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General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon and Related Acts." This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400

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Signed at Washington, D.C., this 13th day of March, 1998.

Terry Sullivan,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 98-6981 Filed 3-19-98; 8:45 am]

BILLING CODE 4510-27-M

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

[Application No. D-10421, et al.]

Proposed Exemptions; Tyson Foods, Incorporated Employee Profit Sharing Plan and Trust (the Plan)

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.

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

Tyson Foods, Incorporated, Employee Profit Sharing Plan and Trust (the Plan), Located in Springdale, Arkansas

[Application No. D-10421]

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 32847, August 10, 1990). If the exemption is granted, 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 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the past sale by the Plan of certain hatcheries, a freezer facility and an office complex (collectively, the Properties), all located in Arkansas, to Tyson Foods, Incorporated (the Company), a party in interest with respect to the Plan, provided that the following conditions were satisfied:

(A) All terms of the transactions were 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 was a one-time transaction for cash;

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

(D) The purchase price was the greater of: (1) the fair market value of each of the Properties as determined by a qualified, independent appraiser, or (2) the Plan's original acquisition cost; and

(E) Prior to the sale, an independent fiduciary reviewed the transactions and determined that the transactions described herein, were appropriate and in the best interests of the Plan and its participants and beneficiaries.

EFFECTIVE DATE: If granted, this exemption will be effective May 23, 1997.

Summary of Facts and Representations

1. The Plan is a defined contribution plan with 4,934 participants and beneficiaries and total assets of \$80,648,308 as of March 31, 1996. The Plan is sponsored by Tyson Foods, Incorporated (the Company), a Delaware corporation, with its principal operations in Arkansas. The Company is primarily engaged in the business of producing and selling chicken-based food products. The Company is in the process of terminating the Plan. The trustees of the Plan are: John Tyson, Gerard Dowd, Lois S. Brottomley, William W. Lovette, and Dennis Leatherby (together, the Trustees). The

Company represents that the Trustees are all currently employees of the Company and that they make investment decisions for the Plan.

2. Among the assets of the Plan, prior to May 23, 1997, were the Properties, consisting of four chicken hatcheries, a corporate office complex and a freezer facility. The Properties were all acquired by the Plan, from the Company in various transactions between 1966 and 1992. After each of the Properties was acquired by the Plan, the Plan leased the Properties to the Company.¹ On May 23, 1997, the Properties were sold by the Plan back to the Company. The percentage of the Plan's total assets invested in the Properties was 32%, based on fair market values of the Properties reported on the 1995 Form 5500.

3. The Trustees determined it was necessary to sell the Properties in order to convert illiquid real estate investments into liquid assets so that the Plan can make final terminating distributions to participants and beneficiaries under the terms of the Plan. The Board of Directors of the Company approved resolutions terminating the Plan. The Company represents that the Board of Directors also authorized the Company to purchase the Properties², if an independent fiduciary for the Plan, determined that the sale of the Properties to the Company was in the best interest of the Plan and its participants and beneficiaries.

4. On February 17, 1997, the Company engaged Arthur Andersen LLP (Arthur Andersen), of Atlanta, Georgia, to act as independent fiduciary on behalf of the Plan. Arthur Andersen is a major accounting and consulting firm which has extensive experience in the business of commercial real estate consulting and appraisal. Arthur Andersen represents that the scope of its engagement was to determine whether: (1) The Plan would receive adequate consideration for the Properties as determined by a qualified independent appraiser approved by Arthur Andersen; and (2) the sale of the Properties was

¹ The Department is not providing relief herein with respect to any transactions involving the Properties other than the sale of the Properties by the Plan to the Company. In this regard, the Department is referring the other transactions involving the Properties to the Internal Revenue Service for the imposition of any applicable excise taxes arising under section 4975 of the Code which may be due.

² Pursuant to the Company's offer to purchase the Properties, the Company agreed to pay all costs and expenses associated with its purchase of the Properties, including but not limited to, appraisals, commissions and taxes, and the costs of seeking the prohibited transaction exemption, proposed herein.

appropriate and in the best interests of the Plan and its participants and beneficiaries. In addition, Arthur Andersen's duties included making a determination as to whether the Plan should sell the Properties to the Company.

5. Arthur Andersen represents, in its written report prepared for the Trustees and for review by the Department, that in its opinion, the sale of the Properties to the Company for \$33,032,000 in cash was in the best interest of the Plan and its participants and beneficiaries. Arthur Andersen further states that the \$33,032,000 aggregate sales price for the Properties represents the greater of (1) the fair market value of the Properties, or (2) the Plan's original acquisition cost for each of the Properties, on a property by property basis.

6. In order to determine that the sale of the Properties by the Plan to the Company, was in the best interests of the Plan and its participants and beneficiaries, Arthur Andersen sought current real estate appraisals for the Properties. The Trustees selected Reed & Associates, Inc. (Reed & Associates), a real estate appraisal firm in Springdale, Arkansas. After interviewing Reed & Associates, Arthur Andersen approved of the Trustees selection. Tom Reed, an MAI appraiser, along with another licenced appraiser employed by Reed & Associates, appraised the Properties between March 25 and May 16, 1997.

Reed & Associates opined that the fair market value of each of the four chicken hatcheries had declined, and that the corporate office complex and freezer facilities had both appreciated in value since they were acquired by the Plan. Reed & Associates assigned specific values for each of the Properties, as discussed below.

7. Arthur Andersen, in its capacity as independent fiduciary for the Plan, reviewed and evaluated the appraisals of the Properties performed by Reed & Associates. Arthur Andersen determined that (1) the appraisals were accurate, (2) the appraisals established the fair market value of each of the Properties, and (3) it was appropriate to rely upon such appraisals for the purpose of determining the sales price of the Properties.

8. Among the Properties are four chicken hatcheries. Three of the four hatcheries are located in Washington County, Arkansas. These hatcheries are known as: the Lincoln Hatchery, Johnson Road Hatchery and Randall Road Hatchery. The fourth hatchery is the Nashville Hatchery which is located in Howard County, Arkansas.

9. The Lincoln Hatchery is located on a 12.89 acre parcel of land and was

acquired by the Plan in 1973 for \$1,173,000. The Plan received net rentals of \$2,567,331 from April 1, 1986 to the date of sale. Reed & Associates determined that the fair market value of the Lincoln Hatchery was \$710,000 as of March 31, 1997. The Company purchased the Lincoln Hatchery for \$1,173,000.

The Johnson Road Hatchery is located on a four acre parcel of land and was acquired by the Plan in 1966 for \$546,000. The Plan received net rentals of \$747,663 from April 1, 1986 to the date of sale. Reed & Associates determined that the fair market value of the Johnson Road Hatchery was \$485,000 as of April 2, 1997. The Company purchased the Johnson Road Hatchery for \$546,000.

The Randall Road Hatchery is located on a 15.3 acre parcel of land and was acquired by the Plan in 1960 for \$813,000. The Plan received net rentals of \$1,178,070 from April 1, 1986 to the date of sale. Reed & Associates determined that the fair market value of Randall Road Hatchery was \$725,000 on March 25, 1997. The Company purchased the Randall Road Hatchery for \$813,000.

The Nashville Hatchery is located on a 2.76 acre parcel of land and it was acquired by the Plan in 1973 for \$460,000. The Plan received net rentals of \$666,543 from April 1, 1986 to the date of sale. Reed & Associates determined that the fair market value of the Nashville Hatchery was \$290,000 as of April 4, 1997. The Company purchased the Nashville Hatchery for \$460,000.

11. The corporate office complex (Corporate Office Complex), located in Washington County, Arkansas, is comprised of four buildings that were purchased in four separate transactions occurring, respectively, in 1969, 1987, 1991, and 1992. The Plan's original acquisition cost of the four buildings, in the aggregate, was \$15,549,946. Between April 1, 1986 and the date of sale, the Corporate Office Complex produced net rental income for the Plan totaling \$21,969,230. Reed & Associates determined that the fair market value of the Corporate Office Complex on May 9, 1997, was \$18,850,000. The Company purchased the Corporate Office Complex for \$18,850,000.

12. The freezer facility (Tyson Valley Freezer Facility) was acquired by the Plan in 1989, at an original acquisition cost of \$6,023,457. The Tyson Valley Freezer Facility consisted of a ground lease in property and the freezer facility located thereon. From the date of acquisition, through the date sale, the Plan collected net rental income totaling

\$5,922,906. The Company, at its own expense, made improvements to the Tyson Valley Freezer Facility while it was owned by the Plan.

Arthur Andersen represents, that after reviewing the appraisal provided by Reed & Associates and considering the advice of legal counsel regarding the ownership of the improvements, it, in its capacity as independent fiduciary for the Plan, determined that the fair market value of the Tyson Valley Freezer Facility was \$11,190,000. The Company purchased the Tyson Valley Freezer Facility for \$11,190,000.

13. As to all the sales, Arthur Andersen concluded that the sale of each of the Properties to the Company was in the best interests of the Plan and its participants and beneficiaries. In addition, Arthur Andersen represents that the Company paid the greater of (1) the fair market value, or (2) and the original acquisition cost to the Plan, for each of the Properties, on a property by property basis. As a result of the sale of the Properties to the Company, the Plan received a total of \$33,032,000 in cash, at closing.

14. Mr. Reed, of Reed & Associates, represents that in his capacity as appraiser, he reviewed the past rental rates paid on each of the Properties, from April 1, 1991, to the date of sale, and that the rental rates paid by the Company to the Plan for each of the Properties constituted fair market rental value.

The Company prepared an analysis of the rents received for each of the Properties from 1986 to the date of sale. The analysis shows that the annualized rates of return ranged from 12% to 24.27%, with most annualized returns in the 12% to 13% range.

15. Arthur Andersen represents, that in its opinion, the sale of the Properties to the Company was appropriate and in the best interests of the Plan and its participants and beneficiaries. Further, Arthur Andersen states that its review of the Plan's records confirm that the Plan has been terminated and that the Properties needed to be sold to permit the assets of the Plan to be distributed to the participants and beneficiaries in accordance with the terms of the Plan.

16. In summary, the applicant represents that the proposed transaction satisfies the 408(a) of the Act for the following reasons: (a) Prior to the sale, an independent fiduciary determined that the transaction was in the best interest of the Plan and its participants and beneficiaries; (b) the sale will enable the Plan to make distributions to participants and beneficiaries; (c) as of the date of sale, the Plan received cash for each of the Properties which was the

greater of (1) the fair market value of the Properties, or (2) the Plan's original acquisition cost for each of the Properties, on a property by property basis; and (d) the sale was a one-time cash transaction and the Plan did not incur any expenses related to the sale.

FOR FURTHER INFORMATION CONTACT: Ms. Janet L. Schmidt of the Department, telephone (202) 219-8883. (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 of disqualified person from certain other provisions of the Act and/or 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 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) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, 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 exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or 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 exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change

after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 17th day of March, 1997.

Ivan Strasfeld,

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

[FR Doc. 98-7272 Filed 3-19-98; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Cross-Trades of Securities by Investment Managers

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice.

SUMMARY: This document announces that the Department has under consideration certain applications for exemptions relating to cross-trades of securities by investment managers with respect to any account, portfolio or fund holding "plan assets"¹ subject to the fiduciary responsibility provisions of Part 4 of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Department requests information to assist it in determining upon what standards and safeguards exemptive relief should be conditioned.

DATES: Responses must be received on or before May 19, 1998.

ADDRESSES: Responses (preferably, at least three copies) should be addressed to: Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, 200 Constitution Ave., NW., Washington, DC 20210. Attention: "Cross-Trades of Securities".

FOR FURTHER INFORMATION CONTACT: Louis J. Campagna or E.F. Williams, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 219-8883 or 219-8194 (not toll-free numbers); or Michael Schloss, Plan Benefits Security Division, Office of the Solicitor, (202) 219-4600 ext. 138 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

¹ See 29 CFR 2510.3-101, Definition of "plan assets"—plan investments.

A. Background

There are generally two types of securities cross-trading transactions: (i) Direct cross-trades, and (ii) brokered cross-trades.

Direct cross-trades occur whenever an investment manager causes the purchase and sale of a particular security to be made directly between two or more accounts under its management without a broker acting as intermediary. Under this practice, the manager executes a securities transaction between its managed accounts without going into the "open market"—such as a national securities exchange (e.g., the New York Stock Exchange ("NYSE")) or an automated broker-dealer quotation system (e.g., the National Association of Securities Dealers Automated Quotation National Market System ("NASDAQ")).

Brokered cross-trades occur whenever an investment manager places simultaneous purchase and sale orders for the same security with an independent broker-dealer under an arrangement whereby such broker-dealer's normal commission costs are reduced. In such instances, brokers are often willing to accept a lower commission because the transaction will be easier to execute where there are shares already available to complete the order for both the buyer and the seller.²

Cross-trading transactions could result in violations of one or more provisions of Part 4 of Title I of ERISA. Section 406(b)(2) provides that an ERISA fiduciary may not act in any transaction involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Where an investment manager has investment discretion with respect to both sides of a cross-trade of securities and at least one side is an employee benefit plan account, the Department has previously taken the position that a violation of section 406(b)(2) of ERISA would occur.³ The Department has also taken the position that by representing the buyer on one side and the seller on the other in a cross-trade, a fiduciary acts on behalf of parties that have adverse interests to each other.⁴ Moreover, the

² This notice assumes that cross-trades, including brokered cross-trades, are not performed on the market as "wash sales" (in which the same party is the buyer and seller) or as "matched orders" (in which confederates simultaneously enter offsetting purchase and sale orders). These and similar types of trades may be used to manipulate stock prices and may raise other issues under ERISA.

³ *Reich v. Strong Capital Management Inc.*, No. 96-C-0669, USDC E.D. Wis. (June 6, 1996).

⁴ See *Strong Capital Management Inc.*, supra.

prohibitions embodied in section 406(b)(2) of ERISA are per se in nature. Merely representing both sides of a transaction presents an adversity of interests that violates section 406(b)(2) even absent fiduciary misconduct reflecting harm to a plan's beneficiaries.⁵

In addition, violations of section 403 and 404 could also arise where the investment manager represents both sides in a cross-trade. Section 404(a)(1)(A) of ERISA requires, in part, that a plan fiduciary must discharge its duties solely in the interests of the participants and beneficiaries of that plan and "for the exclusive purpose" of providing benefits to participants and beneficiaries and defraying reasonable plan expenses. Similarly, section 403(c)(1) of ERISA requires, in part, that the assets of a plan must be "* * * held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

The Department has granted a number of individual exemptions from the prohibitions of section 406(b)(2) of ERISA for cross-trades of securities by investment managers on behalf of employee benefit plan accounts or pooled funds which contain "plan assets" subject to ERISA.⁶ These individual exemptions generally have focused on direct cross-trading transactions. The individual exemptions granted have not provided relief for any violations of section 406(b)(1) or (b)(3) of the Act⁷ which may occur as a result

⁵ See, *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979). In *Cutaiar*, the court held that, "* * * when identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a section 408 exemption, a per se violation of ERISA exists." *Cutaiar*, 590 F.2d at 529.

⁶ In this regard, see the following Prohibited Transaction Exemptions (PTEs): PTE 95-83, Mercury Asset Management (60 FR 47610, September 13, 1995); PTE 95-66, BlackRock Financial Management L.P., (60 FR 39012, July 31, 1995); PTE 95-56, Mellon Bank, N.A. (60 FR 35933, July 12, 1995); PTE 94-61, Batterymarch Financial Management (59 FR 42309, August 17, 1994); PTE 94-47, Bank of America National Trust and Savings Association (59 FR 32021, June 21, 1994); PTE 94-43, Fidelity Management Trust Company (59 FR 30041, June 10, 1994); PTE 94-36, The Northern Trust Company (59 FR 19249, April 22, 1994); PTE 92-11, Wells Fargo Bank, N.A. (57 FR 7801, March 4, 1992)—which replaced PTE 87-51 noted below; PTE 89-116, Capital Guardian Trust Company (54 FR 53397, December 28, 1989); PTE 89-9, State Street Bank and Trust Company (54 FR 8018, February 24, 1989); PTE 87-51, Wells Fargo Bank, N.A. (52 FR 22558, June 12, 1987); and PTE 82-133, Chase Manhattan Bank, N.A. (47 FR 35375, August 13, 1982).

⁷ Section 406(b)(1) of ERISA prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account. Section 406(b)(3) prohibits a plan fiduciary from receiving