

investments by employee benefit plans for which Old AEW provided investment management services, as well as the investment by such plans in a multiple client commingled account managed by Old AEW, subject to certain conditions. These transactions were described in a notice of pendency that was published in the *Federal Register* on April 27, 1993 at 58 FR 25662. PTE 93-40, which was effective as of April 27, 1993, expired by operation of law, as discussed below. The proposed exemption would provide conditional relief identical to that provided by PTE 93-40 for a newly-merged entity known as "AEW Capital Management, L.P."

DATES: Written comments and/or requests for a public hearing should be received by the Department within 45 days of the date of publication of this notice of proposed exemption in the *Federal Register*. The proposed exemption, if granted, will be effective December 10, 1996.

ADDRESSES: All written comments and/or requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: Application No. D-10393. The application pertaining to the proposed 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-5507, 200 Constitution Avenue, NW., Washington, DC 20210.

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

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed exemption that would replace PTE 93-40. PTE 93-40 provided an exemption from certain prohibited transaction restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1) of the Code. The proposed exemption was requested in an application filed by AEW pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures (the Procedures) set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978,

D-10393

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10393]

AEW Capital Management, L.P. (AEW);
Located in Boston, Massachusetts

AGENCY: Pension and Welfare Benefits Administration.

ACTION: Notice of proposed exemption, U.S. Department of Labor to replace Prohibited Transaction Exemption (PTE) 93-40 involving Aldrich, Eastman & Waltch, L.P. and Aldrich, Eastman & Waltch, Inc. (collectively, Old AEW).

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption which, if granted, would replace PTE 93-40 (58 FR 34821, June 29, 1993). PTE 93-40 permitted the payment to Old AEW of certain investment fees and disposition fees relating to real estate

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section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed replacement exemption is being issued solely by the Department.

Specifically, PTE 93-40 provided exemptive relief from section 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)(E) of the Code, with respect to the payment by the plans of certain initial investment fees and disposition fees to Old AEW. In addition, PTE 93-40 provided exemptive relief from the restrictions of section 406(a)(1) (A) through (D) 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 (D) of the Code, with respect to the investment by the plans in a multiple client commingled account managed by Old AEW.

Subsequent to the granting of PTE 93-40, AEW informed the Department that, effective as of December 10, 1996, all the assets of Old AEW and certain of their affiliates had been transferred to the new AEW Capital Management, L.P. (denoted herein as AEW). All of the partnership interests of AEW are owned, directly or indirectly, by New England Investment Companies, a publicly held limited partnership, which in turn is approximately 53 percent owned by The Metropolitan Life Insurance Company. Because AEW is a newly created legal entity, the Department determined that PTE 93-40 was no longer effective as of December 10, 1996. Thus, the Department is of the view that PTE 93-40 would be unavailable for use by AEW with respect to the subject transactions.

AEW represents that, in all material respects, notwithstanding its changes in structure and ownership, AEW has otherwise continued to operate in the same manner, and with the same senior management personnel. AEW is an investment adviser registered under the Investment Advisers Act of 1940 whose client accounts continue to consist of either separate accounts for individual clients or commingled accounts for multiple clients. Accordingly, the Department has decided to publish a new exemption for AEW which, if granted, would replace PTE 93-40 and would have an effective date of December 10, 1996 for transactions described in PTE 93-40.

Notice to Interested Persons

In accordance with the requirements of the Investment Advisers Act of 1940,

Old AEW provided notice and obtained the consent of the independent fiduciary of each of its client plans with respect to its anticipated changes in structure and ownership. AEW will further provide written notice of the proposed exemption to same within 15 days of the date of publication of this notice of pendency in the **Federal Register**. Such notice will include a copy of this notice of pendency as published in the **Federal Register** and an explanation of the rights of interested persons to comment on and/or request a hearing with respect thereto. Written comments and hearing requests are due within 45 days of the date of publication of this notice in the **Federal Register**.

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) 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, a fiduciary to discharge his or her 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 requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) Before an exemption can be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plan; and

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. 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.

(4) The proposed exemption, if granted, will be applicable to the transactions previously described in

PTE 93-40 only if the conditions specified herein are satisfied.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the proposed replacement exemption to the address above, 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 address set forth above.

Proposed 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, the Department proposes to replace PTE 93-40 as follows:

Part I. Exemption for Payment of Certain Fees to AEW

The restrictions of section 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)(E) of the Code, shall not apply to the payment of certain initial investment fees (the Investment Fee) and disposition fees (the Disposition Fee) to AEW by employee benefit plans for which AEW provides investment management services (the Client Plans), pursuant to an investment management agreement (the Agreement) entered into between AEW and the Client Plans either individually, through the establishment of a single client separate account (Single Client Account), or collectively, as participants in a multiple client commingled account (Multiple Client Account), provided that the conditions set forth below in Part III are satisfied. (Single Client Accounts and Multiple Client Accounts are collectively referred to herein as Accounts).

Part II. Exemption for Investments in a Multiple Client Account

The restrictions of section 406(a)(1) (A) through (D) 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 (D) of the Code, shall not apply to any investment by a Client Plan in a Multiple Client Account managed by AEW, provided that the conditions set forth below in Part III are satisfied.

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Part III. General Conditions

(a) The investment of plan assets in a Single or Multiple Client Account, including the terms and payment of any Investment Fee and Disposition Fee, shall be approved in writing by a fiduciary of a Client Plan which is independent of AEW and its affiliates and, in the case of a Multiple Client Account for which ultimate investment discretion is exercised by a bank trustee, a fiduciary which is independent of the bank trustee and AEW and its affiliates (the Independent Fiduciary). Notwithstanding the foregoing, AEW may authorize the transfer of cash from a Single Client Account to a Multiple Client Account, provided that: (1) The Multiple Client Account has similar investment objectives and the identical fee structure as the Single Client Account; (2) the Agreement governing the Single Client Account authorizes AEW to invest in a Multiple Client Account; (3) AEW receives no additional fees from the Single Client Account for cash invested in the Multiple Client Account and no additional Investment Fee is paid with respect to cash transferred to the Multiple Client Account; (4) a binding commitment to make the transfer to the Multiple Client Account is made by AEW within six months of the Independent Fiduciary's decision to allocate assets to the Single Client Account or, in the event that AEW's binding commitment to make the transfer occurs more than six months after such Fiduciary's decision, AEW obtains an additional authorization from the Independent Fiduciary; and (5) each transfer of assets from the Single Client Account to the Multiple Client Account occurs within 60 days of the actual transfer of such assets to the Single Client Account.

(b) The terms of any investment in an Account and of any Investment Fee or Disposition Fee shall be at least as favorable to the Client Plans as those obtainable in arm's length transactions between unrelated parties.

(c) At the time any Account is established and at the time of any subsequent investment of assets (including the reinvestment of assets) in such Account:

(1) Each Client Plan shall have total net assets with a value in excess of \$50 million; and

(2) No Client Plan shall invest, in the aggregate, more than five percent of its total assets in any Account or more than 0 percent of its total assets in all Accounts established by AEW.

(d) Prior to making an investment in any Account, the Independent Fiduciary

of each Client Plan investing in an Account shall receive offering materials from AEW which disclose all material facts concerning the purpose, structure, and operation of the Account, including any fee arrangements.

(e) With respect to its ongoing participation in an Account, each Client Plan shall receive the following written information from AEW:

(1) Audited financial statements of the Account prepared by independent public accountants selected by AEW no later than 90 days after the end of the fiscal year of the Account;

(2) Quarterly and annual reports prepared by AEW relating to the overall financial position and operating results of the Account and, in the case of a Multiple Client Account, the value of each Client Plan's interest in the Account. Each such report shall include a statement regarding the amount of fees paid to AEW during the period covered by such report;

(3) Annual appraisals indicating the fair market value of the Account's assets as established by an M.A.I. licensed real estate appraiser independent of AEW and its affiliates which has been approved by the Client Plan prior to investing in the Account, provided that if a new appraiser for a property is chosen by AEW, the appraiser shall be approved by the Independent Fiduciary of the Client Plan or the responsible independent fiduciaries of Client Plans and other authorized persons acting for investors in a Multiple Client Account (the Responsible Independent Fiduciaries, as defined in Part IV(e) below), prior to any valuation of such property; and

(4) In the case of any Multiple Client Account, a list of all other investors in the Account.

(f) The total fees paid to AEW shall constitute no more than reasonable compensation.

(g) The Investment Fee shall be equal to a specified percentage of the net value of the Client Plan assets allocated to the Account, which shall be payable either:

(1) At the time assets are deposited (or deemed deposited in the case of reinvestment of assets) in the Account; or

(2) In periodic installments, the amount (as a percentage of the aggregate Investment Fee) and timing of which have been specified in advance based on the percentage of the Client Plan's assets invested in real property as of the payment date, provided that (i) the installment period is no less than three months, and (ii) if the percentage of the Client Plan assets which have actually been invested by a payment date is less

than the percentage required for the aggregate Investment Fee to be paid in full through that date (both determined on a cumulative basis), the Investment Fee paid on such date shall be reduced by the amount necessary to cause the percentage of the aggregate Investment Fee paid to equal only the percentage of the Client Plan assets actually invested by that date. The unpaid portion of such Investment Fee shall be deferred to and payable on a cumulative basis on the next scheduled payment date (subject to the percentage limitation described in the preceding sentence).

(h) The Disposition Fee shall be payable after the Client Plan has received distributions from the Account in excess of an amount equal to 100 percent of its invested capital plus a pre-specified annual compounded cumulative rate of return (the Threshold Amount), except that in the case of AEW's removal or resignation, AEW shall be entitled to receive a Disposition Fee payable either at the time of removal or, in the event of AEW's resignation, upon sale of the assets to which the fee is allocable or upon termination of the Account as the case may be, subject to the requirements of paragraph (k) below, as determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value (in accordance with independent appraisals), only to the extent that the Client Plan would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of AEW's removal or resignation. Both the Threshold Amount and the amount of the Disposition Fee, expressed as a percentage of the amount distributed (or deemed distributed) from the Account in excess of the Threshold Amount, shall be established by the Agreement and agreed to by the Independent Fiduciary of the Client Plan.

(i) The Threshold Amount for any Disposition Fee shall include at least a minimum rate of return to the Client Plan, as defined below in Part IV(f).

(j) For any sale of property in an Account which shall give rise to the payment of a Disposition Fee to AEW prior to the termination of the Account, the sales price of the property shall be at least equal to a target amount (the Target Amount), as defined in Part IV(g), in order for AEW to sell the property and receive its Disposition Fee. If the proposed sales price of the property is less than the Target Amount, the proposed sale shall be disclosed to and approved by the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for

a Multiple Client Account, in which event AEW shall be entitled to sell the property and receive its Disposition Fee. If the proposed sales price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, AEW shall still have the authority to sell the property, if the Agreement provides AEW with complete investment discretion for the Account, provided that the Disposition Fee which would have been payable to AEW is paid only at the termination of the Account.

(k) In the event AEW resigns as investment manager for an Account, the Disposition Fee shall be calculated at the time of resignation as described above in paragraph (h) and allocated to each property based upon the relationship that the appraised value of such property bears to the total appraised value of the Account. Each amount arrived at through this calculation shall be multiplied by a fraction, the numerator of which shall be the actual sales price received by the Account on disposition of the property (or in the case of a property which has not been sold prior to the termination of the Account, the appraised value of the property as of the termination date) and to the denominator of which shall be the appraised value of the property which was used in connection with determining the Disposition Fee at the time of resignation, provided that this fraction shall never exceed 1.0. The resulting amount for each property shall be the Disposition Fee payable to AEW upon sale of such property or termination of the Account, as the case may be.

(l) AEW or its affiliates shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (m) of this Part III 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 AEW 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 AEW, shall be subject to the civil penalty that may be assessed under section 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 (m) below.

(m)(1) Except as provided in paragraph (m)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (l) of this Part III shall be unconditionally available at their

customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of a Client Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any contributing employer to a Client Plan or any duly authorized employee or representative of such employer; and

(iv) Any participant or beneficiary of a Client Plan or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraph (m)(1) (ii)-(iv) shall be authorized to examine the trade secrets of AEW and its affiliates or any commercial or financial information which is privileged or confidential.

Part IV. Definitions

For 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, or partner of 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 "management services" means:

(1) Development of an investment strategy for the Account and identification of suitable real estate-related investments;

(2) Directing the investments of the assets of the Account, including the determination of the structure of each investment, the negotiation of its terms and conditions and the performance of all requisite due diligence;

(3) Timing and directing the disposition of any assets of the Account and directing the liquidation of the Account;

(4) Administration of the overall operation of the investments of the Account, including all applicable leasing, management, financing, and capital improvement decisions;

(5) Establishing and maintaining accounting records of the Accounts and distributing reports to Client Plans as described in Part III; and

(6) Selecting and directing all service providers of ancillary services as defined in this Part IV.

(d) The term "ancillary services" means:

(1) Legal services;

(2) Services of architects, designers, engineers, hazardous materials consultants, contractors, leasing agents, real estate brokers, and others in connection with the acquisition, construction, improvement, management and disposition of investments in real property;

(3) Insurance brokerage and consultation services;

(4) Services of independent auditors and accountants in connection with auditing the books and records of the Accounts and preparing tax returns;

(5) Appraisal and mortgage brokerage services; and

(6) Services for the development of income-producing real property.

(e) The term "Responsible Independent Fiduciaries" means with respect to a Multiple Client Account the Independent Fiduciary of each Client Plan invested in the Account and other authorized persons acting for investors in the Account which are not employee benefit plans as defined under section 3(3) of the Act (such as governmental plans, university endowment funds, etc.) that are independent of AEW and its affiliates and are persons other than the bank trustee for the Account, and that collectively hold at least 50% of the interests in the Account.

(f) The term "Threshold Amount" means with respect to any Disposition Fee an amount which equals all of a Client Plan's capital invested in an Account plus a pre-specified annual compounded cumulative rate of return that is at least a minimum rate of return determined as follows:

(1) A non-fixed rate which is at least equal to the rate of change in the consumer price index (CPI) during the period from the deposit of the Client Plan's assets into the Account until distributions of the Client Plan's assets from the Account equal or exceed the Threshold Amount; or

(2) A fixed rate which is at least equal to the rate of change in the CPI over some period of time specified in the Agreement, which shall not exceed 10 years.

(g) The term "Target Amount" means a value assigned to each property in the Account established by AEW either (1) at the time the property is acquired, by mutual agreement between AEW and the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, or (2) pursuant to an objective formula approved by such Fiduciaries at the time the Account is established. However, in no event will such value be less than the acquisition price of the property.