II(c) provides an exception to the general requirement that the assets transferred in-kind to a Fund consist of the Client Plan's *pro rata* portion of each of the transferred assets of the CIF. This exception applies to certain investments in fixed-income securities. The fixed-income securities which are allocated between the CIF and the Fund must have the same coupon rates, maturities and credit ratings at the time of the transaction and cannot exceed one (1) percent of the aggregate assets held by the CIF as of each transfer. In this regard, section IV(j) defines the term "fixed-income security" as any interest-bearing or discounted government or corporate security with a face amount of \$1,000 or more that obligates the issuer to pay the holder a specified sum of money, usually at specific intervals, and to repay the principal amount of the loan at maturity.

Section II(e) of the exemption requires that the Independent Fiduciary receive advance written notice of the in-kind transfer and purchase of assets and full written disclosure of information concerning the Funds. Among the information provided to the Independent Fiduciary will include documentation relating to the identity of all securities that will be valued in accordance with Rule 17a-7(b)(4) of the

1940 Act<sup>7</sup> and allocated on the basis of the Client Plan's *pro rata* portion under section II(c), and the identity of any fixed-income securities that will be allocated on the basis of each Client Plan's *pro rata* share of the aggregate value of such securities pursuant to section II(c).<sup>8</sup>

Under section II(f) of the exemption, the Independent Fiduciary must give the Bank or Plan Adviser prior written approval of the in-kind transfer of the Client Plan's CIF assets to a Fund in exchange for shares of the Fund. Moreover, if the confirmation statements described in section II(g) are to be sent by facsimile or electronic mail, section II(f) requires that the Independent Fiduciary specifically approve the delivery of the confirmation statements in this manner.

Section II(g) has been revised to specifically allow a Bank or Plan Adviser to send information confirming the in-kind transfer to the Independent Fiduciary of a Client Plan, by regular mail or personal delivery or, with the prior written approval of the Independent Fiduciary, by facsimile or electronic mail. However, in addition to the 105 day distribution period for confirmation statements described in sections I(g) and II(g)(2) of the exemption, section II(g)(1) provides for another written confirmation to the Independent Fiduciary, not later than 30 days after the completion of the transaction, for securities that were valued in accordance with Rule 17a-7(b)(4). The additional confirmation must contain the following information: (a) the identity of each such security; (b) the current market price as of the date of the transaction of each such security involved in the transaction; and (c) the identity of each pricing service or market-maker consulted in determining the value of such securities.

Further, section II(h) requires the Bank or Plan Adviser to provide certain ongoing disclosures to the Independent Fiduciary of a Client Plan. Such written disclosures must include: (a) a copy of an updated prospectus for each Fund in

which such plan has invested, which is to be provided at least on an annual basis; and (b) upon the request of the Independent Fiduciary, a report or statement (which may take the form of the most recent financial report, the current Statement of Additional Information, or some other written statement) containing a description of all fees paid by the Fund to the Bank or Plan Adviser. The purpose of this additional disclosure is to ensure that the Independent Fiduciary will continue to have the information necessary to effectively monitor the Fund investments made by the Client Plan.

The Department wishes to note that the requirement under sections I and II of the exemption that all valuations of all plan assets transferred from a CIF to a Fund be determined in accordance with Rule 17a-7 under the 1940 Act is designed to provide flexibility for future transactions. Thus, for example, if Rule 17a-7 is subsequently amended by the SEC to accommodate new pricing systems, Banks or Plan Advisers could take advantage of the amended Rule without having to request an amendment to the class exemption. However, the Department cautions that the exemption would not be available for transactions involving assets that are not valued by reference to sources independent of the Bank or Plan Adviser.

Unlike the individual exemptions cited above, this class exemption does not grant relief for fees that the Bank or Plan Adviser may receive from the Fund as a result of the Client Plans' purchase of Fund shares. However, section III of this exemption provides that a purchase of Fund shares that complies with sections I and II will be deemed a purchase of shares of an open-end investment company for purposes of PTE 77-4, and in compliance with paragraphs (a), (d) and (e) of section II of that exemption. Compliance with all of the conditions of PTE 77-4 would permit the Bank or Plan Adviser to receive investment advisory and similar fees from the Fund with respect to shares acquired by a Client Plan in accordance with this class exemption.

#### 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 the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act 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 the Act which require, among other things, that a fiduciary discharge his duties with respect to the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; 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 the Act and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interests of the plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plans;

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

(4) The exemption is supplemental to, and not in derogation of, any other provisions of the Code and the Act, 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, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

#### *Section I. Retroactive Exemption for the Purchase of Fund Shares With Assets Transferred In-Kind From a CIF*

For the period from October 1, 1988 to August 8, 1997, the restrictions of sections 406(a) and 406 (b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E), shall not apply to the purchase by an employee benefit plan (the Client Plan) of shares of one or more open-end management investment companies (the Fund or Funds) registered under the Investment Company Act of 1940, in exchange for assets of the Client Plan transferred in-kind to the Fund from a collective investment fund (the CIF) maintained by a bank (the Bank) or a plan adviser (the Plan Adviser), where the Bank or Plan Adviser is the

<sup>7</sup> Rule 17a-7(b)(4) describes the method for determining the current market price of securities that are not reported securities under Rule 11Aa3-1 (17 CFR 240.11Aa3-1), are not traded principally on an exchange and are not quoted in the NASDAQ system. 17 CFR 270.17a-7(b)(4). Because the proper valuation of such securities may require more extensive inquiry than in the valuation of securities described in Rule 17a-7 (b)(1)-(b)(3), the Department believes that the Independent Fiduciary should receive advance notice that the transfer will entail such valuations.

<sup>8</sup> The Department is of the view that section II(c) requires that a Bank or Plan Adviser disclose, in the case of any fixed-income securities allocated on the basis of aggregate value, the identity of all such securities.

investment adviser to the Fund and also a fiduciary of the Client Plan. The transfer and purchase must be in connection with a complete withdrawal of the Client Plan's assets from the CIF, and the following conditions must be met:

(a) No sales commissions or other fees are paid by the Client Plan in connection with the purchase of Fund shares.

(b) All transferred assets are securities for which market quotations are readily available, or cash.

(c) The transferred assets constitute the Client Plan's *pro rata* portion of all assets that were held by the CIF immediately prior to the transfer.

(d) The Client Plan receives Fund shares that have a total net asset value equal to the value of the Client Plan's transferred assets on the date of the transfer, as determined with respect to securities, in a single valuation for each asset, with all valuations performed in the same manner, at the close of the same business day, in accordance with Securities and Exchange Commission Rule 17a-7 (using sources independent of the Bank or Plan Adviser and the Fund) and the procedures established by the Funds pursuant to Rule 17a-7.

(e) An independent fiduciary with respect to the Client Plan (the Independent Fiduciary) receives advance written notice of an in-kind transfer and purchase of assets and full written disclosure of information concerning the Fund which includes the following:

(1) A current prospectus for each Fund to which the CIF assets may be transferred;

(2) A statement describing the fees to be charged to, or paid by, a Client Plan and the Funds to the Bank or Plan Adviser, including the nature and extent of any differential between the rates of the fees;

(3) A statement of the reasons why the Bank or Plan Adviser may consider the transfer and purchase to be appropriate for the Client Plan; and

(4) A statement of whether there are any limitations on the Bank or Plan Adviser with respect to which plan assets may be invested in shares of the Funds, and, if so, the nature of such limitations.

(f) On the basis of the foregoing information, the Independent Fiduciary gives prior approval, in writing, for each purchase of Fund shares in exchange for the Client Plan's assets transferred from the CIF, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(g) The Bank or Plan Adviser sends by regular mail or personal delivery to the Independent Fiduciary of each Client Plan that purchases Fund shares in connection with the in-kind transfer, no later than 105 days after completion of each purchase, a written confirmation of the transaction containing—

(1) The number of CIF units held by the Client Plan immediately before the in-kind transfer, the related per unit value and the total dollar amount of such CIF units; and

(2) The number of shares in the Funds that are held by the Client Plan immediately following the purchase, the related per share net asset value and the total dollar amount of such shares.

(h) As to each Client Plan, the combined total of all fees received by the Bank or Plan Adviser for the provision of services to the Client Plan, and in connection with the provision of services to a Fund in which a Client Plan holds shares purchased in connection with the in-kind transfer, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(i) All dealings in connection with the in-kind transfer and purchase between the Client Plan and a Fund are on a basis no less favorable to the Client Plan than dealings between the Fund and other shareholders.

#### *Section II. Prospective Exemption for the Purchase of Fund Shares With Assets Transferred In-Kind From a CIF*

Effective after August 8, 1997, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the purchase by an employee benefit plan (the Client Plan) of shares of one or more open-end management investment companies (the Fund or Funds) registered under the Investment Company Act of 1940, in exchange for assets of the Client Plan transferred in-kind to the Fund from a collective investment fund (the CIF) maintained by a bank (the Bank) or a plan adviser (the Plan Adviser), where the Bank or Plan Adviser is the investment adviser to the Fund and also a fiduciary of the Client Plan. The transfer and purchase must be in connection with a complete withdrawal of the Client Plan's assets from the CIF, and the following conditions must be met:

(a) No sales commissions or other fees are paid by the Client Plan in connection with the purchase of Fund shares.

(b) All transferred assets are securities for which market quotations are readily available, or cash.

(c) The transferred assets constitute the Client Plan's *pro rata* portion of all assets that were held by the CIF immediately prior to the transfer. Notwithstanding the foregoing, the allocation of fixed-income securities held by a CIF among Client Plans on the basis of each Client Plan's *pro rata* share of the aggregate value of such securities will not fail to meet the requirements of this subsection if:

(1) The aggregate value of such securities does not exceed one (1) percent of the total value of the assets held by the CIF immediately prior to the transfer; and

(2) Such securities have the same coupon rate and maturity, and at the time of the transfer, the same credit ratings from nationally recognized statistical rating agencies.

(d) The Client Plan receives Fund shares that have a total net asset value equal to the value of the Client Plan's transferred assets on the date of the transfer, as determined with respect to securities, in a single valuation for each asset, with all valuations performed in the same manner, at the close of the same business day, in accordance with Securities and Exchange Commission Rule 17a-7 (using sources independent of the Bank or Plan Adviser and the Fund) and the procedures established by the Funds pursuant to Rule 17a-7.

(e) An independent fiduciary with respect to the Client Plan (the Independent Fiduciary) receives advance written notice of the in-kind transfer and purchase of assets and full written disclosure of information concerning the Funds which includes the following:

(1) A current prospectus for each Fund to which the CIF assets may be transferred;

(2) A statement describing the fees to be charged to, or paid by, a Client Plan and the Funds to the Bank or Plan Adviser, including the nature and extent of any differential between the rates of the fees paid by the Fund and the rates of the fees paid by the Client Plan in connection with the Client Plan's investment in the CIF;

(3) A statement of the reasons why the Bank or Plan Adviser may consider the transfer and purchase to be appropriate for the Client Plan;

(4) A statement of whether there are any limitations on the Bank or Plan Adviser with respect to which plan assets may be invested in shares of the Funds, and, if so, the nature of such limitations;

(5) The identity of all securities that will be valued in accordance with Rule 17a-7(b)(4) and allocated on the basis of the Client Plan's *pro rata* portion under section II(c); and

(6) The identity of any fixed-income securities that will be allocated on the basis of each Client Plan's *pro rata* share of the aggregate value of such securities pursuant to section II(c).

(f) On the basis of the foregoing information, the Independent Fiduciary gives prior approval, in writing, for each purchase of Fund shares in exchange for the Client Plan's assets transferred from the CIF, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act. In addition, the Independent Fiduciary must give prior approval, in writing, for the receipt of confirmation statements described below in paragraph (g)(1) and (g)(2) by facsimile or electronic mail if the Independent Fiduciary elects to receive such statements in that form.

(g) The Bank or Plan Adviser sends by regular mail or personal delivery or, if applicable, by facsimile or electronic mail to the Independent Fiduciary of each Client Plan that purchases Fund shares in connection with the in-kind transfer, the following information:

(1) No later than 30 days after the completion of the purchase, a written confirmation which contains—

(i) The identity of each transferred security that was valued for purposes of the purchase of Fund shares in accordance with Rule 17a-7(b)(4);

(ii) The current market price, as of the date of the in-kind transfer, of each such security involved in the purchase of Fund shares; and

(iii) The identity of each pricing service or market-maker consulted in determining the current market price of such securities.

(2) No later than 105 days after the completion of each purchase, a written confirmation which contains—

(i) The number of CIF units held by the Client Plan immediately before the in-kind transfer, the related per unit value and the total dollar amount of such CIF units; and

(ii) The number of shares in the Funds that are held by the Client Plan immediately following the purchase, the related per share net asset value and the total dollar amount of such shares.

(h) With respect to each of the Funds in which the Client Plan continues to hold shares acquired in connection with the in-kind transfer, the Bank or Plan Adviser provides the Independent Fiduciary of the Client Plan with—

(1) A copy of an updated prospectus of such Fund, at least annually; and

(2) Upon request of the Independent Fiduciary, a report or statement (which may take the form of the most recent financial report, the current Statement of Additional Information, or some other written statement) containing a description of all fees paid by the Fund to the Bank or Plan Adviser.

(i) As to each Client Plan, the combined total of all fees received by the Bank or Plan Adviser for the provision of services to the Client Plan, and in connection with the provision of services to a Fund in which a Client Plan holds shares acquired in connection with the in-kind transfer, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(j) All dealings in connection with the in-kind transfer and purchase between the Client Plan and a Fund are on a basis no less favorable to the Client Plan than dealings between the Fund and other shareholders.

#### *Section III. Availability of Prohibited Transaction Exemption (PTE) 77-4*

Any purchase of Fund shares that complies with the conditions of either Section I or Section II of this class exemption shall be treated as a "purchase or sale" of shares of an open-end investment company for purposes of PTE 77-4 and shall be deemed to have satisfied paragraphs (a), (d) and (e) of section II of that exemption. 42 FR 18732 (April 8, 1977).

#### *Section IV. Definitions*

For purposes of this exemption:

(a) The term "Bank" means a bank or trust company, and any affiliate thereof [as defined below in paragraph (b)(1)], which is supervised by a state or federal agency.

(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 or relative of such person, 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 "collective investment fund" or "CIF" means a common or collective trust fund or pooled investment fund maintained by a "Bank" as defined in paragraph (a) of this Section IV or by a "Plan Adviser"

as defined in paragraph (m) of this Section IV for the collective investment of the assets attributable to two or more plans maintained by unrelated employers.

(e) The term "Fund" or "Funds" means any open-end management investment company or companies registered under the 1940 Act for which the Bank or Plan Adviser serves as an investment adviser, and may also serve as a custodian, shareholder servicing agent, transfer agent or provide some other secondary service (as defined below in paragraph (i) of this section).

(f) The term "net asset value" means the amount calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and Statement of Additional Information, and other assets belonging to each of the portfolios in such Fund, less the liabilities chargeable to each portfolio, by the number of outstanding shares.

(g) 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 a sister.

(h) The term "Independent Fiduciary" means a fiduciary of a Client Plan who is independent of and unrelated to the Bank or Plan Adviser. For purposes of this exemption, the Independent Fiduciary will not be deemed to be independent of and unrelated to the Bank or Plan Adviser if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Bank or Plan Adviser;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of such fiduciary, is an officer, director, partner, employee of the Bank or Plan Adviser (or is a relative of such persons);

(3) Such fiduciary, directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this exemption.

If an officer, director, partner, employee of the Bank or Plan Adviser (or relative of such persons), is a director of such Independent Fiduciary, and if he or she abstains from participation in (i) the choice of the Client Plan's investment adviser, and (ii) the approval of any purchase or sale between the Client Plan and the Funds, as well as any transaction described in Sections I and II above, then paragraph (h)(2) of this Section IV shall not apply.



(i) The term "secondary service" means a service provided by a Bank or Plan Adviser to a Fund other than investment management, investment advisory or similar services.

(j) The term "fixed-income security" means any interest-bearing or discounted government or corporate security with a face amount of \$1,000 or more that obligates the issuer to pay the holder a specified sum of money, at specific intervals, and to repay the principal amount of the loan at maturity.

(k) The term "Client Plan" means a pension plan described in 29 CFR 2510.3-2, a welfare benefit plan described in 29 CFR 2510.3-1, and a plan described in section 4975(e)(1) of the Code, but does not include an employee benefit plan established or maintained by the Bank or a Plan Adviser for its own employees.

(l) The term "security" shall have the same meaning as defined in section 2(36) of the 1940 Act, as amended, 15 U.S.C. 80a-2(36) (1996).

(m) The term "Plan Adviser" means an investment adviser registered under the Investment Advisers Act of 1940, and any "affiliate" thereof [as defined above in paragraph (b)(1)].

(n) The term "business day" means a banking day as defined by federal or state banking regulations.

(o) The term "unrelated employers" means persons which are not, directly or indirectly, affiliates, as defined above in paragraph (b)(1).

(p) The term "personal delivery" means delivery of the information described in sections I(g) and II(g) above to an individual or individuals designated by the Client Plan to act on behalf of the Independent Fiduciary.

Signed at Washington, D.C., this 1st day of August, 1997.

**Alan D. Lebowitz,**

*Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, Department of Labor.*

[FR Doc. 97-21003 Filed 8-7-97; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10439, et al.]

### Proposed Exemptions; Alloy Die Casting Co. Employees Profit Sharing Plan and Trust (the 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

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this Federal Register Notice. Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in

29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

### Alloy Die Casting Co. Employees' Profit Sharing Plan and Trust (the Plan), Located in Anaheim, California

[Application No. D-10439]

### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed cash sale by the Plan to the Alloy Die Casting Co./W.E. Holmes, Inc. (Alloy), the Plan sponsor and a party in interest with respect to the Plan, of units (the Units) in the Krupp Insured Plus-II Limited Partnership (the Partnership), provided: (a) the sale is a one-time transaction for cash; (b) no commissions or other expenses are paid by the Plan in connection with the sale; (c) the Plan will receive \$1.15 above the highest bid price for the Units at the most recent sealed bid auction for the Units which has occurred prior to the time of the sale; and (d) Alloy will purchase the Units from the Plan within 10 calendar days following the granting of the exemption proposed herein.

### Summary of Facts and Representations

1. On June 23, 1997, the Department proposed an exemption for the subject transaction (62 FR 33924). However, the exemption proposed therein provided for a sales price for the Units of the greater of: (1) \$13.05 per Unit, or (2) \$1.15 above the highest bid price for the Units at the most recent sealed bid auction for the Units which has