

Pension and Welfare Benefits Administration

[Application Number D-10078]

Proposed Class Exemption Relating to Certain Employee Benefit Plan Foreign Exchange Transactions Executed Pursuant to Standing Instructions

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Class Exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). If granted, the proposed exemption would permit certain foreign exchange transactions between employee benefit plans and certain banks and broker-dealers which are parties in interest with respect to such plans, pursuant to standing instructions. The proposed exemption, if granted, would affect participants and beneficiaries of employee benefit plans involved in such transactions, as well as banks and broker-dealers which act as dealers in foreign exchange.

DATES: Written comments and requests for a public hearing with regard to the substantive content of the proposed exemption shall be submitted to the Department before April 4, 1997.

ADDRESSES: All written comments and requests for a public hearing (preferably 3 copies) should be sent to: Pension and Welfare Benefits Administration, Room N-5649, 200 Constitution Avenue NW., Washington, DC 20210. Attention: Foreign Exchange Class Exemption Proposal—Standing Instructions. The application and all comments received, will be available for public inspection in the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:

Lyssa E. Hall, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210 (202) 219-8971 (not a toll-free number) or Susan E. Rees, Plan Benefits Security Division, Office of the Solicitor, (202) 219-9141 (not a toll-free number).

Paperwork Reduction Act Analysis

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, provides the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A) (1995) (PRA 95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the proposed new collection of information under the Proposed Class Exemption Relating to Certain Employee Benefit Plan Foreign Exchange Transactions Executed Pursuant to Standing Instructions.

Dates: Written comments concerning the proposed collection of information must be submitted on or before April 4, 1997 to Mr. Gerald B. Lindrew, Department of Labor, Pension and Welfare Benefits Administration, Room N-5647, 200 Constitution Avenue, NW., Washington, DC 20210. The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarify the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Title: Class Exemption Relating to Certain Foreign Exchange Transactions Pursuant to Standing Instructions.

Summary: The proposed exemption would permit certain foreign exchange transactions between employee benefit plans and certain banks, broker-dealers, and domestic affiliates thereof, which are parties in interest with respect to

such plans, pursuant to standing instructions.

Needs and Uses: ERISA requires that the Department make a finding that the proposed exemption meets the statutory requirements of section 408(a) before granting the exemption. The Department therefore finds it necessary that certain information be provided to an independent fiduciary of each plan in advance of, and subsequent to, the proposed transaction, and that the independent fiduciary approve the proposed transaction.

Type of Review: New.

Respondents and Proposed Frequency of Response: The Department staff estimates that approximately 65 parties will seek to take advantage of the class exemption in any given year. The respondents will be banks and broker-dealers acting as fiduciaries of plans which engage in foreign exchange transactions with such plans.

Estimated Annual Burden: The Department staff estimates the annual burden for preparing the materials required under the proposed class exemption to be 5 hours per respondent for a total of 325 hours. The total annual burden cost (operating/maintenance) is estimated to be \$24,375. These are estimated to be capital/start-up burden costs. Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

SUPPLEMENTARY INFORMATION: This document contains a notice of pendency before the Department of a proposed class exemption from the restrictions of section 406(a)(1) (A) through (D) and section 406 (b)(1) and (b)(2) of ERISA and from the taxes imposed by section 4975(a) and (b) of the Code by reason of certain transactions described in section 4975(c)(1) (A) through (E) of the Code. The proposed exemption was initially requested in an application dated July 18, 1984 (Application No. D-5700) submitted by the American Bankers Association (ABA) pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Pursuant to the foregoing authority, the Department is proposing additional conditions with respect to the relief requested by the Applicant.

On February 17, 1994, the Department granted PTE 94-20 (59 FR 8022), a class exemption which permits purchases and sales of foreign currencies between employee benefit plans and certain banks, broker-dealers and affiliates

thereof which are parties in interest with respect to such plans provided that such transactions are directed by a plan fiduciary who is independent of the bank, broker-dealer or affiliate thereof and the other conditions of the exemption are met. PTE 94-20 provides an exemption from the prohibited transaction restrictions of section 406(a)(1) (A) through (D) of the Act and from the sanctions resulting from section 4975(a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code. PTE 94-20 did not provide relief for all of the transactions described in the 1984 ABA exemption request.

In response to the notice of proposed exemption for PTE 94-20,¹ a number of commenters (the Commenters) expressed concern regarding the lack of relief for foreign exchange transactions executed pursuant to standing instructions. As explained in greater detail in the preamble to PTE 94-20, the Commenters requested that the Department expand the exemption to include retroactive and prospective relief for foreign exchange transactions entered into pursuant to a "standing authorization" (hereinafter standing instruction). Many of the Commenters also requested that the Department amend the definition of the term "directed transaction" by modifying the requirement that the independent plan fiduciary effect the foreign exchange transaction at a specific exchange rate.

The Commenters represented that the utilization of standing instructions is an integral component in foreign exchange transactions involving employee benefit plans. In this regard, the Commenters indicated that, without the ability to execute foreign exchange transactions with plans pursuant to standing instructions, plans would lose investment income and incur higher exchange rates on small transactions.

The ABA requested relief for transactions entered into by a bank on behalf of a plan pursuant to standing instructions from an independent fiduciary in its application dated July 18, 1984. The Department did not include relief with respect to such transactions in the proposal to PTE 94-20 because it was unable, at that time, to make the findings required under section 408(a) of the Act. Specifically, the Department was unable to conclude that the conditions proposed by the ABA would effectively and consistently address the potential for abuse of discretion by party in interest banks in setting exchange rates for foreign exchange transactions. On the basis of

the comments and additional information received following publication of the proposal to PTE 94-20,² the Department concluded that it might be appropriate, under limited circumstances, to provide relief from section 406(b)(1) and (b)(2) of the Act for foreign exchange transactions entered into pursuant to standing instructions.

However, pursuant to the requirements of section 408(a) of the Act, the Department is required to offer interested persons an opportunity to present their views and an opportunity to request a hearing before granting an exemption from section 406(b) of the Act. Therefore, in order not to have delayed the publication of PTE 94-20, the Department determined to separately consider exemptive relief from sections 406(a)(1) (A) through (D), 406(b)(1) and (b)(2) of the Act for foreign exchange transactions between a plan and a party in interest bank, broker-dealer or affiliate thereof where such transactions are engaged in pursuant to a standing instruction.

During the Department's consideration of the standing instruction issue, the ABA made a supplemental submission on September 1, 1992, in which they limited their request for relief for standing instruction transactions and suggested additional conditions regarding such transactions. Over the course of the following two years, the Department solicited further information from the ABA and other interested parties, the most recent of which was received on March 1, 1994, and September 12, 1994. As a result of the suggestions and comments received from those parties, as well as the imposition of additional conditions by the Department, the Department believes that a number of its concerns regarding standing instruction transactions have been addressed.

The Commenters also requested retroactive exemptive relief as of January 1, 1975, for foreign exchange transactions effected pursuant to standing instructions. In this regard, they suggested that the interests of participants and beneficiaries were adequately protected if the general arm's-length requirement and a good faith standard were met for standing instruction transactions effected prior to the publication of a final exemption.³

As the Department stated in the proposal to PTE 94-20, it does not

² On October 3, 1991, the Department held a public hearing and received testimony regarding standing instructions. See 56 FR 46806, September 16, 1991.

³ See 56 FR at 11760, for a discussion of the general arm's length test.

believe that the conditions suggested by the Commenters for retroactive relief would effectively address the potential for abuse of discretion under circumstances where a bank or broker-dealer sets foreign exchange rates for foreign exchange transactions which have been executed pursuant to standing instructions. However, the Department has concluded that it is appropriate to provide limited relief, retroactive to June 18, 1991, for those banks and broker-dealers who effect foreign exchange transactions in accordance with the applicable conditions of Section II of this proposal.⁴

The Department believes that the following conditions, which are contained in PTE 94-20, are equally applicable with respect to the retroactive and prospective relief provided for transactions described in this proposed class exemption: the general and particular arm's length tests; the proscription against the bank or any of its affiliates having any discretionary authority or control with respect to the investment of plan assets involved in the transaction or rendering investment advice with respect to those assets; the requirements concerning confirmation statements; and the maintenance of written policies and procedures regarding the handling of foreign exchange transactions with plans that ensure that the person acting for the bank knows that he or she is acting for the plan.

The Department has further conditioned retroactive relief upon satisfaction of the following condition that addresses the discretion that was exercised by a bank or broker-dealer in setting foreign exchange rates for transactions executed pursuant to standing instructions. Thus, under this requirement, the specific exchange rate for a covered transaction could not have deviated by more than ten percent (above or below) from the interbank bid and asked rates as displayed on Reuters or another independent nationally recognized service in the foreign exchange market for the effected currencies at the time that the bank or broker-dealer executed the foreign exchange transaction. Notwithstanding this requirement, a prohibited transaction will not be considered to have occurred solely because the records necessary to demonstrate compliance with the ten percent requirement have been lost, destroyed or are not available to the bank or broker-dealer. Nonetheless, the bank or

⁴ June 18, 1991 is the effective date for prospective relief in PTE 94-20.

¹ 56 FR 11757 (March 20, 1991).

broker-dealer is not relieved of its responsibility to otherwise demonstrate compliance with the conditions of the proposed exemption. In this regard, the Department notes that there may be other objective pricing information that was readily available at the time of the transaction which could be provided by a bank or broker-dealer to demonstrate compliance with the ten percent requirement.

In response to the Department's concerns regarding the amount of discretion a bank can exercise under a standing instruction, the Commenters suggested, as a further safeguard, a limitation on the types of transactions for which the bank could exercise discretion. Specifically, it was suggested that relief could be limited to transactions which would result in the receipt of small amounts of foreign currency, or where, due to the uncertainty of foreign settlement dates, the exact timing of the receipt of the currency by the bank was uncertain. The Department has adopted this suggestion and proposed limited relief for the conversion of income receipts, such as interest and dividend payments, as well as for *de minimis* purchases and sales of foreign securities.⁵

According to the ABA, standing instructions are necessary to repatriate income receipts received on foreign investments into U.S. dollars so that interest can be earned on such funds. In this regard, the Department did not receive sufficient information regarding how the conversion of foreign denominated income receipts into other foreign currencies would operate under standing instructions. The Department also has concerns about the ability of the bank to maintain the converted funds in an interest-bearing account. Therefore, the Department has limited the scope of the proposed exemption to cover transactions involving the exchange of income conversion items into U.S. dollars.

The Commenters also requested relief for *de minimis* purchase and sale transactions involving foreign securities, i.e., foreign securities transactions requiring the purchase and sale of foreign currency in an amount not exceeding \$500,000.⁶ The ABA

⁵ The Department notes that this exemption does not provide relief for options contracts on foreign exchange transactions. See section IV(a) of PTE 94-20.

⁶ No relief is provided where the bank or broker-dealer has investment discretion or provides investment advice (within the meaning of 29 CFR 2510.3-21) with respect to the investment of the plan assets involved in the transaction. In this regard, Part I of the class exemption would not be available for any foreign exchange transaction involving a bank or broker-dealer that has any

discretionary authority or control over either the initial purchase or sale of foreign securities or the subsequent reinvestment of the proceeds.

represents that many foreign markets outside the U.S. do not have firm settlement dates. Thus, it is difficult to anticipate when the proceeds from sales of plan owned foreign securities will be received by a bank's foreign custodian. In order to keep the funds invested, standing instructions are used so that the conversion can be done as soon as practicable and the plan can begin to earn interest on the sale proceeds. Under these circumstances, obtaining specific directions from an independent plan fiduciary for relatively small transactions is time consuming and not in the best interests of plans. In this regard, the Department has proposed relief for *de minimis* transactions but believes that a limitation of \$100,000 is a more appropriate measure for transactions which are intended to be relatively small.⁷

The Commenters suggested several conditions that would have to be satisfied in order for a bank to enter into a prospective transaction involving the conversion of income receipts pursuant to a standing instruction. Upon review, the Department proposes to apply the same conditions to *de minimis* purchase and sale transactions. The ABA proposed that income item conversions be executed within no more than two business days following the time of receipt by the bank. In this regard, the Department believes that one business day following notice to the bank that "good funds"⁸ have been received by the bank's foreign custodian⁹ is a more appropriate limitation on a bank's exercise of discretion than the suggestion made by the ABA. Such notice must be provided to the bank within one business day following receipt of good funds by the foreign custodian if the custodian is an affiliate of the bank. If the foreign custodian is not an affiliate of the bank, the bank still must convert within one business day following notice to the bank that good

discretionary authority or control over either the initial purchase or sale of foreign securities or the subsequent reinvestment of the proceeds.

⁷ Similarly, the Department is proposing a limitation of \$100,000 for income item conversions.

⁸ Individual commenters have indicated that there may be governmental restrictions on the transfer of funds outside of some foreign countries. In general, "good funds" are defined for purposes of this class exemption as funds available in cash with no governmental restrictions on transfer. This concept was not a part of the ABA application but rather was suggested by individual commenters to ensure that the time period during which the bank must convert income from foreign securities did not begin to run until after the funds became available.

⁹ According to an individual commenter, U.S. custodial banks may operate through their own foreign branches or may employ foreign banks as subcustodians so that foreign instruments can be held in the country of the issuer.

funds have been received. However, the notice must be provided to the bank by the nonaffiliated custodian no later than two business days following receipt by the foreign custodian.

Under the requested exemption, the exchange rate(s) or a range of rates to be used for covered transactions would be established on a daily basis using objective criteria which would be disclosed to and approved by an independent plan fiduciary in advance of the transaction. More specifically, the written policies of the bank will state that the bank will set an exchange rate or range of rates at least once a day but no more than four times per day.¹⁰ Once set, a rate or range of rates will remain in effect for all conversions that occur prior to the time that a new rate is set. The bank will disclose the time or times each day that it will convert income conversion items or execute *de minimis* purchase and sale transactions.¹¹ Income item conversions will be executed and *de minimis* purchase and sale transactions will be executed at the next scheduled time for conversions or executions following notice of receipt of "good funds", or a direction to acquire foreign currency, as applicable. However, if the bank's policy is to bundle or hold small foreign exchange items until a specified threshold amount is reached, then the conversion of such items may be delayed, but in no case may such delay be more than 24 hours after the receipt of notice that good funds were received or the direction to acquire foreign currency was received.

The bank's policies and procedures will describe the methodology used by the bank to determine the specific exchange rate or range of rates for covered transactions. If a range of rates is used, such range cannot deviate by more than three percent (above or below) from the interbank bid and asked rates as displayed on Reuters or another independent nationally recognized service in the foreign exchange market for the effected currencies at the time such range of rates is set by the bank. For example, pursuant to its written procedures, Bank A converts foreign

¹⁰ The ABA application suggested that the bank set the rate only once per day. However, other Commenters noted that if the bank were allowed to set the rate more than once a day, the rate established would be more closely related to the current rates in the foreign exchange market. The Department has determined to modify the ABA proposal in order to provide flexibility to those financial institutions that intend to set rates more frequently than once per day.

¹¹ For example, a bank which converts income items only once a day may set the rate at 10:00 a.m. each day and convert such items at 10:30 a.m. each day. Both times would be disclosed in the bank's written policies.

exchange items at 7:30 a.m., 12:30 p.m. and 3:30 p.m. At 7:00 a.m. Bank A sets the range of rates to be used at 7:30 a.m. To determine the range, the Bank first determines the interbank bid and asked rates at 7:00 a.m. by checking a nationally recognized reporting service. Assume that at 7:00 a.m. the interbank rate for converting Great Britain Pounds into U.S. Dollars is 1.7025-1.7200. In order to determine the range of exchange rates for 7:30 am, the Bank would subtract a maximum of three percent from the bid quoted price and add a maximum of three percent to the asked price. The permissible range of rates under the exemption would be 1.6514-1.7716.

The Department believes that the conditions suggested by the Commenters regarding income item conversions reduce a great deal of the discretion exercised by a bank executing a foreign exchange transaction pursuant to a standing instruction. Accordingly, the Department has adopted their suggestions with the modifications discussed above, as conditions of the proposed exemption.

In addition to the above-noted conditions, the proposal also requires that the authorization to utilize a standing instruction must be in writing. With respect to a record maintenance requirement, the Commenters suggested that this condition should be deemed met if the records are maintained in foreign countries but were available by electronic access in the United States. As discussed in greater detail in PTE 94-20, the Commenters were not able to address the Department's concerns that access to such records could be restricted by foreign governments.¹²

Finally, the Department has required that the confirmation statements for each covered transaction include the time of the exchange. The ABA as well as other Commenters indicated that the inclusion of time on the confirmation statements is not administratively feasible and in any case is unnecessary. The Commenters stated that it would be expensive to revise their computer programs to include the time of the covered transaction. In addition, they stated that such information would not be used by an independent fiduciary to determine the reasonableness of the foreign exchange rates charged to a plan.

In response to the Commenters, the Department notes that, under the proposal, the exchange rates established by a bank can vary depending upon the time of the transaction. In order to monitor covered transactions, an independent fiduciary would need to

know when the transactions occurred in order to compare the rates used by the bank to rates charged in similar transactions executed at the same time. Accordingly, the Department continues to believe that this information is necessary to enable independent plan fiduciaries to monitor the reasonableness of the exchange rates established by the bank.

In light of the apparent industry concern regarding this issue, the Department invites comments and suggestions from interested parties regarding how an independent fiduciary could adequately monitor the exchange rates used for plan foreign exchange transactions if the time of the transaction is not included on the confirmation statements. Any such comments should include a discussion of the feasibility of the suggested alternative as well as how the alternative would be protective of plans.

The Department requests that interested persons, in addition to other comments, describe how an exemption would operate with respect to *de minimis* purchase and sale transactions and whether the conditions applicable to income item conversions are practical and appropriate to protect the interests of the participants and beneficiaries of plan engaging in *de minimis* foreign exchange transactions.

In response to the proposal that became PTE 94-20, the Securities Industry Association (SIA) requested that the Department include registered broker-dealers within the scope of that exemption.¹³ The SIA further requested that the Department include broker-dealers within the scope of any additional relief which it contemplated providing to banks. After considering the SIA's comment, the Department determined that it was appropriate to include registered broker-dealers within the scope of the relief provided by PTE 94-20. For the same reasons, the Department has included registered broker-dealers within the scope of this proposed class exemption.

The Department wishes to point out that ERISA's general standards of fiduciary conduct would apply to the standing instruction arrangements permitted by this proposed class exemption. Section 404 of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, the investment manager or other independent plan fiduciary must

act prudently with respect to the decision to enter into such an arrangement, such as considering the effect of restrictions on funds transfers by foreign governments, as well as to the negotiation of the specific terms under which the bank or broker-dealer will engage in foreign exchange transactions on behalf of the plan. The Department further emphasizes that it expects an investment manager or other independent plan fiduciary, to fully understand the benefits and risks associated with engaging in foreign exchange transactions pursuant to standing instructions, following disclosure by the bank or broker-dealer of all relevant information. In addition, such investment manager or independent plan fiduciary must be capable of periodically monitoring the actions taken by the bank or broker-dealer in the course of its execution of foreign exchange transactions. Thus, in considering whether to authorize a bank or broker-dealer to execute foreign exchange transactions pursuant to standing instructions, a fiduciary should take into account its ability to provide adequate oversight of the bank or broker-dealer.

The Department further notes that the rates at which a plan's foreign exchange transactions are executed directly impact on the plan's overall rate of return with respect to its portfolio of foreign securities. Accordingly, the plan's investment manager has a continuing obligation to prudently maximize the plan's rate of return by ensuring that the plan's foreign exchange transactions are executed at prices that are fair and reasonable.

Finally, the Department wishes to note that, during periods of increased foreign exchange market volatility, it may not be consistent with ERISA's prudence and exclusive benefit requirements for an investment manager to permit foreign exchange transactions on behalf of a plan at prices established by the bank or broker-dealer pursuant to the procedures contained in the standing instruction agreement. Under those circumstances, the exchange rate established by the bank or broker-dealer may be significantly less favorable to the plan than market prices at the time that the transaction is executed. In such cases, it may be necessary for the bank or broker-dealer to comply with the requirements of PTE 94-20.

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)

¹² 59 FR 8024.

¹³ For a discussion of the SIA comment, see 59 FR 8023 (Thursday, Feb. 17, 1994).

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

(3) If granted, the proposed exemption will be applicable to a transaction only if the conditions specified in the class exemption are met; and

(4) The proposed exemption, 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 exemption 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 exemption. Comments received will be available for public inspection with the referenced application at the above address.

Proposed Exemption

The Department has under consideration the grant of the following class 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.)

Section I Covered Transactions

(a) For the period from June 18, 1991 to May 5, 1997, the restrictions of sections 406(a)(1) (A) through (D) and 406 (b)(1) and (b)(2) of the Employee Retirement Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of Code section 4975(c)(1) (A) through (E), shall not apply to the following foreign exchange transactions, between a bank or broker-dealer and an employee benefit plan with respect to which the bank or broker-dealer, or any affiliate is a trustee, custodian, fiduciary or other party in interest, pursuant to a standing instruction, if the conditions set forth in section II below are met:

- (1) an income item conversion; or
- (2) a *de minimis* purchase or sale transaction.

(b) Effective after May 5, 1997, the restrictions of sections 406(a)(1) (A) through (D) and 406 (b)(1) and (b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of Code section 4975(c)(1) (A) through (E), shall not apply to the following foreign exchange transactions, between a bank or broker-dealer, and an employee benefit plan with respect to which the bank or broker-dealer, or any affiliate is a trustee, custodian, fiduciary or other party in interest, pursuant to a standing instruction, if the conditions set forth in section III below are met:

- (1) an income item conversion; or
- (2) a *de minimis* purchase or sale transaction.

Section II Retroactive Conditions

(a) At the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties.

(b) At the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms afforded by the bank, the broker-dealer, (or any affiliate thereof) in comparable arm's length foreign exchange transactions involving unrelated parties.

(c) Neither the bank, the broker-dealer, (nor any affiliate thereof) has any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the

meaning of 29 CFR 2510.3-21(c)) with respect to the investments of those assets.

(d) The bank or broker-dealer maintains at all times written policies and procedures regarding the handling of foreign exchange transactions for plans with respect to which the bank or broker-dealer is a trustee, custodian, fiduciary or other party in interest or disqualified person which assure that the person acting for the bank or broker-dealer knows that he or she is dealing with a plan.

(e) The exchange rate used by the bank or broker-dealer for a particular foreign exchange transaction did not deviate by more than 10% (above or below) the interbank bid and asked rates at the time of the transaction as displayed on Reuters or another independent service in the foreign currency market for such currency; provided, however, that a prohibited transaction shall not be deemed to have occurred solely because the records necessary to demonstrate compliance with this section have been lost, destroyed or are not available to the bank or broker-dealer. Nothing in this section shall be deemed to relieve the bank or broker-dealer of its responsibility to demonstrate compliance with the conditions of this proposed exemption.

(f) A written confirmation statement is furnished with respect to each covered transaction to the independent plan fiduciary. The confirmation statement shall include:

- (A) Account name;
 - (B) Transaction date;
 - (C) Exchange rates;
 - (D) Settlement date;
 - (E) Currencies exchanged;
 - (i) identity of foreign currency sold;
 - (ii) amount sold;
 - (iii) identity of currency purchased;
- and
- (iv) amount purchased.

The confirmation shall be issued in no event more than 5 business days after execution of the transaction.

Section III Prospective Conditions

(a) At the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the term generally available in comparable arm's-length foreign exchange transactions between unrelated parties.

(b) At the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms afforded by the bank or broker-dealer, (or any affiliate thereof) in comparable arm's-length foreign exchange transactions involving unrelated parties.

(c) Neither the bank, the broker-dealer, (nor any affiliate thereof) has any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to the investments of those assets.

(d) The bank or broker-dealer maintains at all times written policies and procedures regarding the handling of foreign exchange transactions for plans with respect to which the bank or broker-dealer is a trustee, custodian, fiduciary or other party in interest or disqualified person which assure that the person acting for the bank or broker-dealer knows that he or she is dealing with a plan.

(e) The covered transaction is performed under a written authorization executed in advance by a fiduciary of the plan whose assets are involved in the transaction, which plan fiduciary is independent of the bank or broker-dealer engaging in the covered transaction. The written authorization must specify:

(1) The identities of the currencies in which covered transactions may be executed; and

(2) That the authorization may be terminated by either party without penalty on no more than ten days notice.

(f)(1) Income item conversions are executed within no more than one business day from the date of receipt of notice by the bank or broker-dealer that such items are good funds, and

(A) a foreign custodian which is an affiliate of the bank or broker-dealer, provides such notice to the bank or broker-dealer within "one business day" of its receipt of good funds; or

(B) in the case of a foreign custodian which is not an affiliate of the bank or broker-dealer, such notice is provided to the bank or broker-dealer within two business days of such custodian's receipt of good funds.

(2) *De minimis* purchase and sale transactions are executed within no more than one business day from the date that either the bank or broker-dealer receives notice from a foreign custodian that the proceeds of a sale of foreign securities denominated in foreign currency are good funds, or the direction to acquire foreign currency was received by the bank or broker-dealer, and

(A) a foreign custodian which is an affiliate of the bank or broker-dealer, provides such notice to the bank or broker-dealer within one business day of its receipt of good funds from a sale; or

(B) in the case of a foreign custodian which is not an affiliate of the bank or broker-dealer, such notice is provided to the bank or broker-dealer within two business days of such custodian's receipt of good funds from a sale.

(g)(1) At least once each day, at the time(s) specified in its written policies and procedures, but no more than four times per day, the bank or broker-dealer establishes either a rate of exchange or a range of rates to be used for income item conversions and *de minimis* purchase and sale transactions covered by this exemption.

(2) Income item conversions items are executed at the next scheduled time for conversions following receipt of notice by the bank or broker-dealer from the foreign custodian that such funds are good funds. If it is the policy of the bank or broker-dealer to aggregate small amounts of foreign currency until a specified minimum threshold amount is received, then the conversion may take place at a later time but in no event more than 24 hours after receipt of notice.

(3) *De minimis* purchase and sale transactions are executed at the next scheduled time for such transactions following receipt of either notice that the sales proceeds denominated in foreign currency are good funds, or a direction to acquire foreign currency. If it is the policy of the bank or broker-dealer to aggregate small transactions until a specified threshold amount is received, then the execution may take place at a later time but in no event more than 24 hours after receipt of either notice that the sales proceeds, have been received by the foreign custodian as good funds, or a direction to acquire foreign currency.

For purposes of this paragraph (g), the range of exchange rates established by the bank or broker-dealer for a particular foreign currency cannot deviate by more than three percent [above or below] the interbank bid and asked rates as displayed on Reuters or another nationally recognized independent service in the foreign exchange market, for such currency at the time such range of rates is established by the bank or broker-dealer.

(h) Prior to the execution of the authorization referred to in paragraph (e), the bank or broker-dealer provides the authorizing fiduciary with a copy of the bank's or broker-dealer's written policies and procedures regarding the handling of foreign exchange transactions involving income item conversions and *de minimis* purchase and sale transactions. The policies and procedures must, at a minimum, contain the following information:

(1) Disclosure of the time(s) each day that the bank or broker-dealer will establish the specific rate of exchange or the range of exchange rates for the covered transactions to be executed and the time(s) that such covered transactions will take place. The bank or broker-dealer shall include a description of the methodology that the bank or broker-dealer uses to determine the specific exchange rate or range of exchange rates;

(2) Disclosure that income items conversions and *de minimis* purchase and sale transactions will be executed at the first scheduled transaction time after notice that good funds from an income conversion or a sale have been received, or a direction to purchase foreign currency has been received. To the extent that the bank or broker-dealer aggregates small amounts of foreign currency until a specified minimum threshold amount is met, a description of this practice and disclosure of the threshold amount; and

(3) A description of the process by which the bank's or broker-dealer's foreign exchange policies and procedures for income item conversions and *de minimis* purchase and sale transactions may be amended and disclosed to plans.

(1) The bank or broker-dealer engaging in the covered transaction furnishes to the authorizing fiduciary a written confirmation statement with respect to each covered transaction not more than five business days after execution of the transaction.

1. With respect to income item conversions, the confirmation shall disclose the following information:

- (A) Account name;
- (B) Date of notice that good funds were received;
- (C) Transaction date;
- (D) Exchange rate;
- (E) Settlement date;
- (F) Identity of foreign currency;
- (G) Amount of foreign currency sold;
- (H) Amount of U.S. dollars credited to the plan; and
- (I) Time of the transaction.

2. With respect to *de minimis* purchase and sale transactions, the confirmation shall disclose the following information:

- (A) Account name;
- (B) Date of notice that sales proceeds denominated in foreign currency are received as good funds or direction to acquire foreign currency was received.
- (C) Transaction date;
- (D) Exchange rates;
- (E) Settlement date;
- (F) Currencies exchanged:
 - i. identity of the currency sold;
 - ii. the amount sold;

iii. identity of the currency purchased;

iv. the amount purchased;

(G) Time of the transaction.

With respect to section (i)(1)(I) and (i)(2)(G) above, the requirement for disclosure of the time of the exchange shall be deemed to be met, if income item conversions and/or *de minimis* purchase and sale transactions by a bank or broker-dealer take place once per day and the time of such conversions is set forth in the bank's or broker-dealer's written policies and procedures which are provided to the independent plan fiduciary as required under section II(h)(1) of this exemption.

(j) The bank or broker-dealer, or its affiliate, maintains, within territories under the jurisdiction of the United States Government, for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (1) of this section to determine whether the applicable conditions of this exemption have been met, including a record of the specific exchange rate or range of exchange rates the bank or broker-dealer established each day for foreign exchange transactions effected under standing instructions for income item conversions and *de minimis* purchase and sale transactions. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the bank's or broker-dealer's control, the records are lost or destroyed prior to the end of the six-year period, and no party in interest other than the bank or broker-dealer, or its affiliate shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained by the bank or broker-dealer, or its affiliate, or are not made available for examination by the bank or broker-dealer, or its affiliate as required by paragraph (h) below.

(k)(1) Except as provided in subparagraph (2) of this paragraph and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (j) of this Section are available at their customary location for examination, upon reasonable notice, during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service.

(B) Any fiduciary of a plan who has authority to acquire or dispose of the assets of the plan involved in the foreign exchange transaction or any duly authorized employee or representative of such fiduciary.

(C) Any contributing employer to the plan involved in the foreign exchange transaction or any duly authorized employee or representative of such employer.

(2) None of the persons described in subparagraphs (B) and (C) shall be authorized to examine a bank's or broker-dealer's trade secrets or commercial or financial information of a bank or broker-dealer, or an affiliate thereof which is privileged or confidential.

Section IV Definitions and General Rules

For purposes of this exemption,

(a) A "foreign exchange transaction" means the exchange of the currency of one nation for the currency of another nation.

(b) The term "standing instruction" means a written authorization from a plan fiduciary, who is independent of the bank or broker-dealer engaging in the foreign exchange transaction and any affiliate thereof, to the bank or broker-dealer to effect the transactions specified therein pursuant to the instructions provided in such authorization.

(c) A "bank" means a bank which is supervised by the United States or a State thereof, or any domestic affiliate thereof.

(d) A "broker-dealer" means a broker-dealer registered under the Securities Exchange Act of 1934, or any domestic affiliate thereof.

(e) A "domestic affiliate" of a bank or broker-dealer means any entity which is supervised by the United States or a state thereof and which is directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such bank or broker-dealer.

(f) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(g) An "income item conversion" means the conversion into U.S. dollars of an amount which is the equivalent of no more than 100,000 U.S. dollars of interest, dividends or other distributions or payments with respect to a security, tax reclaims, proceeds from dispositions of rights, fractional shares or other similar items denominated in the currency of another nation that are received by the bank or broker-dealer on behalf of the plan from the plan's foreign investment portfolio.

(h) A "*de minimis* purchase or sale transaction" means the purchase or sale of foreign currencies in an amount of no more than 100,000 U.S. dollars or the

equivalent thereof in connection with the purchase or sale of foreign securities by a plan.

(i) For purposes of this exemption the term "employee benefit plan" refers to a pension plan described in 29 CFR § 2510.3-2 and/or a welfare benefit plan described in 29 CFR § 2510.3-1.

(j) For purposes of this exemption, the term "good funds" means funds immediately available in cash with no sovereign or other governmental impediments or restrictions to the exchange or transfer of such funds.

(k) For purposes of this exemption, the term "business day" means a banking day as defined by federal or state banking regulations.

Signed at Washington, DC, this 28th day of January, 1997.

Alan D. Lebowitz,

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

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. 96-4 CARP DPRA]

Digital Phonorecord Delivery Rate Adjustment Proceeding

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice vacating precontroversy discovery schedule and notice of meeting.

SUMMARY: The Library of Congress is vacating the current precontroversy discovery schedule and the date for initiating the proceeding to determine reasonable rates and terms for digital transmissions that constitute a digital phonorecord delivery to allow further negotiations. On April 1, 1997, the parties will meet with members of the Copyright Office and report on the status of these negotiations.

DATES: The schedule for the digital phonorecord delivery rate adjustment proceeding is vacated as of February 3, 1997. On April 1, 1997, at 10:00 a.m., the Copyright Office will conduct a status meeting with all interested parties.

ADDRESSES: The meeting will be held at the Library of Congress, James Madison Building, Room LM-414, First and Independence Avenue, SE., Washington, DC 20540.

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney for Compulsory Licenses, or Tanya M.