

Pension and Welfare Benefits Administration

[Application Number D-8414]

Proposed Amendment to Prohibited Transaction Exemption (PTE) 80-51 Involving Bank Collective Investment Funds

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

ACTION: Notice of a proposed amendment to PTE 80-51.

SUMMARY: This document contains a notice of pendency before the Department of Labor of a proposed amendment to PTE 80-51. PTE 80-51 is a class exemption that permits Bank Collective Investment Funds, in which employee benefit plans have an interest, to engage in certain transactions, provided specified conditions are met. The proposed amendment, if adopted, would affect, among others, participants, beneficiaries and fiduciaries of plans that invest in the collective investment funds, banks, and other persons engaging in the described transactions.

DATES: Written comments and requests for a hearing should be received by the Department on or before April 8, 1991.

EFFECTIVE DATE: If adopted, the proposed amendment to section I(a)(1)(A) of PTE 80-51 would be effective as of July 1, 1990.

ADDRESSES: All written comments and requests for a hearing (preferably at least three copies) should be sent to: Office of Exemption Determinations, Pension and Welfare Benefits Administration, room N-5649, Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Bank Collective Investment Funds. The application pertaining to the exemptive relief proposed herein (Application D-8414) and the comments received will be available for public

inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, room N-5507, 200 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Lyssa Hall of the Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 523-8971 (this is not a toll-free number); or Diane Pedulla of the Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-9497 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 80-51 (45 FR 49709, July 25, 1980).¹ PTE 80-51 provides an exemption from the restrictions of sections 406 and 407(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code) by reason of certain provisions of section 4975(c)(1) of the Code.

The amendment to PTE 80-51 proposed herein was requested in an exemption application dated May 17, 1990 on behalf of the American Bankers Association (the Applicant).

The Department is proposing the amendment to PTE 80-51 pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code² and in accordance with ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

The Applicant requested a modification to section I(a)(1)(A) of PTE 80-51, on behalf of its member banks. Section (a)(1)(A) permits a bank collective investment fund to engage in transactions, which otherwise might be prohibited by section 406 and 407(a) of ERISA and section 4975(c)(1) of the Code, with persons who are parties in interest with respect to an employee benefit plan investing in the fund. The plan's participation in the fund, under section I(a)(1)(a) may not exceed five percent of the total assets in the

¹ Minor technical corrections were made to the language of the final exemption in a notice published in the Federal Register on August 8, 1980. (45 FR 52949 August 8, 1980).

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

In the discussion of the exemption, references to sections 406 and 407 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

collective investment fund.

The Applicant requests that the five percent percentage limitation in section I(a)(1)(A)(ii) of PTE 80-51 be increased to ten percent, so that the general exemption in section I(a)(1)(A) of PTE 80-51 would be available where the interest of a plan in a bank collective investment fund does not exceed ten percent of the total assets in the collective investment fund.

The Department notes that all the relevant conditions contained in PTE 80-51, with the exception of the one modified by this proposal, still must be met under the proposed amendment. These conditions include a requirement that the party in interest is not the bank (or an affiliate) which holds the plan assets in its collective investment fund. The terms of the transaction are at least as favorable to the collective investment fund as those obtainable in an arm's-length transaction with an unrelated party. Also, the bank must maintain certain records for a period of six years from the date of the transaction. The Department also notes that banks generally are subject to extensive federal and state regulation.

According to the Applicant, banks have based their ERISA compliance programs for collective investment funds on the availability of the exemptions contained in PTE 80-51. Where PTE 80-51 is unavailable for their collective investment funds, banks have been required either to restructure their compliance programs to ensure that other exemptions are available or to take other administrative steps to ensure that the transactions to be entered into by the collective investment fund are not prohibited.

The Applicant requests that the Department adopt the ten percent standard in light of PTE 90-1, 55 FR 2891 (January 29, 1990), which amends PTE 78-19, 43 FR 59915 (December 22, 1978). PTE 90-1 provides an exemption for insurance company pooled separate accounts which parallels the relief provided top banks by PTE 80-51. Prior to the amendments made by PTE 90-1, PTE 78-19 provided exemptive relief for any transaction between a pooled separate account and a party in interest (other than the insurer or one of its affiliates) with respect to a plan participating in the account if, among other things, the assets of the plan did not exceed a specified percentage of the total assets in the account. PTE 90-1 amended section I(a)(1) of PTE 78-19 by: (1) Increasing the percentage limitation from five percent to ten percent for

transactions occurring on or after July 1, 1988; (2) by increasing the percentage limitation relating to transactions entered into by insurance company pooled separate accounts involving the furnishing of goods and the leasing of real property from .025 percent to .5 percent; and (3) by providing relief for investments made by certain pooled separate accounts in short-term obligations. These latter two amendments to PTE 78-19 parallel the exemptive relief provided by the Department to bank collective investment funds in PTE 80-51.

The Applicants state that the requested modification of PTE 80-51 would not only provide bank collective investment funds the same exemptive relief as previously granted to pooled separate accounts and to a variety of other pooled investment vehicles, but also finally would conform PTE 78-19, as amended by PTE 90-1, and PTE 80-51. By granting the proposed amendment, the Department would eliminate the unfair competitive disadvantage currently faced by bank collective investment funds.

The Applicant argues that the five percent rule contained in section I(a)(1)(A) is essentially a *de minimis* rule. Also, the Applicant argues that expanding the five percent requirement would be in the best interests of participating plans and their participants and beneficiaries. A higher percentage limitation would allow the collective investment funds to compete equitably for a broader range of investment opportunities and would generally increase the types of competitive collective investment vehicles available for plan investment. A higher percentage limitation would also provide banks with the flexibility necessary to deal with inadvertent fluctuations in the levels of plan participation in a fund. The Applicant has found that, in the case of certain collective investment funds, the general exemption of section I(a)(1)(A) has been lost, not as a result of a particular plan's additional contributions to a fund but due to withdrawals from the fund by other plans. In these situations, neither the bank nor the plan with a now greater than five percent interest will have acted in any way to increase the plan's interest in the fund in excess of the five percent limitation. Expanding the *de minimis* standard would provide banks with the flexibility necessary to deal with these inadvertent fluctuations in the levels of plan participation in a collective investment fund. Without this relief, banks are placed in the dilemma of either attempting to comply with

ERISA without the availability of this important exemption or of cutting back the interests some plans have in a fund in order to ensure ERISA compliance. Because banks rely heavily on the availability of PTE 80-51 in complying with ERISA's prohibited transaction rules, raising the percentage limitation to comport with the limit established in other exemptions (most recently, PTE 90-1) would reduce the severe burden that exists when the exemption is not available. Also, the savings resulting from the reduced burden of compliance due to a higher percentage limitation would result in lower administrative costs for plans participating in the funds.

The five percent limitation represents the Department's view that, where a plan's interest in a collective investment fund is a small percentage of the fund's total assets, the plan sponsor will not be in a position to influence the investment decisions of the investment fund for the benefit of any person who is a party in interest to the plan. However, since the issuance of PTE 80-51, the Department has considered the appropriateness of a five percent limitation in the context of another class exemption as well as individual exemptions for collective investment vehicles. On the basis of arguments similar to those raised by the Applicant above, the Department generally provided exemptive relief subject to a ten percent limitation.³ Accordingly, based on its experience with PTE 80-51 and various individual exemptions and for the reasons given above, including arguments presented by the Applicant, the Department has decided to propose an amendment of section I(a)(1)(A) of PTE 80-51 to increase the percentage limitation from five to ten percent.

The Department has restated section I(a)(1)(B) of PTE 80-51 to conform to the identical relief provided insurance company pooled separate accounts under section I(a)(2) of PTE 90-1.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA does not relieve a fiduciary or other party in interest or disqualified person from certain other

provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of ERISA, 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 class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The proposed amendment, if granted, will 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.

Written Comments and Hearing Request

All interested persons are invited to submit written comments or requests for a public hearing on the proposed amendment to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed amendment. Comments received will be available for public inspection with the referenced application at the above address.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the recordkeeping requirements that are included in this proposed class exemption are being submitted to the Office of Management and Budget for its review and approval.

Proposed Amendment

Under section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with ERISA Procedure 75-1,

³ In this regard, see PTE 90-1 (Insurance Company Pooled Separate Accounts 55 FR 2891 January 29, 1990); PTE 87-71 (SEI Property Fund, 52 FR 32079, August 25, 1987); PTE 86-08 (Boston Financial Real Estate Equity Group Trust, 51 FR 2596, January 17, 1986); PTE 85-44 (The LaSalle Fund II, 50 FR 8410, March 1, 1985); PTE 84-41 (Copley Investors Limited Partnership, 49 FR 19153 May 4, 1984); and PTE 87-66 (American Income Property Fund), 52 FR 27883 July 24, 1987).

the Department proposes to amend PTE 80-51 as set forth below.

1. Section I(a)(1) of the exemption is amended to read: Any transaction between a party in interest with respect to a plan and a collective investment fund that is maintained by a bank and in which the plan has an interest, or any acquisition or holding by the collective investment fund of employer securities or employer real property, if the party in interest is not the bank that maintains the collective investment fund, any other collective fund maintained by the bank or any affiliate of the bank, and if, at the time of the transaction, acquisition or holding, either

(A) The interest of the plan together with the assets of any other plans maintained by the same employer or employee organization in the collective investment fund does not exceed—

(i) 10 percent of the total of all assets in the collective investment fund, if the transaction occurs prior to October 23, 1980; or

(ii) 5 percent of the total of all assets in the collective investment fund, if the transaction occurs on or after October 23, 1980, and on or before June 30, 1990; or

(iii) 10 percent of the total of all assets in the collective investment fund, if the transaction occurs on or after July 1, 1990, or

(B) The collective investment fund is a specialized fund that has a policy of investing, and invests, substantially all of its assets in short-term obligations (having a stated maturity date of one year or less or having a maturity date of one year or less from the date of acquisition by such specialized fund), including but not necessarily limited to—

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

(ii) Certificates of deposit;

(iii) Bankers' acceptances; or

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

Signed at Washington, DC, this 31st day of January, 1991.

Alan D. Lebowitz,

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

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