

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Prohibited Transaction Exemption 97-49; Exemption Application No. D-10310, et al.]

Grant of Individual Exemptions; Bricklayers and Allied Crafts, Local No. 74 of DuPage County

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) 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).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, 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 proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Pension Fund of the Bricklayers and Allied Crafts, Local No. 74 of DuPage County, Illinois, a/k/a Masons' and Plasterers', Local No. 74 of DuPage County, Illinois (the Pension Plan) and Bricklayers and Allied Craftsmen Local No. 74 Apprenticeship, Education and Training Trust Fund (the Apprenticeship Plan; together, the Plans), Located in Westmont, Illinois

[Prohibited Transaction Exemption 97-49; Exemption Application Nos. D-10310 and L-10311]

Exemption

The restrictions of section 406(b)(2) of the Act shall not apply to the sale of certain real property (the Property) by the Apprenticeship Plan to the Pension Plan, provided the following conditions are satisfied: (1) The sale is a one-time transaction for cash; (2) no commissions or other expenses are paid by the Plans in connection with the sale; (3) the purchase price for the Property represents its fair market value as determined by a qualified, independent appraiser; and (4) the Pension Plan's independent fiduciary and the Apprenticeship Plan's trustees have reviewed the transaction and have determined that the transaction is appropriate for each of the Plans and in the best interest of the Plans' participants and beneficiaries.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on July 21, 1997 at 62 FR 39027.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

McLane Company, Inc. Profit Sharing Plan and Trust (the Plan), Located in Temple, Texas

[Prohibited Transaction Exemption 97-50; Exemption Application No. D-10340]

Exemption

The restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the past sale (the Sale) by the Plan of two parcels of unimproved real property located in Temple, Texas and Goodyear,

Arizona (the Properties) to McLane Company, Inc. (McLane), the Plan sponsor and a party in interest with respect to the Plan, provided that the following conditions were satisfied: (a) The Sale was a one time transaction for a lump sum cash payment; (b) the purchase prices were the fair market values of the Properties as of the date of the Sale; (c) the Properties have been appraised by qualified independent real estate appraisers; (d) a qualified, independent fiduciary determined that the Sale was in the best interests of the Plan; and (e) the Plan paid no commissions or other expenses relating to the Sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 20, 1997 at 62 FR 27625.

EFFECTIVE DATE: The effective date of this exemption is April 21, 1993.

Written Comments

The Department received no requests for a public hearing on the proposed exemption. The Department received one written comment which was submitted by Sarofim Realty Advisors (the Applicant). The Applicant's comment, and the Department's response thereto, is summarized below.

First, the Applicant requests that the words "the IMA" should be inserted in the first sentence of Paragraph 7 of the Summary of Facts and Representations (SFR) at page 27627 in lieu of the phrase "Investment Management Agreement" (as such words are set forth in quotations). The Department concurs.

The third paragraph in Paragraph 9 of the SFR at page 27628 states:

McLane also represents that, if McLane had treated the excess of the purchase price for the properties over their fair market values as a Plan contribution in 1993, the resulting allocations would not have violated the limitations of Internal Revenue Code section 415.

The Applicant requests that the paragraph be deleted in its entirety and replaced by a new paragraph that provides as follows:

The Applicant represents that McLane's motives for consummating the Sale were not relevant to the process employed by the Applicant in evaluating whether or not, in the professional opinion of the Applicant, it would be prudent and in the best interest of Plan participants for the Applicant to direct the Trustee to consummate the Sale. The Applicant further represents that in connection with its negotiations with McLane, the Applicant sought and obtained for the Plan what the Applicant determined was the highest possible sales price for the

subject Properties. Such price, coupled with the Applicant's determination that continued holding of the Properties would likely result in further lost opportunities for the Plan to provide enhanced benefits from alternative investments, resulted in the Applicant's decision to direct the Trustee to consummate the Sale.

Although the Department has no objection to the new paragraph suggested by the Applicant, the Department continues to believe that the original language of the third paragraph in Paragraph 9 of the SFR is relevant to the issues addressed in the proposed exemption.

Finally, the Applicant requests that the Department modify the first sentence in Paragraph 10 of the SFR at page 27628. The Department does not object to this requested revision and amends the sentence to provide as follows:

In summary, the Applicant represents that it now understands that the Department is of the view that the conditions of PTE 84-14 may not have been satisfied with respect to the Sale.

The Department has considered the entire record, including the comments submitted by the Applicant, and has determined to grant the exemption as amended in response to the Applicant's comments.

FOR FURTHER INFORMATION CONTACT: Wendy McColough of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

H. Weiss & Company, Incorporated Defined Benefit Pension Plan (The Plan), Located in New York, New York

[Prohibited Transaction Exemption 97-51; Application No. D-10402]

Exemption

The restrictions of sections 406(a), 406(b)(1), and 406(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 sale by the Plan of a certain condominium unit (the Property) located in New York, New York, to Hanna Weiss, a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(A) All terms of the transaction are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party

(B) The sale is a one-time transaction for cash

(C) The Plan pays no commissions nor other expenses relating to the sale

(D) The purchase price is the greater of: (1) The fair market value of the

Property as determined by a qualified, independent appraiser, or (2) the original acquisition price *;

(E) Before the transaction is consummated, the Plan has received rental payments of no less than the Property's fair market rental value for each month of the Plan's ownership of the Property during which it was occupied by Hanna Weiss, a party in interest with respect to the Plan; and

(F) Within 60 days of the publication in the **Federal Register** of this Notice, Weiss makes final payment to the Internal Revenue Service of any remaining unpaid excise taxes which are applicable under section 4975(a) of the Code by reason of the Plan's rental of the Property to a party in interest.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice of Proposed Exemption published on July 21, 1997 at 62 FR 39028.

FOR FURTHER INFORMATION CONTACT: Janet L. Schmidt of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

Smart Chevrolet Co. Employees' Profit Sharing Retirement Plan (the Plan), Located in Pine Bluff, Arkansas

[Prohibited Transaction Exemption 97-52; Exemption Application No. D-10445]

Exemption

The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1) (A) through (E) of the Code shall not apply to: (1) The secured loans (the Loans) by the Plan to Motors Finance Company (Motors), a party in interest with respect to the Plan, and (2) the guaranty of such Loans (the Guaranty) by the individual partners of Motors; provided that the following conditions are met: (a) The terms and conditions of the Loans are at least as favorable as those which the Plan could have received in similar transactions with an unrelated third party; (b) an independent fiduciary negotiates, reviews, approves, and monitors the Loans and the Guaranty under the terms and conditions, as set forth in paragraph # 6 of the notice of proposed exemption; and (c) the balance of all Loans will at no time exceed 15% of the assets of the Plan.

For a more complete statement of the facts and representations supporting the

* The original acquisition cost is determined as follows: (original purchase price + aggregate real estate taxes + aggregate condominium association fees) - aggregate rental income = original acquisition cost.

Department's decision to grant this exemption, refer to the notice of proposed exemption published on July 11, 1997 at 62 FR 37307.

Temporary Nature of Exemption

The exemption is temporary and will expire five (5) years after the date of the grant. However, the exemption will extend until the maturity of any of the 90 day Loans made within the 5 year period.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll free number.)

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/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th day of September, 1997.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, Department of Labor.

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