



4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration
Proposed Exemption from Certain Prohibited Transaction
Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemption.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemption 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 proposed exemption: **D-11845, Rosetree & Company 401(k) Plan and Trust.**

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemption within [INSERT DATE 30 DAYS FROM THE DATE OF PUBLICATION OF THIS FEDERAL REGISTER NOTICE].

ADDRESSES: 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. All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue, N.W., Suite 400, Washington, D.C. 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: moffitt.betty@dol.gov, or by FAX to (202) 693-8474 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

WARNING: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

SUPPLEMENTARY INFORMATION:

The proposed exemption was requested in an application 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 (76 FR 66637, 66644, October 27, 2011).¹ 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, this notice of proposed exemption is issued solely by the Department.

The application contains representations with regard to the proposed exemption 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.

¹ The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Rosetree & Company 401(k) Plan and Trust (the Plan)

Located in Skokie, IL

[Application No. D-11845]

PROPOSED EXEMPTION

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).

SECTION I. COVERED TRANSACTION

If the proposed exemption is granted, the sanctions resulting from the application of section 4975(c)(1)(B) of the Code, shall not apply to the proposed guarantee (the Guarantee) by Richard Rosenbaum (Mr. Rosenbaum), the Plan trustee, a disqualified person with respect to the Plan, of: (1) a loan (the Loan) made by the Great Lakes Credit Union (GLCU), an unrelated third party lender, to Kurtson Realty, LLC (Kurtson), a real estate company that is wholly owned by the Plan;² and (2) a

² Because Mr. Rosenbaum is the sole owner of Rosetree & Company, Ltd. (Rosetree), the Plan sponsor, and the only participant in the Plan, there is no jurisdiction under Title I of the Employee Retirement Income Security Act of 1974 (the Act), pursuant to 29

future Loan made by an unrelated third party lender (hereinafter, GLCU and any third party lender is referred to as a "Lender") to Kurtson, provided that the general conditions that are set forth below in Section II are met.

SECTION II. GENERAL CONDITIONS

(a) The Loan is made for purposes of the Plan acquiring and rehabilitating investment property from an unrelated third party through Kurtson;

(b) The Loan is made on commercially reasonable terms;

(c) The debt service and value to loan ratio for the Loan, and for any future Loan, are based primarily on the characteristics of the property serving as collateral for such Loan (the Collateral Property);

(d) The Lender and the Loan servicer (the Loan Servicer) are unrelated to Mr. Rosenbaum and the Plan;

(e) The Lender has a pre-existing Loan service arrangement with the Loan Servicer, and maintains this relationship for the duration of the Loan;

(f) Mr. Rosenbaum does not receive any compensation or derive any personal benefit from the Collateral Property;

CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

(g) For the duration of the Loan or any future Loan, the Collateral Property is not used by or leased to: (1) any other disqualified persons with respect to the Plan; (2) Rosetreee or any affiliate of Rosetree; or (3) any person or entity in which Mr. Rosenbaum may have an interest that would affect his best judgment as a Plan fiduciary;

(h) The Guarantee is a condition that is: (1) customarily required in similar transactions between Kurtson and the Lender, and is not unique to the Loan or to the specific parties to the Loan; and (2) solely due to a regulatory requirement of the National Credit Union Administration that is imposed upon credit unions, including GLCU;

(i) If the Plan defaults on a Loan, Mr. Rosenbaum pays the balance of such Loan, and has no recourse against the Plan for repayment;

(j) No interest or any fee is charged to Kurtson or the Plan in connection with the Guarantee; and

(k) The Guarantee is not part of an agreement, arrangement, or understanding in which Mr. Rosenbaum causes the assets of the Plan to be used in a manner that is designed to benefit himself or any person who has an interest which would affect the exercise of Mr. Rosenbaum's best judgment as a fiduciary of the Plan.

SUMMARY OF FACTS AND REPRESENTATIONS³

The Parties

1. The Plan is a 401(k) Plan sponsored by Rosetree, a licensed CPA firm, insurance agency, and registered investment adviser. Mr. Rosenbaum (the Applicant) is the sole shareholder and employee of Rosetree. He performs all of Rosetree's operations and receives periodic compensation. Mr. Rosenbaum is also the sole participant in the Plan, as well as the Plan administrator and trustee. As of March 31, 2016, the Plan had approximately \$480,000 in total assets.

2. Kurtson is a real estate operating company that is wholly owned by the Plan. Kurtson currently owns three investment properties, including a 3-unit apartment building located at 1842 S. Drake, Chicago, Illinois (the Collateral Property), which is rented to unrelated parties. Mr. Rosenbaum performs administrative duties for Kurtson, but he receives no compensation for his services.

3. The Plan contemplates entering into a Loan from GLCU, a credit union based in Bannockburn, Illinois. As of December 31, 2015, GLCU had \$719 million in assets.

³ The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

4. Spectrum Business Resources, LLC (Spectrum) is GLCU's loan servicing agent in Lisle, Illinois. As the Loan Servicer for several member credit unions, Spectrum identifies potential borrowers, prepares loan write-ups for the credit union loan committees, prepares loan documents and maintains correspondence and relationships with the borrowers. Both GLCU and Spectrum are unrelated to the Plan and Mr. Rosenbaum.⁴

The Loans

5. Kurtson seeks an initial Loan from GLCU in order to acquire and rehabilitate a new investment property that will serve as the Collateral Property for the Loan. A Loan proposal (the Loan Proposal) from Spectrum, which specifies the terms and conditions under which the requested financing will be provided to Kurtson, states that "GLCU will provide up to a \$90,000, secured, guaranteed commercial mortgage on the [Collateral Property], [which will require] 60 monthly payments of principal and interest through maturity in 5 years, based on a 20-year amortization schedule, at a 5.95% fixed interest rate." The Loan Proposal also provides that "the Loan amount will not exceed 75%

⁴ Mr. Rosenbaum also represents that he has no relationship with any of Spectrum's member credit unions other than as a depositor or borrower.

of the appraised value of the [Collateral Property].”

6. In addition to the Collateral Property, the collateral for the Loan will consist of an assignment of rents on the Collateral Property by Kurtson to GLCU. Other terms of the Loan Proposal require an appraisal of the Collateral Property prior to the formal approval of such Loan, to confirm a minimum market value of \$120,000. Further, pursuant to credit union regulations, the Loan will require a written Guarantee from Mr. Rosenbaum.⁵

7. With respect to fees and other expenses associated with the Loan, the Applicant represents that there will be a processing fee of \$250. In addition, Kurtson will be required to reimburse GLCU for all costs associated with the transaction, including but not limited to attorney's fees, appraisal fees, recording fees, title insurance costs, survey costs, searches, documentation fees, and any other costs and fees associated with the transaction. The Loan will not have any prepayment penalties.

Although the Loan Proposal allows for a Loan amount of up to

⁵ Mr. Rosenbaum represents that he is also a guarantor of other loans made to entities he controls for transactions that are substantially similar to the proposed exemption transaction. He states that the outstanding loan amounts for which he serves as a guarantor are approximately \$767,000 on properties having an appraised value of \$1,240,000.

\$90,000, Kurtson will obtain a Loan for \$80,000, resulting in a value to loan ratio of 150%. The Loan would represent approximately 14.29% of the Plan's assets.

8. The Applicant anticipates that the Plan will engage in additional Loans of a similar nature in the future. Accordingly, Kurtson will obtain all future Loans from the Lender under similar, commercially-reasonable terms, subject to changes in market conditions that would affect the interest rate. The debt service and value to loan ratio for the Loan, and for any future Loan, will be based primarily on the characteristics of the Collateral Property.

In addition, the Lender and the Loan Servicer will be unrelated to Mr. Rosenbaum and the Plan. Although, the Lender may not have a pre-existing loan service arrangement with the Loan Servicer, it will maintain this relationship with Spectrum for the duration of a Loan. Further, Mr. Rosenbaum will not receive any compensation or derive any personal benefit from the Collateral Property. Finally, the Collateral Property for the Loan or any future Loan, may not be used by or leased to: (a) any other disqualified persons with respect to the Plan; (b) Rosetreee or any affiliate of Rosetree; or (c) any person or entity in which Mr. Rosenbaum may have an interest that would affect his best judgment as a Plan fiduciary.

Appraisal of the Collateral Property

9. The Collateral Property for the initial Loan has been appraised by Steven F. Egglar, a Certified Residential Real Estate Appraiser, of C.A. Benson and Associates, Inc., which is located in La Grange Park, Illinois. Mr. Egglar represents that he has no interest in the Collateral Property and no bias with respect to the participants in the proposed transaction, or with respect to Rosetree, the Plan, or Kurtson. Mr. Egglar also represents that his employment and/or compensation for performing the appraisal or any future appraisals was not conditioned on any agreement or understanding that he would report (or present analysis, supporting), among other things, a predetermined specific value, a predetermined minimum value, a range or direction in value, or a value that favors the cause of any party.

10. In an appraisal report dated September 30, 2014 (the 2014 Appraisal), Mr. Egglar certifies that he developed his opinion of the market value of the Collateral Property based solely on the Sales Comparison and Income Approaches to valuation. As of September 23, 2014, Mr. Egglar placed the fair market value of the Collateral Property at \$120,000, under the

Sales Comparison Approach, and at \$117,000, under the Income Approach. After reconciling both valuations, Mr. Egglar ultimately determined that the Collateral Property was worth \$120,000, as of September 30, 2014.

11. In a statement dated May 31, 2016, Charles A. Benson, Jr., SRA of C. A. Benson and Associates, Inc., who was the supervisory appraiser for the 2014 Appraisal, provided an update to the sales data discussed in the 2014 Appraisal, as it applies to the Collateral Property. As noted in the 2014 Appraisal, Mr. Benson represents that the average sale price of a 2-4 unit [in the \$100,000-200,000 price range] in the North Lawndale community, where the Collateral Property is located, was \$136,171 over the 12-month period prior to the 2014 Appraisal. According to Mr. Benson, in the ensuing 12 month period, the average sale price for properties in the same price range as the Collateral Property was \$131,287, which represented a 3.6% decline in value. Mr. Benson also represents that from September 25, 2015 to May 10, 2016, the average sale price of properties that were comparable to the Collateral Property was \$137,953. According to Mr. Benson, this amount represents a 1.3% increase from the average sale price noted in the 2014 Appraisal. Mr. Benson explains that this price difference reflects a small decrease in the year after the 2014 Appraisal, followed by an

increase to a level that was slightly higher than what was noted in the 2014 Appraisal. Overall, Mr. Benson represents that market conditions in the area have stabilized since the 2014 Appraisal.

The Applicant represents that any investment property used by the Applicant as Collateral Property to support a future Loan will be similarly valued by a qualified, independent appraiser.

Rationale for the Loans

13. Mr. Rosenbaum represents that he is an experienced real estate investor. As a former Partner in charge of the Chicago Real Estate practice of Coopers & Lybrand (now Price Waterhouse Coopers), Mr. Rosenbaum states that he has been a senior executive at other real estate industry entities, and that he personally owns ten properties that are similar to the Collateral Property.

It is Mr. Rosenbaum's opinion that, given the current investment environment, real estate investments of this type provide higher rates of return and less risk than other investments available. Mr. Rosenbaum is also of the view that the proposed Loans will enable the Plan to earn a higher rate of return by investing in an additional property, which would not be obtainable if the exemption request is denied.

The Guarantee

14. As represented above, the Loan Proposal requires Mr. Rosenbaum's Guarantee. Accordingly, the Applicant is requesting an administrative exemption from the Department that will allow Mr. Rosenbaum to provide a Guarantee for the Loan that Kurtson, a wholly-owned entity of the Plan and thus, a Plan asset, is requesting from GLCU, as well as for future Loans from Lenders, which may include GLCU. The proposed Loan will be made on commercially reasonable terms, and both the debt service and value to loan ratios for the Loan from GLCU indicate that the Loan will be based primarily upon the characteristics of the Collateral Property that is being financed for purposes of the Loan. The Applicant represents that, although the Plan is dealing with GLCU, an independent lender, Mr. Rosenbaum is being asked by GLCU to participate as a Loan guarantor. The Applicant represents that the proposed Guarantee is solely due to a regulatory requirement of the National Credit Union Administration⁶ that is imposed upon credit unions, including GLCU. Further, the Applicant represents that it is not aware of any other bank or savings institution that makes non-recourse

⁶ See 12 CFR 723.7(b) - ("Principals, other than a not for profit organization, as defined by the Internal Revenue Service Code (26 U.S.C. 501) or those where the Regional Director grants a waiver, must provide their personal liability and guarantee.")

loans at present.⁷ The Applicant represents that only insurance companies do not require guarantees, but only for loans over \$1 million.

Notwithstanding the regulatory requirement, the Applicant believes that with respect to the Loan, the Collateral Property provides adequate collateral and cash flow to repay the Loan without relying upon Mr. Rosenbaum's personal credit or funds.

No interest or any fee will be charged to Kurtson or the Plan in connection with the Guarantee. In addition, the Guarantee will not be part of an agreement, arrangement, or understanding in which Mr. Rosenbaum causes the assets of the Plan to be used in a manner that is designed to benefit himself or any person who has an interest which would affect the exercise of Mr. Rosenbaum's best judgment as a fiduciary of the Plan.

The Applicant also requests exemptive relief for Mr. Rosenbaum's Guarantee of certain future Loans that may be made to Kurtson by a Lender. As represented above, the debt service and value to loan ratios for all future Loans will be based primarily upon the characteristics of the Collateral Property for the specific Loan.

⁷ The Applicant represents that prior to 2008, it is aware of only two financial institutions that made non-recourse loans to retirement plans. However, the Applicant explains that both institutions are no longer in business.

Legal Analysis

15. Section 4975(c)(1)(B) of the Code prohibits any direct or indirect lending of money or other extension of credit between a plan and a disqualified person. Section 4975(e)(2)(A) of the Code defines the term "disqualified person" to include a plan fiduciary. Section 4975(e)(3) of the Code defines the term "fiduciary," in part, to include any person who exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control regarding management or disposition of its assets. As Plan trustee, with investment discretion over the assets of the Plan, Mr. Rosenbaum is a fiduciary and therefore, a disqualified person. Thus, in absence of a statutory or administrative exemption, the Guarantee would violate section 4975(c)(1)(B) of the Code.

Statutory Findings

17. The Applicant states that the proposed exemption is administratively feasible in that it covers a specific factual situation that will not require ongoing monitoring by the Department. In addition, the Applicant states that the proposed exemption is in the best interests of the Plan and Mr. Rosenbaum as the sole participant because the Loan will allow the Plan to

invest in another property in which the rate of return will be substantially higher for the Plan than investing in traditional assets, such as the stock market, and with less risk.⁸

Further, the Applicant represents that the proposed exemption is protective of the rights of Mr. Rosenbaum as the sole Plan participant because the Loan is made by an unrelated, third party to the Plan and guaranteed by Mr. Rosenbaum in his individual capacity. In addition, the Applicant represents that no interest or fee is charged to Kurtson or the Plan in connection with the Guarantee.

Summary

18. In summary, the Applicant represents that the proposed transaction satisfies the statutory criteria of section 4975(c)(2) of the Code because:

(a) The Loan will be made for purposes of the Plan acquiring and rehabilitating investment property from an unrelated third party through Kurtson;

⁸ As an example, the Applicant states that the typical property he acquires costs \$100,000 to purchase and rehabilitate, which then generates \$25,000 annually in cash flow and appraises for \$150,000. The Applicant further explains that there is strong demand for apartments that are similar to the Collateral Property, and the rents are generally guaranteed by the Federal Government under the Section 8 Housing Program.

(b) The Loan will be made on commercially reasonable terms;

(c) The debt service and value to loan ratio for the Loan, and for any future Loan, will be based primarily on the characteristics of the Collateral Property;

(d) The Lender and the Loan Servicer will be unrelated to Mr. Rosenbaum and the Plan;

(e) The Lender will have a pre-existing Loan service arrangement with the Loan Servicer, and will maintain this relationship for the duration of the Loan;

(f) Mr. Rosenbaum will not receive any compensation or derive any personal benefit from the Collateral Property;

(g) For the duration of the Loan or any future Loan, the Collateral Property will not be used by or leased to: (1) any other disqualified persons with respect to the Plan; (2) Rosetree or any affiliate of Rosetree; or (3) any person or entity in whom Mr. Rosenbaum may have an interest that would affect his best judgment as a Plan fiduciary;

(h) The Guarantee will be a condition that is: (1) customarily required in similar transactions between Kurtson and the Lender, and will not be unique to the Loan or to the specific parties to the Loan; and (2) solely due to a regulatory requirement of the National Credit Union Administration that is imposed upon credit unions, including GLCU;

(i) If the Plan defaults on a Loan, Mr. Rosenbaum will pay the balance of each Loan and will have no recourse against the Plan for repayment;

(j) No interest or any fee will be charged to Kurtson or the Plan in connection with the Guarantee; and

(k) The Guarantee will not be part of an agreement, arrangement, or understanding in which Mr. Rosenbaum causes the assets of the Plan to be used in a manner that is designed to benefit himself or any person who has an interest which would affect the exercise of Mr. Rosenbaum's best judgment as a fiduciary of the Plan.

NOTICE TO INTERESTED PERSONS

As Mr. Rosenbaum is the sole participant and beneficiary of the Plan, it has been determined that there is no need to distribute the Notice of Proposed Exemption (Notice) to interested persons. Therefore, comments and requests for a hearing must be received by the Department within thirty (30) days of the publication of this Notice in the Federal Register.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential

business information that you do not want publicly disclosed.
All comments may be posted on the Internet and can be retrieved
by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the
Department, telephone (202) 693-8565. (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 of the Act and/or 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, 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) Before an exemption may be granted under section 408(a) of the Act and/or 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 the plan;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or 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; and

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 24th day of April, 2017.

Lyssa E. Hall, Director,
Office of Exemption
Determinations,
Employee Benefits Security
Administration,
U.S. Department of Labor.

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