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: 2011–01, Wasatch Advisers, Inc., D–11400; 2011–02, Morgan Stanley & Co. Incorporated, D–11489; and 2011–03, The West Coast Bancorp 401(k) Plan (the Plan), D–11611: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption 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 applicant has represented that it has 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 exemption.

The notice of proposed exemption was issued and the exemption is 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 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.

Wasatch Advisers, Inc.; Located in Salt Lake City, Utah

[Prohibited Transaction Exemption 2011–01; Exemption Application Number D–11400]

Exemption

Section I. Exemption and Conditions

Wasatch Advisors, Inc. (Wasatch) shall not be precluded from qualifying as a "qualified professional asset manager" (a QPAM) pursuant to Prohibited Transaction Exemption 84–14 (hereinafter, either PTE 84–14 or the QPAM Class Exemption) [1] for the period from April 19, 2006 through July 13, 2007, solely because of its failure to satisfy the shareholders' equity requirement of PTE 84–14, section V(a)(4) (the Shareholders' Equity Requirement), provided that the following conditions were met:

(a) Upon learning that it did not have adequate shareholders' equity to satisfy the Shareholders' Equity Requirement, Wasatch took all steps necessary to protect the interests of its ERISA Clients (as defined in section II(b)), including obtaining a letter of credit (the Letter of Credit);

(b) The Letter of Credit was an irrevocable standby letter of credit for $1,000,000, structured in a manner that covered any ERISA Claim (as defined in section II(a)) occurring from April 19, 2006 (the date Wasatch learned it did not satisfy the Shareholders' Equity Requirement) through July 13, 2007 (the date on which Wasatch determined it satisfied the Shareholders' Equity Requirement);

(c) The Letter of Credit was issued by Zions First National Bank, which was independent of Wasatch and regulated by federal banking authorities;

(d) The Letter of Credit was held by Zions First National Bank for the benefit of all ERISA Clients;

(e) The Letter of Credit was payable on demand solely to an ERISA Client (or its agent) if the ERISA Client provided:

(1) A certified copy of the final order for damages against Wasatch based on an ERISA Claim from a court of competent jurisdiction with all rights of appeal having expired or having been exhausted; or a true copy of a settlement agreement between the ERISA Client and Wasatch providing for damages to the ERISA Client with respect to an ERISA Claim;

(2) In the case of a final court judgment, a certified true copy of a Sheriff's or Marshall's levy and execution on the judgment, returned unsatisfied, or such other documentation, certified by an officer of the court in which the judgment was entered, stating that the judgment remains unsatisfied following attempts to collect the judgment in accordance with local court rules; and

(3) A certificate of an authorized representative of the ERISA Client stating the amount of the judgment or settlement which remains unsatisfied;

(f) From 1996 through 2007, Joseph S. Call, a certified public accountant who is independent of Wasatch, performed a yearly audit on Wasatch, using generally acceptable accounting principles to quantify Wasatch's shareholders' equity; and

(g) From 1996 through 2007, Wasatch's reliance on Mr. Call's determinations as to the dollar amount relevant to the Shareholders' Equity Requirement was reasonable.

Section II. Definitions

(a) The term "ERISA Claim" means: a civil proceeding for monetary relief which is commenced by the filing or service of a civil complaint or similar pleading or a request for monetary relief which could have been the subject of such a complaint or pleading but for a settlement agreement, filed against Wasatch or with respect to which a settlement is reached prior to July 13, 2007, by reason of Wasatch's breach or violation of a duty described in sections 404 or 406 of ERISA;

(b) The term "ERISA Client" means any employee benefit plan covered by Title I of ERISA to which Wasatch provides or provided investment management services on or before July 13, 2007;

(c) A person will be "independent" of another person only if:

(i) For purposes of this exemption, such person is not an affiliate of that other person; and

(ii) The other person, or an affiliate thereof, is not a fiduciary that has investment management authority or renders investment advice with respect to the assets of such person;

(d) An "affiliate" of a person means:

(i) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term

[1] 49 FR 9494 (Mar. 13, 1984), as corrected at 50 FR 41430 (Oct. 10, 1985), and amended at 70 FR 49305 (Aug. 23, 2005) and at 75 FR 38837 (Jul. 6, 2010).

"control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(ii) Any officer, director, employee or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

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

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 in the **Federal Register** on September 16, 2010 at 75 FR 56569.

FOR FURTHER INFORMATION CONTACT: Chris Motta of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

Morgan Stanley & Co. Incorporated Located in New York, New York

[Prohibited Transaction Exemption 2011–02; Exemption Application No. D–11489]

Exemption

Section I. Transactions Involving Plans Described in Both Title I and Title II of ERISA

The restrictions of section 406(a)(1)(A) through (D) and section 406(b) of ERISA, and the sanctions resulting from the application of sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met: [2]

(a) The sale or exchange of an "Auction Rate Security" (as defined in Section IV (b)) by a "Plan" (as defined in Section IV(h)) to the "Sponsor" (as defined in Section IV (g)) of such Plan; or

(b) A lending of money or other extension of credit to a Plan in connection with the holding of an Auction Rate Security by the Plan, from (1) Morgan Stanley & Co. Incorporated or an "Affiliate" (Morgan Stanley); (2) an "Introducing Broker" (as defined in Section IV (f)); or (3) a "Clearing Broker" (as defined in Section IV (d))—where the loan is (i) repaid in accordance with its terms, and (ii) guaranteed by the Plan Sponsor.

[2] For purposes of this exemption, references to section 406 of ERISA should be read to refer also to the corresponding provisions of section 4975 of the Code.

II. Transactions Involving Plans Described in Title II of ERISA Only

The sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met:

(a) The sale or exchange of an Auction Rate Security by a "Title II-Only Plan" (as defined in Section IV(i)) to the "Beneficial Owner" (as defined in Section IV(c)) of such Plan; or

(b) A lending of money or other extension of credit to a Title II-Only Plan in connection with the holding of an Auction Rate Security by the Title II-Only Plan, from (1) Morgan Stanley; (2) an Introducing Broker; or (3) a Clearing Broker—where the loan is (i) repaid in accordance with its terms, and (ii) guaranteed by the Beneficial Owner.

III. Conditions

(a) Morgan Stanley acted as a broker or dealer, non-bank custodian, or fiduciary in connection with the acquisition or holding of the Auction Rate Security that is the subject of the transaction;

(b) For transactions involving a Plan (including a Title II-Only Plan) not sponsored by Morgan Stanley for its own employees, the decision to enter into the transaction is made by a Plan fiduciary who is "Independent" (as defined in Section IV(e)) of Morgan Stanley. Notwithstanding the foregoing, an employee of Morgan Stanley who is the Beneficial Owner of a Title II-Only Plan may direct such Plan to engage in a transaction described in Section II, if all of the other conditions of this Section III have been met;

(c) The last auction for the Auction Rate Security was unsuccessful;

(d) The Plan does not waive any rights or claims in connection with the loan or sale as a condition of engaging in the above described transaction;

(e) The Plan does not pay any fees or commissions in connection with the transaction;

(f) The transaction is not part of an arrangement, agreement, or understanding designed to benefit a party in interest or disqualified person;

(g) With respect to any sale described in Section I(a) or Section II(a):

(1) The sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security; and

(2) For purposes of the sale, the Auction Rate Security is valued at par, plus any accrued but unpaid interest; [3]

(h) With respect to an in-kind exchange described in Section (I)(a) or Section II(a), the exchange involves the transfer by a Plan of an Auction Rate Security in return for a "Delivered Security," as such term is defined in Section IV(j), where:

(1) The exchange is unconditional;

(2) For purposes of the exchange, the Auction Rate Security is valued at par, plus any accrued but unpaid interest;

(3) The Delivered Security is valued at fair market value, as determined at the time of the in-kind exchange by a third party pricing service or other objective source;

(4) The Delivered Security is appropriate for the Plan and is a security that the Plan is otherwise permitted to hold under applicable law; [4]

(5) The total value of the Auction Rate Security (*i.e.,* par, plus any accrued but unpaid interest) is equal to the fair market value of the Delivered Security;

(i) With respect to a loan described in Section I(b) or II(b):

(1) The loan is documented in a written agreement containing all of the material terms of the loan, including the consequences of default;

(2) The Plan does not pay an interest rate that exceeds one of the following three rates as of the commencement of the loan:

(A) The coupon rate for the Auction Rate Security;

[3] The Department notes that this exemption does not address tax issues. The Department has been informed by the Internal Revenue Service and the Department of the Treasury that they are considering providing limited relief from the requirements of sections 72(t)(4), 401(a)(9), and 4974 of the Code with respect to retirement plans that hold Auction Rate Securities. The Department has also been informed by the Internal Revenue Service that if Auction Rate Securities are purchased from a Plan in a transaction described in Sections I and II at a price that exceeds the fair market value of those securities, then the excess value would be treated as a contribution for purposes of applying applicable contribution and deduction limits under sections 219, 404, 408, and 415 of the Code.

[4] The Department notes that ERISA's general standards of fiduciary conduct would also apply to the transactions described herein. In this regard, section 404 requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things: (1) The decision to exchange an Auction Rate Security for a Delivered Security; and (2) the negotiation of the terms of such exchange (or a cash sale or loan described above), including the pricing of such securities. The Department further emphasizes that it expects plan fiduciaries, prior to entering into any of the transactions, to fully understand the risks associated with these types of transactions, following disclosure by Morgan Stanley of all the relevant information.

(B) The Federal Funds Rate; or
(C) The Prime Rate;
(3) The loan is unsecured; and
(4) The amount of the loan is not more than the total par value of the Auction Rate Securities held by the Plan.

(j) Morgan Stanley maintains, or causes to be maintained, for a period of at least six (6) years from the date of a covered transaction, such records as are necessary to enable the persons described in paragraph (k), below, to determine whether the conditions of this exemption, if granted, have been met, except that—

(1) No party in interest with respect to a Plan that engages in a covered transaction, other than Morgan Stanley shall be subject to a civil penalty under section 502(i) of ERISA or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination, as required, below, by paragraph (k); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Morgan Stanley, such records are lost or destroyed prior to the end of the six-year period; and

(k)(1) Except as provided in subparagraph (2), below, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of ERISA, the records referred to in paragraph (j), above, are unconditionally available at their customary location for examination during normal business hours by—

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

(B) The fiduciary of any Plan, including any IRA owner, that engages in a covered transaction, or any duly authorized employee or representative of such fiduciary; or

(C) The employer of participants and beneficiaries and the employee organization whose members are covered by the Plan that engages in a covered transaction, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraph (k)(1)(B) or (C) shall be authorized to examine trade secrets of Morgan Stanley, or commercial or financial information which is privileged or confidential; and

(3) Should Morgan Stanley refuse to disclose information on the basis that such information is exempt from disclosure, Morgan Stanley shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

IV. Definitions

(a) The term "Affiliate" means any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "Auction Rate Security" or "ARS" means a security:

(1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) With an interest rate or dividend that is reset at specific intervals through a Dutch Auction process;

(c) The term "Beneficial Owner" means the individual for whose benefit the Title II-Only Plan is established and includes a relative or family trust with respect to such individual;

(d) The term "Clearing Broker" means a member of a securities exchange who acts as a liaison between an investor and a clearing corporation, helps to ensure that a trade is settled appropriately, ensures that the transaction is successfully completed, and is responsible for maintaining the paper work associated with the clearing and execution of a transaction;

(e) The term "Independent" means a person who is (1) not Morgan Stanley or an Affiliate, and (2) not a "relative" (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(f) The term "Introducing Broker" means a registered broker who is able to perform all the functions of a broker, except for the ability to accept money, securities, or property from a customer;

(g) The term "Sponsor" means a plan sponsor as described in section 3(16)(B) of ERISA and any Affiliates;

(h) The term "Plan" means any plan described in section 3(3) of ERISA and/or section 4975(e)(1) of the Code;

(i) The term "Title II-Only Plan" means any plan described in section 4975(e)(1) of the Code that is not an employee benefit plan covered by Title I of ERISA;

(j) The term "Delivered Security" means a security that is (1) Listed on a national securities exchange (excluding OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); or (2) A U.S. Treasury obligation; or (3) A fixed income security that has a rating at the time of the exchange that is in one of the two highest generic rating categories from an Independent nationally recognized statistical rating organization (*e.g.,* a highly rated municipal bond or a highly rated corporate bond); or (4) A certificate of deposit insured by the Federal Deposit Insurance Corporation. Notwithstanding the above, the term "Delivered Security" shall not include any Auction Rate Security, or any related Auction Rate Security, including derivatives or securities materially comprised of Auction Rate Securities or any illiquid securities.

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 on July 2, 1010 at 75 FR 38557. In addition, a notice of technical correction was published on July 12, 2010 at 75 FR 39707.

Written Comments

The Department received one written comment with respect to the notice of proposed exemption (Proposal). The comment was submitted by the applicant, who requests certain modifications to the exemption language.

Specifically, the applicant requests deletion of the recordkeeping and record access conditions in Section III(j) and (k) of the Proposal. The applicant argues that the Proposal covers transactions that are identical to the those covered in certain individual prohibited transaction exemptions that the Department has previously granted and that these exemptions do not contain any recordkeeping and record access conditions.

In the event, however, that the Department decides to impose the aforementioned conditions, the applicant requests the following modifications. (1) Because the covered transactions are not pursuant to a settlement with the U.S. Securities and Exchange Commission (SEC), the applicant requests deletion of the reference to the SEC in Section III(k)(1)(A); (2) The applicant objects to permitting access to its records not only by plan fiduciaries but all clients as "unreasonable, unwarranted and burdensome," and requests that Section III(k)(1)(B) be modified to limit record access to fiduciaries of plans that engage in a covered transaction and then only to their own plan's records; (3) The applicant objects to permitting access to its records not only by plan sponsors but to all plan participants and their representatives as an "unwarranted burden" and one that "makes absolutely no sense in the context of an IRA," and requests deletion of the reference to participants and their representatives from Section III(k)(1)(C); (4) The applicant objects to the 30-day deadline for providing a written explanation for any refusal to disclose information that

it believes is exempt from disclosure on grounds that "it is practically impossible to meet this deadline, because the request would likely be received in a branch office and would have to be forwarded to headquarters for analysis and determination whether in fact the information sought should be disclosed." The applicant therefore requests that Section III(k)(3) be modified to provide for a 60-day deadline; and 5) Finally, the applicant objects to the requirement in Section III(k)(3) that the applicant's written explanation for any refusal to disclose information to a requesting person include a notice advising that the Department may request such information on grounds that "such advice may mislead the person into thinking that the Department could request the information on behalf of the person." The applicant therefore requests deletion of this requirement from Section III(k)(3).

In response to the applicant's written comment, the Department notes that an individual prohibited transaction exemption is granted on a particular set of facts and circumstances to a particular applicant and may not be relied upon by any other entity. Thus, the Department is not persuaded by the applicant's argument that, because the recordkeeping and record access conditions were not contained in certain 2009 individual exemptions, therefore such conditions should not be imposed on the applicant. Moreover, the Department notes that the record-keeping and record access conditions are, in general, contained in a number of other similar recently issued exemptions during 2010 involving ARS.

Regarding the applicant's requested modification to proposed Section III(k)(1)(B), however, the Department agrees that access to the records should be limited to the fiduciary of the Plan involved in the covered transaction, and, accordingly, has modified this condition.

Regarding the applicant's requested modification to proposed Section III(k)(1)(C), the Department disagrees with the applicant's objection to this condition because it refers to record access by "any employer of participants and beneficiaries" including any authorized employee—not directly by all participants and their representatives. Although the Department has not made this requested change, it has revised the language contained in Section III(k)(1)(C) so it is parallel to the language contained in Section III(k)(1)(B). The Department further notes that Section III(k)(1)(C) has no relevance in the context of a Title II only IRA since there is no employer to request access to records.

Accordingly, except as indicated, the Department has not adopted the applicant's alternative requests either to delete the recordkeeping and record access conditions in Section III(j) and (k), or to modify the language of those conditions in the final exemption and has granted the exemption as proposed.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 693–8557. (This is not a toll-free number.)

The West Coast Bancorp 401(k) Plan (the Plan) Located in Lake Oswego, Oregon

[Prohibited Transaction Exemption 2011–03; Exemption Application No. D–11611]

Exemption

The restrictions of sections 406(a)(1)(A) and (E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) and the sanctions resulting from the application of section 4975(c)(1)(A) and (E) of the Code, shall not apply, effective January 29, 2010, to: (1) The acquisition of stock rights (the Rights) by the Plan issued by the West Coast Bancorp, Inc. (Bancorp), the Plan sponsor and a party in interest with respect to the Plan under the terms and conditions of a Rights offering (the Offering); and (2) the holding of the Rights by the Plan until their expiration, during the subscription period of the Offering, provided that the following conditions were met:

(a) The receipt of the Rights by the Plan occurred in connection with the Offering and was made available by Bancorp on the same terms to all shareholders (the Shareholders) of the common stock of Bancorp (Common Stock);

(b) The acquisition of the Rights by the Plan resulted from an independent act of Bancorp as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to such acquisition;

(c) All Shareholders of Common Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Common Stock held by such Shareholders;

(d) All decisions regarding the Rights held by the Plan were made by the individual Plan participants whose accounts in the Plan received the Rights, in accordance with the provisions under the Plan for individually-directed investment of such account; and

(e) The Plan did not pay any fees or commissions in connection with the acquisition and or holding of the Rights.

DATES: *Effective Date:* This exemption is effective as of January 29, 2010, the commencement date of the Offering.

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 on October 6, 2010 at 75 FR 61953.

FOR FURTHER INFORMATION CONTACT: Mr. Anh-Viet Ly of the Department at (202) 693–8648. (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 exemption 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) This exemption is 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 this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 13th day of January 2011.

Ivan Strasfeld,

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

[FR Doc. 2011–975 Filed 1–18–11; 8:45 am]

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