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PWBA Office of Exemption Determinations

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application Number D-8414]

Amendment to Prohibited Transaction Exemption (PTE) 80-51

Involving Bank Collective Investment Funds

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

Action: Adoption of amendment to PTE 80-51, and redesignation as
PTE 91-38.

Summary: This document amends PTE 80-51, 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
amendment affects, among others, participants, beneficiaries and
fiduciaries of plans that invest in the collective investment
funds, banks, and other persons engaging in the described
transactions.

Effective Date: The amendment to section I(a)(1)(A) of PTE
80-51 is effective as of July 1, 1990.

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) 523-9597 (this is not a toll-free number).

Supplementary Information: On February 6, 1991, notice was published in the Federal Register (56 FR 4856) 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 adopted by this notice was requested in an exemption application dated May 17, 1990, on behalf of the American Bankers Association (ABA). The exemption application was submitted 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).

Information collection requirements contained in PTE 80-51 have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1989 (Pub. L. 96-511) and have been assigned OMB number 1210-0082 approved for use through April 30, 1994.

The notice of pendency gave interested persons an

opportunity to comment on the proposal. Public comments were received pursuant to the provisions of 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.

For the sake of convenience, the entire text of PTE 80-51, as amended, has been reprinted with this notice. The Department has redesignated the exemption as PTE 91-38.

1. Description of the Exemption

PTE 80-51 consists of four parts. Section I(a)(1)(A) of the exemption permits a bank collective investment fund to engage in transactions, which otherwise might be prohibited by sections 406 and 407(a) of the Act 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 collective investment fund.

The amendment to PTE 80-51 granted pursuant to this notice increases the percentage limitation in section I(a)(1)(A)(ii) of PTE 80-51 from 5 to 10 percent, so that the general exemption in section I(a)(1)(A) 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 amendment, still must be met under the amended class exemption. These conditions, among others, 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. In addition, the terms of the transaction must be at least as favorable to the bank 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.

2. Discussion of Comments Received

The Department received three letters commenting on the proposed amendment to PTE 80-51. The ABA represents that it believes that the savings resulting from the reduced burden of compliance due to a higher percentage limitation would be of benefit to participants in that it would result in lower administrative costs.

The California Bankers Association (CBA), a trade association representing over 420 commercial banks in the State of California, supports the proposed amendment. The CBA represents that the proposed amendment to the class exemption would eliminate the competitive disadvantage currently faced by bank collective investment funds.

The Federal Retirement Thrift Investment Board, (the Board) which administers and manages the Thrift Savings Fund for federal employees, requested that the proposed amendment be extended for

purposes of the Federal Employee's Retirement System Act of 1986

(FERSA).³ In this regard, the Department notes that it proposed an amendment to PTE T88-1 on June 3, 1991, which would generally

incorporate subsequent modifications to the class exemptions

described therein.⁴

3. Miscellaneous

For purposes of clarity, section III(b) of the

exemption has been restated to provide that only the bank will be

subject to a civil penalty under section 502(i) of the Act or the

taxes imposed by section 4975(a) and (b) of the Code if the

records required pursuant to the exemption are not maintained or

available.

<center>General Information</center>

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) In accordance with section 408(a) of ERISA, the Department makes the following determinations:

(i) The amendment set forth herein is administratively feasible;

(ii) It is in the interests of plans and of their participants and beneficiaries; and

(iii) It is protective of the rights of the participants and beneficiaries of plans;

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

(4) The amendment is 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.

Exemption

Accordingly, PTE 80-51 is amended 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 ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

Section I Exemption for Certain Transactions Involving Bank

Collective Investment Funds

(a) Effective January 1, 1975, the restrictions of sections 406(a), 406(b)(2) and 407(a) of the Act and the taxes

imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B), (C) or (D) of the Code, shall not apply to the transactions described below if the applicable conditions set forth in Section III are met.

(1) Transactions Between Parties in Interest and Bank

Collective Investment Funds: General. 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 interests 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 interests 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.

(2) Special Transactions Not Meeting the Criteria of

Section I(a)(1)(A) Between Employers of Employees Covered by a

Multiple Employer Plan and Collective Investment Funds. Any

transaction between an employer (or an affiliate of an employer)

of employees covered by a multiple employer plan and a collective

investment fund maintained by a bank 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 at the time of the transaction, acquisition or holding--

(A) In the case of a transaction occurring prior to October 23, 1980, the employer is not a "substantial employer" with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(B) In the case of a transaction occurring on or after October 23, 1980:

(i) The interest of the multiple employer plan in the collective investment fund does not exceed 10 percent of the total assets in the collective investment fund, and the employer is not a "substantial employer" with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(ii) The interest of the multiple employer plan in the collective investment fund exceeds 10 percent of the total assets in the collective investment fund, but the employer is not a "substantial employer" with respect to the plan and would not be a "substantial employer" within the meaning of section 4001(a)(2) of the Act if "5 percent" were substituted for "10 percent" in that definition.

(3) Acquisition, Sale or Holding of Employer Securities and Employer Real Property.

(A) Except as provided in subsection (B) of this section (3), any acquisition, sale or holding of employer securities and any acquisition, sale or holding of employer real property by a collective investment fund in which a plan has an

interest and which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, if no commission is paid to the bank or to the employer or any affiliate of the bank or the employer in connection with the acquisition or sale of employer securities or the acquisition, sale or lease of employer real property; and

(i) In the case of employer real property--

(aa) Each parcel of employer real property and the improvements thereon held by the collective investment fund are suitable (or adaptable without excessive cost) for use by different tenants, and

(bb) The property of the collective investment fund that is leased or held for lease to others, in the aggregate, is dispersed geographically.

(ii) In the case of employer securities--

(aa) The bank in whose collective investment fund the security is held is not an affiliate of the issuer of the security, and

(bb) If the security is an obligation of the issuer, either

1. The collective investment fund owns the obligation at the time the plan acquires an interest in the collective investment fund, and interests in the collective fund are offered and redeemed in accordance with valuation procedures of the collective investment fund applied on a uniform or consistent basis, or

2. Immediately after acquisition of the obligation: (a)

Not more than 25 percent of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by such plan, and (b) in the case of an obligation that is a restricted security within the meaning of Rule 144 under the Securities Act of 1933, at least 50 percent of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by persons independent of the issuer.

The bank, its affiliates and any collective investment fund maintained by the bank shall be considered to be persons independent of the issuer if the bank is not an affiliate of the issuer.

(B) In the case of a plan that is not an eligible individual account plan (as defined in section 407(d)(3) of the Act), the exemption provided in subsection (A) of this paragraph (3) shall be available only if, immediately after the acquisition of the securities or real property, the aggregate fair market value of employer securities and employer real property with respect to which the bank has investment discretion does not exceed 10 percent of the fair market value of all the assets of the plan with respect to which the bank has such investment discretion.

(C) For the purposes of the exemption contained in subsection (A) of this section (3), the term "employer securities" shall include securities issued by, and the term

"employer real property" shall include real property leased to, a person who is a party in interest with respect to a plan (participating in the collective investment fund) by reason of a relationship to the employer described in section 3(14)(E), (G), (H) or (I) of the Act.

(b) Effective January 1, 1975, the restrictions of section 406(a)(1)(A), (B), (C) and (D) and section 406(b)(1) and (2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B), (C), (D) or (E) of the Code, shall not apply to the transactions described below, if the conditions of Section III are met.

(1) Transactions with Persons Who Are Parties in Interest With Respect to the Plan Solely by Virtue of Being Certain Service Providers or Certain Affiliates of Service Providers. Any transaction between a collective investment fund and a person who is a party in interest with respect to a plan that has an interest in the collective investment fund, if--

(A) The person is a party in interest (including a fiduciary) solely by reason of providing services to the plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act, or both and the person neither exercised nor has any discretionary authority, control, responsibility or influence with respect to the investment of plan assets in, or held by, the collective investment fund, and

(B) The person is not an affiliate of the bank maintaining the collective investment fund.

2. Certain Leases and Goods. The furnishing of goods to a collective investment fund by a party in interest with respect to a plan participating in the collective investment fund, or the leasing of real property owned by the collective investment fund to such party in interest and the incidental furnishing of goods to such party in interest by the collective investment fund, if--

(A) In the case of goods, they are furnished to or by the collective investment fund in connection with real property owned by the collective investment fund;

(B) The party in interest is not the bank maintaining the collective investment fund, or any affiliate of the bank, or any other collective investment fund maintained by the bank; and

(C) The amount involved in the furnishing of goods or leasing of real property in any calendar year (including the amount under any other lease or arrangement for the furnishing of goods in connection with the real property investments of the collective investment fund with the same party in interest or any affiliate thereof) does not exceed the greater of \$25,000 or 0.5 percent of the fair market value of the assets of the collective investment fund on the most recent valuation date of the fund prior to the transaction.

(3) Management of Real Property. Any services provided to a collective investment fund in which a plan has an interest

by the bank maintaining that fund or by an affiliate of that bank in connection with the management of the real property owned by the collective investment fund, if the compensation paid to the bank or its affiliate does not exceed the cost of the services to the bank or its affiliate.

(4) Transactions Involving Places of Public

Accommodation. The furnishing of services, facilities and any goods incidental to such services and facilities by a place of public accommodation owned by a bank collective investment fund, to a party in interest with respect to a plan, which plan has an interest in the collective investment fund, if the services, facilities and incidental goods are furnished on a comparable basis to the general public.

Section II Excess Holdings Exemption for Employee

Benefit Plans

(a) Effective January 1, 1975, the restrictions of sections 406(a), 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B), (C) or (D) of the Code shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property (other than through a collective investment fund), if--

(1) The acquisition or holding contravenes the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act solely by reason of being aggregated with employer

securities or employer real property held by a collective investment fund in which the plan has an interest;

- (2) The requirements of either paragraph (a)(1) or paragraph (a)(2) of Section I of this exemption are met; and
- (3) The applicable conditions set forth in Section III of this exemption are met.

Section III General Conditions

- (a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the bank, the terms of the transaction are not less favorable to the collective investment fund than the terms generally available in arm's-length transactions between unrelated parties.
- (b) The bank maintains for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (c) of this section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the bank's control, the records are lost or destroyed prior to the end of the six-year period; and (2) no party in interest other than the bank shall be subject to the civil penalty that may be assessed under 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (c) below.

(c)(1) Except as provided in subsection 2 of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination 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 interests of the plan in the collective investment fund, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan that has an interest in the collective investment fund or any duly authorized employee or representative of such employer.

(D) Any participant or beneficiary of any plan that has an interest in the collective investment fund, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph shall be authorized to examine a bank's trade secrets or commercial or financial information which is privileged or confidential.

Section IV Definitions and General Rules

For the purposes of this exemption,

(a) An "affiliate" of a person includes--

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative of, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

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

(c) The term "party in interest" includes a "disqualified person" as defined in section 4975(e)(2) of the Code.

(d) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

(e)(1) Except as provided in subparagraph (2) of this paragraph, the term "collective investment fund" means a common or collective trust fund or pooled investment fund maintained by a bank or a trust company.

(2) In the case of a common or collective trust fund or pooled investment fund maintained by a bank or trust company that

consists of separate investment accounts, each separate investment account of that fund, rather than the entire fund, shall be considered to be a separate "collective investment fund" for purposes of this exemption.

(f) The term "multiple employer plan" means an employee benefit plan that satisfies at least the requirements of section 3(37)(A)(i), (ii) and (iii) of the Act and section 414(f)(1)(A), (B) and (C) of the Code.

(g) The term "obligation" means a bond, debenture, note, certificate, or other evidence of indebtedness.

(h) The time as of which any transaction, acquisition or holding occurs is the date upon which the transaction is entered into, the acquisition is made or the holding commences.

In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into, or an acquisition is made, on or after January 1, 1975, or a renewal that requires the consent of the bank occurs on or after January 1, 1975, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered

into, or holding commencing prior to January 1, 1975, if either the requirements of this exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975 if the transaction had been entered into, the acquisition was made, or the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a holding exempt by virtue of section I(a)(1) at such time as the interest of the plan in the collective investment fund exceeds the percentage interest limitation of section I(a)(1), unless no portion of such excess results from an increase in the assets allocated to the collective investment fund by the plan. For this purpose, assets allocated do not include the reinvestment of fund earnings.

Nothing in this paragraph shall be construed as exempting a transaction entered into by a collective investment fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

(i) Each plan participating in a collective investment fund shall be considered to own the same proportionate undivided interest in each asset of the collective investment fund as its proportionate interest in the total assets of the collective

investment fund as calculated on the most recent preceding valuation date of the fund.

(j) Where any of the assets of a collective investment fund are invested in another collective investment fund, the interest of the plan in the second fund arising from its investment in the first fund shall be established by multiplying the percentage interest of the plan in the first fund by the percentage interest of the first fund in the second fund, such computation to be continued similarly in the event that further investments are made by the second investment fund in one or more other collective investment funds.

Signed at Washington, D.C., this 5th day of July 1991.

Alan D. Lebowitz
Deputy Assistant Secretary for
Program Operations
Pension and Welfare Benefits
Administration

U.S. Department of Labor

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).

²Section 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.

³ PTE T88-1 (53 FR 52838 December 29, 1988) adopted six prohibited transaction class exemptions (including PTE 80-51) for purposes of the prohibited transaction provisions of FERSA.

⁴56 FR 25140.

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