

Respondent's argument that he was prescribed all of the controlled substances in his system is directly contradicted by the credible testimony of Dr. Markowitz and DI Lewis. I find no evidence of any alcohol or other non-prescribed controlled substance use by Respondent after June 2008, which is consistent with Dr. Markowitz's testimony and opinion that Respondent is not currently suffering from depression.

Agency precedent has "long held that a practitioner's self-abuse of a controlled substance is a relevant consideration under factor five and has done so even when there is no evidence that the registrant abused his prescription writing authority." *Tony T. Bui, M.D.*, 75 Fed. Reg. 49,979, 49,989 (DEA 2010). Respondent's unlawful conduct in June 2008, which was associated with his use of alcohol and non-prescribed controlled substances, is clearly an "indication of impairment or abuse" at least in June 2008, and Respondent's argument to the contrary is without merit. That said, Respondent's conduct appears to be a relatively isolated event. Respondent testified to completing a class on alcohol addiction and there is no evidence to support a finding of alcohol or controlled substance abuse after June of 2008. *See Azen v. DEA*, 1996 WL 56114 at \*2 (9th Cir. Feb. 9, 1996) (impressive evidence of rehabilitation and continued abstinence important consideration). Accordingly, I find Respondent's conduct in June 2008 to be inconsistent with the public interest and a relevant consideration weighing somewhat against registration.<sup>59</sup> *See David E. Trawick, D.D.S.*, 53 Fed. Reg. 5326, 5326 (DEA 1988) (holding that "offences or wrongful acts committed by a registrant outside of his professional practice, but which relate to controlled substances may constitute sufficient grounds" for denying relief favorable to Respondent, where Respondent had history of alcohol and controlled substances abuse).

Because the Government has made out a prima facie case against Respondent, a remaining issue in this case is whether Respondent has adequately accepted responsibility for his past misconduct such that his registration might nevertheless be consistent with the public interest. *See Patrick W. Stodola*, 74 Fed. Reg. 20,727, 20,734 (DEA 2009). Respondent argues generally that the Government has failed

to demonstrate that granting Respondent a new registration would be inconsistent with the public interest. But across various dimensions, the record reveals that Respondent has not sustained his burden in this regard. In fact, as discussed above, Respondent's testimony in numerous material instances was not credible and reflected an overall lack of admission of past misconduct, let alone acceptance of responsibility. The passage of time since Respondent's misconduct is of no consequence with regard to the issue of acceptance of responsibility. "DEA has long held that '[t]he paramount issue is not how much time has elapsed since [his] unlawful conduct, but rather, whether during that time \* \* \* Respondent has learned from past mistakes and has demonstrated that he would handle controlled substances properly if entrusted with a new registration.'" *Robert L. Dougherty, M.D.*, 76 Fed. Reg. 16,823, 16,835 (DEA 2011) (citing *Leonardo V. Lopez, M.D.*, 54 Fed. Reg. 36,915, 36,915 (DEA 1989) and *Robert A. Leslie, M.D.*, 68 Fed. Reg. 15,227, 15,227 (DEA 2003)). Respondent's testimony with regard to his June 2008 misconduct, and his misconduct pertaining to Factors Two and Four, clearly indicate a complete lack of acceptance of responsibility.

I find that Respondent's lack of credibility during numerous material portions of his testimony weighs heavily in favor of denying Respondent's application. *See Hoxie v. DEA*, 419 F.3d 477, 483 (6th Cir. 2005) (DEA properly considers physician's candor, forthrightness in assisting investigation and admitting of fault as important factors in determining whether registration is consistent with public interest). In light of the foregoing, Respondent's evidence as a whole fails to sustain his burden to accept responsibility for his misconduct and demonstrate that he will not engage in future misconduct. I find that Factor Five weighs heavily in favor of a finding that Respondent's registration would be inconsistent with the public interest.

## VI. Conclusion and Recommendation

After balancing the foregoing public interest factors, I find that the Government has established by substantial evidence a prima facie case in support of denying Respondent's application for registration, based on Factors Two, Four and Five of 21 U.S.C. § 823(f). Once DEA has made its prima facie case for revocation or denial, the burden shifts to the respondent to show that, given the totality of the facts and circumstances in the record, revoking or denying the registration would not be

appropriate. *See Morall v. DEA*, 412 F.3d 165, 174 (D.C. Cir. 2005); *Humphreys v. DEA*, 96 F.3d 658, 661 (3d Cir. 1996); *Shatz v. United States Dep't of Justice*, 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston*, 45 Fed. Reg. 72, 311 (DEA 1980).

Additionally, where a registrant has committed acts inconsistent with the public interest, he must accept responsibility for his actions and demonstrate that he will not engage in future misconduct. *See Patrick W. Stodola*, 74 Fed. Reg. 20,727, 20,735 (DEA 2009). Also, "[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest." *Joseph Gaudio, M.D.*, 74 Fed. Reg. 10,083, 10,094 (DEA 2009). An agency's choice of sanction will be upheld unless unwarranted in law or without justification in fact. A sanction must be rationally related to the evidence of record and proportionate to the error committed. *See Morall v. DEA*, 412 F.3d 165, 181 (D.C. Cir. 2005). Finally, an "agency rationally may conclude that past performance is the best predictor of future performance." *Alra Laboratories, Inc. v. DEA*, 54 F.3d 450, 452 (7th Cir. 1995).

I recommend denial of Respondent's application for a COR. I find the evidence as a whole demonstrates that Respondent has not accepted responsibility and his registration would be inconsistent with the public interest. Respondent's overall lack of candor while testifying at hearing is fully consistent with a denial of Respondent's application for a DEA COR.

Dated: April 29, 2011.

**Timothy D. Wing,**

*Administrative Law Judge.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-11679]

#### Notice of Amendment to Proposed Exemption Sammons Enterprises, Inc. Employee Stock Ownership Plan (the ESOP); Located in Dallas, TX

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of amendment to proposed exemption.

<sup>59</sup> In light of the absence of other evidence of controlled substance and alcohol abuse, the passage of time, and Respondent's attendance at alcohol addiction classes, I give this issue little overall weight for purposes of my recommended decision.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of an amendment to a proposed individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended (the Code). The proposed transactions involve Sammons Enterprises, Inc. (Sammons). The proposed exemption, if granted, would affect the ESOP for which Sammons is the sponsor, and the participants and beneficiaries of the ESOP.

*Temporary Nature of Exemption:* This exemption, if granted, will expire at the earlier of (i) the first day of the first fiscal year of Sammons next following the fiscal year in which falls the fifth anniversary of the date of grant of the exemption; and (ii) the first day upon which the ESOP fails to own at least 99% of the issued and outstanding shares of Sammons.

*Written Comments and Hearing Requests:* All interested persons are invited to submit written comments and/or requests for a hearing on the proposed exemption within forty five (45) days from the date of the 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 the request for a hearing and (2) the nature of the person's interest in the proposed exemption and the manner in which the person would be adversely affected by the proposed exemption. A request for a hearing must also state the issues to be addressed at the requested hearing and include a general description of the evidence to be presented at the requested hearing.

**ADDRESSES:** All written comments and requests for a public hearing concerning the proposed exemption should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 202010, Attention: Application No. D-11679. Interested persons are also invited to submit comments and/or hearing requests to the Employee Benefits Security Administration by email or FAX. Any such comments or requests should be sent either to: [moffitt.betty@dol.gov](mailto:moffitt.betty@dol.gov), or by FAX to (202) 219-0204 by the end of the scheduled comment period. The application for exemption and the comments received will be available for inspection in the Public Documents

Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8546. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This document contains a notice of amendment to a proposed individual exemption from the restrictions of ERISA 406(a)(1)(A) and (D), 406(b)(1), and 406(b)(2), and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D) and (E) of the Code. The proposed exemption has been requested by GreatBanc Trust Company (GreatBanc), the independent fiduciary for the ESOP, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of the 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. Accordingly, this proposed exemption is being issued solely by the Department.

On November 14, 2011, the Department of Labor (the Department) published in the **Federal Register** (76 FR 70503) a notice of proposed exemption (the Notice) for a transaction involving the ESOP. The entity that requested the exemption, GreatBanc, the independent fiduciary for the ESOP, as well as the ESOP's sponsor, Sammons, have now requested a clarification with respect to the conditions that appeared in the Notice.

Condition (f) of the Notice reads: "(f) Shares of Sammons stock are held in an ESOP suspense account, and are allocated each year to each eligible ESOP participant at the maximum level permitted under the Code;" and

Representation (f) in Paragraph 16 of the Summary of Facts and Representations of the Notice reads the same way.

GreatBanc represents that this statement was likely the product of the following representation made in the original application submitted to the Department and repeated in Paragraph 5 of the Notice: "Although the ESOP is not leveraged, under a special structure established pursuant to Section 664(g) of the Code, the shares acquired from the [Sammons] charitable remainder trust are held in an ESOP suspense account, and are currently allocated each year to each eligible ESOP participant at the maximum level permitted under Code Section 664(g)(7), i.e., 25% of compensation (up to a maximum allocation of \$45,000)."

GreatBanc confirms that the representations in the exemption application concerning the level of current allocations to ESOP participants are entirely accurate. Participants received the maximum allocations permitted under the Code for the 2010 Plan year (the first Plan year for which Code Section 664(g)(7) applied to the ESOP), and will receive the maximum level of allocations for the 2011 Plan year as well. It was not, however, the intention of GreatBanc nor Sammons to represent to the Department, nor to offer as a condition for the granting of an exemption, that the ESOP would provide the maximum permitted allocations to ESOP participants during each Plan year for which the exemption proposed herein would be in effect, but rather to represent that the allocations made to ESOP participants would at all times be made in accordance with the applicable provisions of Code Section 664(g).

The Department has accepted this request for clarification by GreatBanc and Sammons and has accordingly amended the Notice so that condition (f) now reads: "(f) Shares of Sammons stock are held in an ESOP suspense account, and are allocated each year to each eligible ESOP participant in accordance with the applicable provisions of the Code;" and the Department notes that Representation 16, subsection (f) of the Notice is similarly amended.

#### Notice of Amendment to Proposed Exemption

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Act in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions of

sections 406(a)(1)(A) and (D), 406(b)(1), and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D) and (E) of the Code, shall not apply to the personal holding company consent dividend election (the Consent) with respect to Sammons Enterprises, Inc. (Sammons), by the trustee of the ESOP, provided that the following conditions are satisfied:

(a) The trustee of the ESOP is an independent, qualified fiduciary (the I/F), acting on behalf of the ESOP, which determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the ESOP and the participants and beneficiaries of the ESOP;

(b) Before the ESOP enters into the proposed transaction, the I/F reviews the transaction, and determines whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act;

(c) The I/F monitors compliance with the terms and conditions of this proposed exemption, as described herein, and ensures that such terms and conditions are at all times satisfied;

(d) Sammons provides to the I/F, in a timely fashion, all information reasonably requested by the I/F to assist it in making its decision whether or not to approve the transaction;

(e) The consent dividend will represent no more than two percent (2%) of the ESOP's assets in any taxable year within the timeframe of the exemption proposed herein;

(f) Shares of Sammons stock are held in an ESOP suspense account, and are allocated each year to each eligible ESOP participant in accordance with the applicable provisions of the Code;

(g) All of the requirements of section 565 of the Code are met with respect to the Consent; and

(h) All shareholders of Sammons are requested to consent to the dividend in the manner prescribed under section 565 of the Code.

**Notice to Interested Persons:** The applicant represents that notice to interested persons will be provided by first class mail within 15 days of the publication of this Notice of Amendment to Proposed Exemption in the **Federal Register**. This notification to interested persons will include both a copy of the November 14, 2011 Notice and a copy of this Notice of Amendment to Proposed Exemption.

Signed at Washington, DC, this 27th day of March 2012.

**Lyssa E. Hall,**

*Acting Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Exemptions From Certain Prohibited Transaction Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of Individual Exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following Grants: D-11628, Aztec Well Servicing Company & Related Companies Medical Plan Trust Fund (the Plan), 2012-04; D-11637, HSBC-North America (U.S.) Tax Reduction Investment Plan (the Plan), 2012-05; D-11662, Retirement Program for Employees of EnPro Industries (the Plan), 2012-06; D-11669, Genzyme Corporation 401(k) Plan and Its Successor Plans (together, the Plan or the Applicant), 2012-07; and D-11680, Citigroup Inc. (Citigroup or the Applicant), 2012-08.

**SUPPLEMENTARY INFORMATION:** A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemptions. The notice set forth summaries of facts and representations contained in the applications for exemption and referred interested persons to the applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemptions.

The notice of proposed exemption was issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011)<sup>1</sup> and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and

its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

#### Aztec Well Servicing Company & Related Companies Medical Plan Trust Fund (the Plan) Located in Aztec, New Mexico

[Prohibited Transaction Exemption 2012-04; Exemption Application No. D-11628]

#### Exemption

##### Section I

The restrictions of sections 406(a)(1)(A), (C) and (D), 406(b)(1), and 406(b)(2) of the Act shall not apply to the payment by the Plan to Basin Occupational & Urgent Care, LLC (BOUC), a party in interest with respect to the Plan, for the on-site provision to the Plan of urgent medical care and wellness services by a nurse-practitioner and a wellness coordinator employed by BOUC, provided that the following conditions are satisfied:

(a) An independent, qualified fiduciary (I/F), with expertise in plans providing health and welfare benefits under the Act and the fiduciary obligations thereunder, acting on behalf of the Plan, determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of the Plan;

(b) Before the Plan enters into the proposed transaction, the I/F reviews the transaction, ensures that the terms of

<sup>1</sup> The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).