

*Mine:* No. 58 Mine, MSHA I.D. No. 46-08884, located in McDowell County, West Virginia.

*Regulation Affected:* 30 CFR 75.1101-1(b) (Type and quality of firefighting equipment).

*Modification Request:* The petitioner requests a modification of the existing standard to permit weekly inspection and functional testing of its complete deluge-type water spray system and removal of blow-off dust cover from the nozzles. The petitioner states that the results of the examination and functional test and any malfunction or clogged nozzle detected, will be recorded in a book and maintained on the surface for that purpose. The petitioner states that the record will be retained at the mine for one year. The petitioner further states that: (1) Blow-off dust covers are currently provided for each nozzle; (2) in view of frequent inspections and functional testing of the system, the dust covers are not necessary because nozzles can be maintained in an unclogged condition through weekly use; and (3) it is burdensome to recap the large number of covers weekly after each inspection and functional test. The petitioner asserts that the alternative method will at all times guarantee no less than the same measure of protection afforded the miners employed at the No. 58 Mine by the existing standard.

Dated: December 15, 2009.

**Patricia W. Silvey,**

*Director, Office of Standards, Regulations and Variances.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Prohibited Transaction Exemptions and Grant of Individual Exemptions Involving: 2009-33, Cotter Merchandise Storage Company Defined Benefit Pension Plan (the Plan), D-11423; and 2009-34, Unaka Company Incorporated Employees Profit Sharing Plan (the Plan), D-11445

**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).

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.

### Exemption

The restrictions of sections 406(a), 406(b) 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 (1) the proposed sale by the Plan to the Cotter Merchandise Storage Company (Cotter or the Applicant), the Plan sponsor and a party in interest with respect to the Plan, of certain promissory notes (the Notes) which are currently held by the

Plan; and (2) the assignment, by the Plan to Cotter, of a civil judgment (the Judgment) against the Plan's former trustee, Robert Geib (Mr. Geib).

*This exemption is subject to the following conditions:*

- (a) The terms and conditions of the proposed sale transaction are at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated party;
- (b) As consideration for the Notes, the Plan receives either (1) the greater of \$372,197 or (2) the fair market of the Notes (based upon the value of the Plan's proportionate share of Mr. Geib's ownership interest in Cotter common stock), as determined by a qualified, independent appraiser on the date of the sale transaction;
- (c) The proposed sale is a one-time transaction for cash;
- (d) The Plan pays no fees, commissions, costs or other expenses in connection with the proposed sale;
- (e) Cotter pays the Plan all future recoveries resulting from the Judgment; and
- (f) An independent fiduciary (1) determines that the sale is an appropriate transaction for the Plan and is in the best interests of the Plan and its participants and beneficiaries; (2) monitors the sale on behalf of the Plan; and (3) ensures that the Plan receives all future recoveries resulting from the Judgment.

### Written Comments

In the notice of proposed exemption (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing within 35 days from the date of publication of the Notice in the **Federal Register**. All comments and requests for a hearing were due by October 30, 2009.

During the comment period, the Department received no requests for a hearing. The Department did, however, receive a comment letter from the Applicant, dated October 6, 2009, concerning Conditions (e) and (f)(3) of the Notice. Condition (e) requires that Cotter pay the Plan all future recoveries resulting from the Judgment. Condition (f)(3) requires the independent fiduciary to ensure that the Plan receives all future recoveries from the Judgment. The Applicant explains that once it obtains the Notes from the Plan, it will seize the underlying common stock collateralizing the Notes that is currently owned by Mr. Geib. The Applicant represents that the seized Cotter stock will be retired as Treasury stock. As a result, the retirement of the seized Cotter stock will not give rise to any cash recoveries.

The Applicant believes that the aforementioned conditions of the Notice should be amended to clarify that it will apply only to future cash recoveries that may arise from the Judgment. Therefore, the Applicant has revised Conditions (e) and (f)(3) of the final exemption to read as follows:

(e) Cotter pays the Plan future cash recoveries, if any, resulting from the Judgment; and \* \* \*

(f)(3) [The independent fiduciary] ensures that the Plan receives all future cash recoveries, if any, resulting from the Judgment.

The Department does not concur with the Applicant's comment. Therefore, it has not revised Conditions (e) and (f)(3) of the operative language. Although the Department is aware of Mr. Geib's financial circumstances, it wishes to emphasize that to the extent Cotter recovers any consideration (either in cash or in kind) resulting from the Judgment, that such consideration should be paid to the Plan.

After giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file is made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

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 September 25, 2009 at 74 FR 49025.

**FOR FURTHER INFORMATION CONTACT:** Mr. Anh-Viet Ly of the Department at (202) 693-8648. (This is not a toll-free number.)

### Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code,<sup>1</sup> by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the Plan (the Sale) to Unaka Company Incorporated (Unaka), a party in interest with respect to the Plan, of two promissory notes (the Notes) that are secured by deeds of trust on certain parcels of real property.

*This exemption is subject to the following conditions:*

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

(b) As consideration, the Plan receives the greater of the current outstanding balance of the Notes, plus all accrued but unpaid interest to the date of the Sale (Sale Date), or the fair market value of the Notes as determined by qualified, independent appraisers in updated appraisals on the Sale Date.

(c) The Plan pays no commissions, costs, fees, or other expenses with respect to the Sale; and

(d) As soon as it is feasible following the Sale, the Plan releases the deeds of trust securing the Notes.

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 September 25, 2009 at 74 FR 49029.

**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 15th day of December 2009.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-70,295]

### Ultimizers, Inc., Boring, OR; Notice of Revised Determination on Reconsideration

By application dated September 21, 2009, a company official requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of Ultimizers, Inc., Boring, Oregon (subject firm) to apply for Trade Adjustment Assistance (TAA). The Department's Notice of Affirmative Determination Regarding Application for Reconsideration was signed on October 15, 2009, and published in the **Federal Register** on October 27, 2009 (74 FR 55261).

The initial investigation resulted in a negative determination issued on September 9, 2009, was based on the finding that imports of optimizing lumber cut-off saws, feeders, sorters and scanners did not contribute importantly to worker separations at the subject firm and no shift in production to a foreign source occurred.

To support the request for reconsideration, the petitioner supplied additional information regarding lost bids by the subject firm during the relevant period. The Department of Labor conducted a bid survey of the domestic firms to which the subject facility was the lowest domestic bidder. The results of the survey revealed that the bids were awarded to foreign producers. The loss of these contracts contributed importantly to the declines in sales and employment at the subject firm. The investigation further revealed that sales, production and employment at the subject firm declined during the relevant period.

### Conclusion

After careful review of the additional facts obtained on reconsideration, I determine that workers of Ultimizers, Inc., Boring, Oregon, who are engaged in activities related to the production of parts feeding and assembly equipment meet the worker group certification

<sup>1</sup> Unless otherwise noted herein, reference to specific provisions of the Act refer also to the corresponding provisions of the Code.