

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

[Prohibited Transaction Exemption 2001–14; Exemption Application No. D–10571, et al.]

**Grant of Individual Exemptions; Keystone Brokerage, Inc. (Keystone) et al.**

**AGENCY:** Pension and Welfare Benefits 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 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective 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 notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices 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 public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were 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 (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

**Keystone Brokerage, Inc. (Keystone), et al. Located in Williamsport, PA**

[Prohibited Transaction Exemption 2001–14 Exemption Application No. D–10571]

**Exemption****Section I. Covered Transactions**

The sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1)(A) through (D) of the Code shall not apply, effective October 3, 1997 through June 30, 2000, to the purchase or redemption of shares, by a self-directed individual retirement account (the IRA), of investment portfolios (the Portfolios) of certain mutual funds that were affiliated with Keystone (the Affiliated Funds) or in other mutual funds that were unaffiliated with Keystone (the Third Party Funds),<sup>1</sup> in connection with the IRA's participation in the KeyPremier Nautilus Series Program, or its successor, the Nautilus Series Program, (together, the Investment Advisory Program).

In addition, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) and (F) of the Code, shall not apply, effective October 3, 1997 through June 30, 2000, to (1) the provision, by Keystone, of asset allocation and related services to an independent fiduciary of an IRA (the Independent Fiduciary), which resulted in the selection of Portfolios in the Investment Advisory Program by the Independent Fiduciary for the investment of IRA assets; and (2) the receipt of fees by Martindale Andres & Co., Inc. and Governor Group Advisors, Inc. (GGA), affiliates of Keystone, in connection with provision of investment advisory or sub-advisory services to the Fund Portfolios.

This exemption is subject to the conditions set forth below in Section II.

**Section II. General Conditions**

(a) The participation by an IRA in the Investment Advisory Program was approved by an Independent Fiduciary.

(b) As to each IRA, the total fees that were paid to Keystone and its affiliates constituted no more than reasonable compensation for the services provided.

(c) With the exception of distribution-related fees paid to Keystone pursuant

to Rule 12b–1 (the Rule 12b–1 fees) of the Investment Company Act of 1940 (the Investment Company Act) which were offset, no IRA paid a fee or commission by reason of the acquisition or redemption of the shares of the Funds.

(d) The terms of each purchase or redemption of shares in the Funds remained at least as favorable to an investing IRA as those obtainable in an arm's length transaction with an unrelated party.

(e) Keystone provided written documentation to each IRA's Independent Fiduciary of its recommendations or evaluations regarding the Fund Portfolios as well as the design and parameters with respect to an asset allocation model (the Asset Allocation Model), based upon objective criteria that were uniformly applied.

(f) Any recommendation or evaluation made by Keystone to an Independent Fiduciary was implemented only at the express direction of such Independent Fiduciary.

(g) The quarterly fee paid by an IRA to Keystone and its affiliates for asset allocation and related services rendered to such IRA under the Investment Advisory Program (the Outside Fee) was offset by—

(1) All gross investment management fees (the Advisory Fees) that were paid by the Affiliated Funds to Keystone, including any sub-advisory fees that were paid by the Affiliated Funds to third party sub-advisers;

(2) All administrative fees (the Administrative Fees) that were paid to GGA and BISYS Fund Services Limited Partnership (BISYS), an unrelated party; and

(3) All Rule 12b–1 Fees that were paid by the Third Party Funds to Keystone or its current and former affiliates with respect to an Investment Advisory Account (the Account), such that the sum of the offset and the net Outside Fee always equaled the aggregate Outside Fee, thereby making the selection of Affiliated Funds or Third Party Funds revenue-neutral.

(h) With respect to its participation in the Investment Advisory Program, prior to purchasing shares in the Portfolios of the Affiliated Funds and the Third Party Funds—

(1) Each Independent Fiduciary received the following written or oral disclosures from Keystone:

(A) A brochure describing the Investment Advisory Program; an Investment Advisory Program Account Agreement (the Account Agreement); a description of the Asset Allocation Models; and a reference guide/disclosure statement providing details

<sup>1</sup> The Affiliated Funds and the Third Party Funds are collectively referred to herein as the Funds.

about the Investment Advisory Program, the fees charged thereunder, the procedures for establishing, making additions to and withdrawing from the Accounts, and other related information;

(B) A risk tolerance and goal analysis questionnaire (the Questionnaire) or a written report of responses given by the Independent Fiduciary in a personal interview with a Keystone representative (the Interview Report);

(C) Copies of applicable prospectuses (the Prospectuses) for the Fund Portfolios discussing the investment objectives of the Portfolios; the policies employed to achieve the objectives of the Portfolios; the corporate affiliation existing between Keystone and its affiliates; the compensation paid to such entities; disclosures relating to rebalancing and reallocating Asset Allocation Models; and information explaining the risks attendant to investing in Portfolios for the Affiliated Funds and the Third Party Funds;

(D) Upon written or oral request to Keystone, a Statement of Additional Information supplementing the applicable Prospectus, which described the types of securities and other instruments in which the Portfolios could invest and the investment policies and strategies that the Portfolios could utilize, including a description of the risks;

(E) A copy of the Account Agreement between the IRA and Keystone relating to the IRA's participation in the Investment Advisory Program;

(F) A written recommendation of a specific Asset Allocation Model, together with a copy of the Questionnaire and response or the Interview Report;

(G) Upon written request to Keystone, a copy of any investment advisory agreement or sub-advisory agreement between Keystone and the Affiliated Funds; and

(H) Written disclosures of Keystone's affiliation or non-affiliation with the parties who act as sponsors, distributors, administrators, investment advisers and sub-advisers, custodians and transfer agents of the Portfolios.

(2) If accepted as an investor in the Investment Advisory Program, the Independent Fiduciary was required to acknowledge in writing to Keystone prior to purchasing shares of the Fund, that such Independent Fiduciary had received copies of the documents described in paragraph (h)(1) of this Section II and represent to Keystone that such individual was—

(A) Independent of Keystone and its affiliates;

(B) Knowledgeable with respect to the IRA in administrative matters and funding matters related thereto; and

(C) Able to make an informed decision concerning participation in the Investment Advisory Program.

(i) Subsequent to its participation in the Investment Advisory Program, each Independent Fiduciary received the following written or oral disclosures from Keystone with respect to ongoing participation:

(1) Written confirmations of each purchase or redemption transaction involving shares of an Affiliated Fund or a Third Party Fund Portfolio (including transactions resulting from the realignment of assets caused by a change in the Asset Allocation Model's investment mix and from periodic rebalancing of Account assets);

(2) Telephone quotations of such Independent Fiduciary's IRA Account balance;

(3) A periodic, but not less frequently than quarterly, Statement of Account specifying the net asset value of the IRA's assets in such Account, a summary of purchase, sale and exchange activity and dividends received or reinvested, a summary of cumulative realized gains and/or losses, and a statement of fees paid to Keystone and its affiliates;

(4) Semiannual and annual reports that included financial statements for the Portfolios;

(5) A quarterly report pertaining to the applicable Asset Allocation Model describing the Asset Allocation Model's performance during the preceding quarter; market conditions and economic outlook; and, if applicable, prospective changes in Portfolio allocations for the Asset Allocation Model and the reasons therefor;

(6) At least annually, a written or oral inquiry from Keystone to ascertain whether the information provided on the Questionnaire or in the Interview Report was still accurate or required updating; and

(7) At least annually during the first calendar quarter of each year after March 24, 1999, or at other times specified in Section II(l), a termination form (the Termination Form), meeting the requirements of Section II(k) and (l) below.

(j) If authorized in writing by the Independent Fiduciary, the IRA was automatically rebalanced on a quarterly basis by Keystone (using the net asset values of the affected Funds as of the close of business on a pre-established date) to the Asset Allocation Model previously prescribed by the Independent Fiduciary, if one or more Fund allocations deviated from the

Asset Allocation Model prescribed by the Independent Fiduciary because—

(1) At least one transaction required to rebalance the IRA among the Funds involved a purchase or redemption of securities valued at \$250 or more; and

(2) The net asset value of the Fund affected was more than 5 percent of the IRA's investment in such Fund.

(k) Keystone was authorized to provide written notice to the Independent Fiduciary, at least 30 days prior to the implementation of any of the following changes:

(1) A change in the asset mix outside the current Asset Allocation Model;

(2) The division of a class of assets (the Asset Class);

(3) The replacement of a Third Party Fund with an Affiliated Fund, or an Affiliated Fund with a Third Party Fund; and

(4) An increase in the Outside Fee.

(l) The written notice described above in Section II(k) was required to —

(1) State that the Independent Fiduciary could terminate the IRA's participation in the Investment Advisory Program at will and without penalty, upon receipt by Keystone of written notice from the Independent Fiduciary; and

(2) Explain that any of the proposed changes noted in paragraphs (k)(1)–(4) of Section II would go into effect if the Independent Fiduciary did not elect to withdraw by the effective date.

(3) For changes occurring after March 24, 1999, the notice was to be accompanied by a Termination Form containing instructions identical to those set forth above in paragraphs (l)(1)–(2) of this Section II.

(m) Keystone was not authorized to replace an Affiliated Fund with a Third Party Fund Portfolio or vice versa, nor was Keystone authorized to make an additional Third Party Fund Portfolio available for investment under the Investment Advisory Program.

(n) Keystone will maintain, for a period of six years, the records necessary to enable the persons described in paragraph (o) of this Section II 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 control of Keystone and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest, other than Keystone, shall be subject to the taxes imposed by section 4975(a) and 4975(b) of the Code if the records are not maintained or are not available for

examination as required by paragraph (o) of this Section II below.

(o)(1) Except as provided in section (o)(2) of this paragraph, the records referred to in paragraph (o) of this Section II are unconditionally available at their customary location during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the Securities and Exchange Commission;

(B) Any Independent Fiduciary of a participating IRA or any duly authorized representative of such Independent Fiduciary; and

(C) Any participant or beneficiary of any participating IRA or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in paragraphs (o)(1)(B) and (o)(1)(C) of this paragraph (o) are authorized to examine the trade secrets of Keystone or commercial or financial information which is privileged or confidential.

### Section III. Definitions

For purposes of this exemption:

(a) The term “Keystone” means Keystone Brokerage, Inc. and any affiliate of Keystone, as defined in paragraph (b) of this Section III.

(b) An “affiliate” of Keystone includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Keystone; (For purposes of this subparagraph, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any individual who is an officer, director or partner in Keystone or a person described in subparagraph (b)(1); and

(3) Any corporation or partnership of which Keystone or an affiliate or a person described in subparagraphs (b)(1) or (b)(2) of this Section III, is a 10 percent or more partner or owner.

(c) The term “officer” means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer performing a policy-making function for the entity.

(d) The term “IRA” includes a self-directed individual retirement account which is described in section 408(a) of the Code and which is not an “employee benefit plan” covered under Title I of the Act. The term “IRA” does not include any IRAs that were sponsored or maintained by Keystone or

its affiliates for their own employees nor does it include any IRAs that were held by employees of Keystone or its affiliates in their individual capacities.

(e) The term “Independent Fiduciary” means an individual who was covered under a self-directed IRA which invested in shares of the Funds.

(f) The term “Asset Class” means an asset class under a classification system used by Morningstar, Inc. (Morningstar) or Lipper, Inc. (Lipper). For purposes of this exemption, two Funds were not in the same Asset Class if they were classified differently under either the Morningstar or Lipper classification systems. Thus, for example, if two Funds were treated in separate Asset Classes under the Morningstar system, they would be treated as being in separate Asset Classes even if the Funds were in the same Asset Class (or were not classified at all) under the Lipper system.

(g) The term “Affiliated Fund” means a portfolio of an investment company registered under the Investment Company Act for which Keystone or an affiliate acted as the investment adviser and may have also acted as the sub-adviser, co-administrator or custodian.

(h) The term “Third Party Fund” means a portfolio of an investment company that is registered under the Investment Company Act for which neither Keystone nor any affiliate acted as an investment adviser, sub-adviser, co-administrator or custodian.

(i) The “Advisory Fees” refer to the investment advisory fees that were paid by the Affiliated Funds to Keystone and its affiliates.

(j) The “Administrative Fees” refer to the co-administration fees that were paid by the Affiliated Funds to GGA and BISYS.

(k) The “Rule 12b-1 Fees” were paid to Keystone and its affiliates by the Third Party Funds in connection with certain distribution-related services (e.g., advertising) that were made pursuant to a written plan of distribution.

*Effective Date:* This exemption is effective from October 3, 1997 until June 30, 2000.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the proposed exemption published on January 22, 2001 at 66 FR 6679.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

### **Ibbotson Associates, Inc. (Ibbotson) Located in Chicago, Illinois**

[Prohibited Transaction Exemption 2001-15; Exemption Application No.: D-10897]

### **Exemption**

The restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the provision of asset allocation services (the Service) by Ibbotson to Plan participants and the receipt of fees by Ibbotson from Service Providers in connection with the provision of such asset allocation services, provided that the following conditions are met.

### **I. General Conditions**

A. The retention of Ibbotson to provide the Service will be expressly authorized in writing by an independent fiduciary of each Plan.

B. Ibbotson shall provide the independent fiduciary of each Plan with the following, in writing:

(1) Prior to authorization, a complete description of the Service and disclosure of all fees and expenses associated with the Service.

(2) Any other reasonably available information regarding the Service that the independent fiduciary requests.

(3) A contract for the provision of the Service which defines the relationship between Ibbotson, the Service Providers and the Plan sponsor, and the obligations thereunder. Such contract shall be accompanied by a termination form with instructions on the use of the form. The termination form must expressly state that a Plan may terminate its participation in the Service without penalty at any time. However, a Plan which terminates its participation in the Service before the expiration of the contract will pay its pro-rata share of the fees that it would otherwise owe for the Service under the contract and, if applicable, any direct costs actually incurred by Ibbotson which would have been recovered from the Plan but for the termination of the contract, including any direct setup expenses not previously recovered. Thereafter, the termination form shall be provided no less than annually.

(4) At least 45-days prior to the implementation of any material change to the Service or increase in fees or expenses charged for the Service, notification of the change and an explanation of the nature and the amount of the change in the Service or increase in fees or expenses.

(5) A copy of the proposed and final exemption as published in the **Federal Register**.

(6) An annual report of Plan activity which summarizes the performance of the asset allocation categories provided to the Plan and provides a breakdown of all fees and expenses paid to Ibbotson in connection with the provision of the Service to the Plan for the year. Such report shall be provided no more than 45 days after the period to which it relates. Upon the independent fiduciary's or Plan sponsor's request, such report may be provided more frequently.

C. Ibbotson will provide each Plan participant with the following:

(1) Written notice that the Service is available and provided by Ibbotson, an entity independent of the Service Provider and the Plan sponsor.

(2) Prior to using the Service, full written disclosures that will include information about Ibbotson and a description of the Service.

(3) Access to a web site or paper-based communications which will clearly indicate that the Plan participant is receiving the Service from Ibbotson, and that Ibbotson is independent of the Service Provider.

(4) A questionnaire which must be completed prior to utilization of the Service.

(5) An investment advisory service agreement under which the Plan participant will acknowledge his or her understanding that the Service is provided by Ibbotson and not the Service Provider. This agreement must be completed prior to utilization of the Service.

D. Any investment advice given to a Plan participant by Ibbotson under the Service will be based solely on the responses provided by the Plan participant through the Service's interactive computer program or through a paper or telephone interview and will be based on the application of an objective methodology developed by Ibbotson.

E. Any investment advice given to a Plan participant will be implemented only at the express direction of the Plan participant.

F. The total fees paid to Ibbotson and a Service Provider, in connection with the provision of the Service, by each Plan does not exceed "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

G. The only fees which are payable to Ibbotson in connection with the provision of the Service include, subject to negotiation, one or more of the following:

(1) An annual flat fee based on a fixed dollar amount per Plan participant for the Service. This fee may be paid by the Plan, Plan sponsor, Plan participant or the Service Provider.

(2) A technology licensing fee payable by the Service Provider in the first year that the Service is provided to a Plan. The fee will be a fixed dollar amount based on the number of Plan participants and beneficiaries contained on the Service Provider's record-keeping system. Each time the number of Plan participants and beneficiaries on the Service Provider's record-keeping system increases by at least 10%, an additional fixed dollar amount based on the increase in Plan participants and beneficiaries will be assessed and charged to the Service Provider for the new Plan participants and beneficiaries (the Revised Technology Fee).

(3) For subsequent years, Ibbotson will charge the Service Provider an annual technology maintenance fee equal to up to 20% of the technology licensing fee charged to the Service Provider in the first year plus up to 20% of the Revised Technology Fee.

(4) Ibbotson will charge the Plan or Plan sponsor an Internet customization fee where a Plan sponsor contracts directly with Ibbotson for the provision of the Service. This flat fee will be based on the time spent by Ibbotson personnel on its customization of the Service for the particular Plan.

(5) For those Plan sponsors electing to receive a Plan analysis report, an annual flat fee based on a fixed dollar amount per Plan investment analysis report. This fee will be paid by the Plan sponsor or Service Provider.

H. No portion of any fee or other consideration payable by the Plan or the Plan sponsor to Ibbotson in connection with the Service will be received or shared with a Service Provider.

I. Neither the fees charged nor the compensation received by Ibbotson will be affected by the investment selections or the decisions made by the Plan participants and beneficiaries regarding investments of the assets in their accounts.

J. Each Service Provider shall represent to Ibbotson that it will not impose any additional fees and/or charges (relating to the investment products made available to Plans) on Plans who contract for the Service unless such fees and charges are imposed on the Service Provider's similarly situated clients who do not contract for the Service.

K. Ibbotson will maintain insurance coverage from an insurer with a rating in one of the three highest generic categories by at least one nationally

recognized statistical rating service, in the amount of at least \$5 million for the payment of any liabilities that may arise with respect to the Service by reason of a breach of fiduciary duty described in section 404 of the Act or a violation of the prohibitions of section 406 of the Act or section 4975 of the Code. Such insurance coverage will be provided under a "claims made" policy. In the event that Ibbotson changes insurers or ceases to provide the Service, Ibbotson will maintain "trail coverage" with respect to claims made during the period in which the policy was in effect for a period of three years following such a change or cessation of the Service.

L. No Service Provider shall at any time own any interest, by vote or value in Ibbotson, and neither Ibbotson nor any affiliate shall own any interest, by vote or value, in a Service Provider.

M. The annual revenues derived by Ibbotson from any one Service Provider shall not constitute more than 5% of the annual revenues of Ibbotson.

N. Ibbotson will maintain for a period of six years, the records necessary to enable the persons described in paragraph (O) of this section to determine whether the conditions of the exemption are met, including records of the recommendations made to Plan participants and beneficiaries and their investment choices, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Ibbotson, the records are lost or destroyed prior to the end of the six year period.

(2) No party in interest, other than Ibbotson 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 records are not maintained or not available for examination as required by this paragraph and paragraph O(1) below.

O. (1) Except as provided in subparagraph (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to paragraph (N) 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, the Internal Revenue Service, or the Securities and Exchange Commission,

(b) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary,

(c) Any contributing employer to any participating Plan or any duly authorized representative of such employer, or an employee organization whose members are participants and beneficiaries of a participating Plan; or

(d) Any Plan participant or beneficiary of any participating Plan or any duly authorized representative of such Plan participant or beneficiary.

(2) None of the persons described in paragraph (1)(b)–(d) of this paragraph (O) shall be authorized to examine trade secrets of Ibbotson, or commercial or financial information which is privileged or confidential.

### III. Definitions

A. The term “Service” means the asset allocation service provided by Ibbotson to Plans which is accessed through computer software and other written communications in order to provide personalized recommendations to Plan participants regarding the allocation of their investments among the options offered under their Plan.

B. The term “Service Provider” means an entity that has been in the financial services business for at least three years, and during such period, has not been convicted of a felony offense involving abuse or misuse of such entity’s employee benefit plan position or employment, or any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary. Such entity is also described in one of the following categories:

1. A bank, savings and loan association, insurance company or registered investment adviser which meets the definition of a “qualified professional asset manager” (QPAM) set forth in section V(a) of Prohibited Transaction Exemption 84–14 (49 Fed. Reg. 9494 (Mar. 13, 1984)), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985) and in addition, has, as of the last day of its most recent fiscal year, total client assets under management and control in an amount not less than \$250 million; or

2. A broker dealer registered under the Securities Exchange Act of 1934, which has, as of the last day of its most recent fiscal year, \$1 million in shareholders’ or partners’ equity, and total client assets under management and control in an amount not less than \$250 million.

C. The term “independent fiduciary” means a Plan fiduciary which is independent of Ibbotson and its affiliates and independent of the Service Provider and its affiliates.

D. The term “affiliate” 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, relative of, or partner in any such person; and

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

E. The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

F. The term “Plan” means an employee benefit pension plan as defined in section 3(2) of the Act.

*Effective Date:* This exemption is effective for transactions occurring on or after January 22, 2001.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the notice of proposed exemption published at 66 FR 6689 (January 22, 2001).

#### *Written Comments*

The Department received one comment from interested persons which was submitted by Ibbotson (the Applicant).

Section I(C) describes the information that Ibbotson will provide Plan participants. Specifically, I(C)(3) states: “Access to Ibbotson’s web site or paper-based communications which will clearly indicate that the Plan participant is receiving the Service from Ibbotson, and that Ibbotson is independent of the Service Provider.” In its comments, the Applicant states that it has determined that access to the Service and to information relating to thereto and to Ibbotson will be housed on the website established and maintained by the Service Provider or by another entity on the Service Provider’s behalf, and not on a separate Ibbotson website. The Applicant represented in its application, and as stated in representations 5 and 6 of the Summary of Facts and Representations of the Notice of proposed exemption, all recommendations resulting from the use of the Service will be generated by Ibbotson’s proprietary forecasting engine, and that Ibbotson will always retain sole control of the content of the Service and the advice contained therein will monitor it. Thus, Ibbotson requests that the text of Section I(C)(3) be modified to read “Access to web site or paper-based communications which will clearly indicate that the Plan participant is receiving the Service from Ibbotson, and that Ibbotson is independent of the Service Provider.” The Department has made the requested

change. In light of this modification, the Department notes that the first sentence of the third paragraph of representation 5 has been changed to now read “If a Plan participant elects to receive his/her advice through the Internet, the Plan participant will access a website provided by the Service Provider or the Plan sponsor where the questionnaire and investment advice is housed.” The second sentence of this paragraph has been deleted.

Section I(C)(4) states “A tolerance questionnaire which must be completed prior to utilization of the Service.” The Applicant requests that the word “tolerance” be removed because it may be confusing to participants who might then expect to receive a separate questionnaire designed to evaluate risk tolerance. As stated in representation 5 of the Summary of Facts and Representations, the questionnaire is designed to evaluate a Plan participant’s anticipated time horizon to retirement, savings rate and other personal financial factors. The Department has made the requested revision.

In its comments, the Applicant requested that the effective date of the exemption be made retroactive to the date of publication of the proposed exemption in the **Federal Register**. The Department concurs, and has made the final exemption effective January 22, 2001.

Lastly, at the request of the Applicant, in the second paragraph of representation 8, the Department has replaced the number 40 with 70. Thus, it now reads: “Step 1: Generate return and inflation data. Ibbotson’s first step in this process is to generate hundreds of sets of asset return and inflation data covering the next 70 years.”

**FOR FURTHER INFORMATION CONTACT:**  
Allison Padams Lavigne, U.S.  
Department of Labor, (202)219–8971.  
(This is not a toll-free number.)

#### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does

it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 11th day of April, 2001.

**Ivan Strasfeld,**

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

[FR Doc. 01-9348 Filed 4-13-01; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10876, et al.]

#### Proposed Exemptions; Retirement Plan of Plumbers and Steamfitters Local No. 489 of Cumberland, Maryland (the Plan) et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the

comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, NW., Washington, DC 20210.

**Notice to Interested Persons:** Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

#### Retirement Plan of Plumbers and Steamfitters Local No. 489 of Cumberland, Maryland (the Plan) Located in Cumberland, Maryland

[Application No. D-10876]

#### Proposed Exemption

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) of certain real property (the Property) to the Plan by the Plumbers and Steamfitters Local No. 489 (the Union), a party in interest with respect to the Plan, provided the following conditions are satisfied:

(a) The terms and conditions of the transaction are no less favorable to the Plan than those which the Plan would receive in an arm's-length transaction with an unrelated party;

(b) The Sale is a one-time transaction for cash;

(c) The Plan incurs no expenses from the Sale;

(d) The Plan pays the lesser of \$100 or the fair market value of the Property; and

(e) An independent fiduciary will approve and enforce the terms of the proposed transaction, if granted.

#### Summary of Facts and Representations

1. The Plan is a multiemployer defined benefit pension plan. As of January 21, 2000, the estimated number of participants and beneficiaries affected by the proposed transaction is 199 and the approximate aggregate fair market value of the Plan's total assets is in excess of \$14,000,000. The Plan is a Taft-Hartley trust fund established pursuant section 302(c)(5) of the Labor Management Relations Act which is intended to qualify under section 401(a) of the Code. The Plan is administered by a four member board of trustees (the Trustees) of whom two members are selected by the Union. The Plan is for employees covered by collective bargaining agreements between the participating employers and the Union, and for certain employees of the Plan and the Union.

2. The Property is located at 2 Park Street, Cumberland, Maryland. The Property contains an area of 15,751