exemption from the prohibited transaction restrictions of section 408 of ERISA, and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1984 (the Code) by reason of section 4975(c)(1)(A) of the Code.\(^1\)

**I. Background**

PTE 77-9 was initially granted on June 24, 1977 (42 FR 33290). On that same date, additional conditions were proposed to be added to the exemption (42 FR 33290). The proposed additional conditions, together with other proposed amendments (see 43 FR 19334, April 28, 1978), were the subject of a public hearing on July 20, 1978. The exemption, as amended, was published in the Federal Register on January 5, 1979 (44 FR 1479). Subsequently, a change in the effective date of one of the conditions of PTE 77-9 was proposed (see 4 FR 32310, June 5, 1979) and adopted (see 44 FR 32256, September 7, 1979).

PTE 77-9 provides that insurance agents and brokers, pension consultants, insurance companies, investment companies, and investment company principal underwriters. The proposed amendments are in response to requests by the applicant that the Department of Labor (the Department) permit certain transactions similar to those currently addressed in PTE 77-9. If the Department permits such transactions, it will also permit those transactions to be engaged in by employees of such plans, and persons engaging in transactions to which the exemption applies.

**EFFECTIVE DATE:** If adopted, this proposed exemption would be effective for transactions occurring after October 31, 1977.

**DATE:** Written comments and requests for public hearing must be received by June 7, 1982.

**ADDRESS:** Written comments and requests for a public hearing (preferably at least three copies) should be sent to: Office of Fiduciary Standards, Pension and Welfare Benefits Programs, Room C-4526, U.S. Department of Labor, Washington, D.C. 20210.

Attention: Amendments to Prohibited Transaction Exemption 77-9.

The above-referenced applications and all comments and requests for a public hearing will be available for public inspection in the Public Documents Room, Pension and Welfare Benefits Programs, U.S. Department of Labor, Room N-4077, 20 Constitution Avenue, N.W., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Mary O. Lin, Esq., Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, D.C. 20216; telephone 202-323-6658. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of proposed amendments to Prohibited Transaction Exemption 77-9 (PTE 77-9). PTE 77-9 provides an exemption from the prohibited transaction provisions of the Act for certain transactions between an employee benefit plan and entities within an investment company complex when an entity within the complex serves as a non-discretionary trustee or custodian with respect to the plan.

Generally, the subject transactions permitted to the purchase, redemption, or exchange of investment company securities, the sale of insurance or annuity contracts, and the provision of various services.

In a letter dated May 10, 1979, ICI made a new submission with respect to the requested exemption, in which it requested an exemption for (1) the provision to a plan of "non-discretionary trust or custodial services" by an investment company, and the receipt of fees therefor, and (2) any other transaction which would be permissible under the Act or the Code but for the provision of the non-discretionary trust or custodial services to a plan. In support of its request, ICI states that investment company complexes customarily internalize trustee or custodian functions by means of a bank or non-bank subsidiary. ICI further suggests that requiring a plan holding shares of an investment company to retain a custodian unaffiliated with such investment company increases the expenses of the plan and reduces the efficiency of the plan's transactions with respect to securities issued by that investment company. ICI has further supplemented its application with a letter dated April 21, 1980, which listed typical nondiscretionary trust or custodial services.\(^1\)

United States. Its membership comprises numerous investment companies, their investment advisors, and their principal underwriters.

\(^1\) In the April 21, 1980, letter, ICI states that "non-discretionary trust or custodial services" include:

(a) Open and maintain plan accounts and in the case of defined contribution plans, individual participant accounts, perform all instructions.

(b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer's instructions.

(c) Invest contributions and other plan assets in shares of a mutual fund or fund or other products such as insurance or annuity contracts designed by the employer, plan trustees, or participants, and reinvest dividends and other distributions in such investments.

(d) Provide or maintain a "designated beneficiary" form and make distributions from the trust or custodial accounts to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, or participants.

\(^2\) The Investment Company Institute is a trade association for the mutual fund industry of the United States. Its membership comprises numerous investment companies, their investment advisors, and their principal underwriters.
All of the transactions specifically described in ICI's application (except for the provision of certain services to a plan, discussed below) would be exempt from the prohibited transaction rules by PTE 77-9, but for the provision of non-discretionary trust or custodial services to the plan participant in the transaction. An entity within the investment company complex with respect to the transactions described in paragraphs III(a) through III(d) of PTE 77-9, paragraph V(a) limits the exemption to situations where, among other things, "(i) the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter is not * * * a trustee of the plan." Limited relief for transactions between an investment company complex and a plan that utilizes the custodial services provided by the complex is provided by paragraph III(f) of PTE 77-9, which exempts (i) the purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, and investment company or an investment company principal underwriter, when such investment company, principal underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan including the provision in connection therewith of non-discretionary trust or custodial services, if any, with respect to the plan.

However, since paragraph III(f) is limited to transactions involving plans that adopt a complex's master or prototype plan and where, moreover, the investment company complex provides no services to the plan other than non-discretionary trust or custodial services in connection with sponsorship of the plan, it is not available to a large segment of the investment industry.

B. Application No. D-1913. Investors Diversified Services Inc. (IDS) has also requested a class exemption from the prohibited transaction provisions of the Act. This application was made with respect to a broad range of transactions involving employee benefit plans and investment company complexes which provide (1) non-discretionary trust or custodial services, and (2) actuarial and other consulting services, to such plans.

As is the case with the ICI application, the exemption relief for the proposed IBS application (except for the provision of certain services to a plan, discussed below) would be available under PTE 77-9, but for the provision of non-discretionary trust or custodial services to plans. Accordingly, if the Department's proposal is adopted, the exemption in paragraph III(f) will be available if the relationship to the plan of the investment company, its principal underwriter, or its investment company principal underwriter arises solely from the sponsorship of a master or prototype plan, or from the provision of non-discretionary trust or custodial services, or from both. The Department tentatively believes that this modification will not adversely affect the protections afforded by the exemption to plan participants.

As is also noted above, the exemptive relief provided for transactions described in paragraphs III(a) through (d) is not available if the plan is an affiliate thereof, or if a non-discretionary trustee with respect to the plan, provided that the non-discretionary trustee does not render investment advice with respect to any assets of the plan.

In the preamble to the adoption of a previous amendment to PTE 77-9, the Department declined to amend paragraph V(a) in the manner now...
services is permitted by, although subject to the limitations contained in, section 408(b)(1) of the Act (relating to the provision of services between a plan and a fiduciary) and the Department's regulations thereunder. See 29 CFR 2550.408(b)-2. Since exemptive relief for provision of such services is available under section 408(b)(2), under conditions that appear to the Department to be appropriate, the Department is not persuaded of the necessity for, and has not proposed herein, additional relief in connection with such services.

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 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 duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent manner in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a)(4) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of 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(s) and of the participants and beneficiaries of the plan(s) and protective of the rights of the participants and beneficiaries of the plan(s); 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 and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Written Comments and Request for a Hearing

All interested persons are invited to submit written comments or requests for a hearing on the proposed amendments to the address and within the time period set forth above. All comments will be made a part of the record. Comments are requests for a hearing shall state the reasons for the writer's interest in the proposed amendments. Comments and requests for a hearing received will be available for inspection at the address set forth above.

Proposed Amendment

On the basis of the applications referred to and summarized above, the Department proposes to amend the Prohibited Transaction Exemption 77-9 by revising paragraphs III(f) and V(a), and adding new paragraph V(g), to read as set forth below, pursuant to the authority conferred under section 408(a) of the Act, and in accordance with ERISA, Procedure 75-1 (40 FR 16471, April 20, 1975).

"Exemption"

"Section II—Prospective Exemption. The provisions of section 406(a)(1)(A), (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section 13 of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in section IV and V are met.

"Section II—Transactions."

"(1) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company principal underwriter, when such investment company or principal underwriter is an investment company principal underwriter or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a master or prototype plan; or (2) the provision of non-discretionary trust services to the plan; or (3) both (1) and (2).

"Section V—Conditions for Transactions Described in Section II(a) through (d)."

(a) the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter, when such investment company or principal underwriter is not (1) a trustee of the plan (other than a non-discretionary trustee who does not render investment advice with respect to any assets of the plan); (2) a plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g)(2) of the Code); (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of any assets of the plan on a discretionary basis; or (4) for transactions described in section II(b) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan.

"Section VI—Definitions. For the purposes of this exemption:

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The term "nondiscretionary trust services" means custodial services and services ancillary to custodial services, none of which services are discretionary, and the term "nondiscretionary trustee" of a plan means a trustee whose powers and duties with respect to any assets of the plan are limited to (1) the provision of nondiscretionary trust services to the plan, and (2) duties imposed on the trustee by any provision or provisions of the Act or the Code. For purposes of this exemption, a person who is otherwise a nondiscretionary trustee will not fail to be a nondiscretionary trustee solely by reason of his having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

Signed at Washington, D.C. this 31st day of March, 1982.

Jeffrey N. Clayton,
Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

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