

exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions 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.

ACR Homes, Inc. Employee Stock Ownership Plan and Trust (the ESOP) Located in Roseville, Minnesota

[Application No. D-11146]

Proposed Exemption

The Department is considering granting an 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 (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, 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, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the past sale on August 28, 2001 (the Stock

Redemption), by the ESOP to the ACR Homes, Inc., the sponsoring employer (the Employer), of 3,600 shares of the Employer's class A common stock (the Shares) for \$511,250 in cash; provided that the following conditions were satisfied:

(a) The Stock Redemption was a one-time cash transaction;

(b) The ESOP received the fair market value of the Shares as determined by an independent, qualified appraiser on the date of the Stock Redemption; and

(c) The ESOP paid no commissions or other expenses associated with the Stock Redemption.

EFFECTIVE DATE: If granted, this exemption will be effective as of August 28, 2001.

Summary of Facts and Representations

1. The ESOP was established by the Employer on January 1, 1995 for the benefit of its employees. Since 1995, the ESOP has been amended and restated from time to time to comply with the Act, the Code and the regulations thereunder. Specifically, the ESOP was amended and restated on January 1, 1998, to reflect the Employer's status as a subchapter "S" corporation, as elected under section 1361 of the Code. It is

represented that the ESOP meets the requirements of sections 401(a), 409, and 4975(e)(7) of the Code, as well as the relevant requirements of the Act.¹

As of November 25, 2002, the ESOP had approximately 350 participants and beneficiaries. James A. Nelson (Mr. Nelson) and Dorothy Nelson (Mrs. Nelson, collectively; the Nelsons) are trustees of the ESOP. After the Stock Redemption, Mr. Nelson and Mrs. Nelson respectively owned 30.5% and 29.5% of the issued and outstanding shares of the Employer's stock (the Stock). Mr. Nelson is the president of the Employer. Mrs. Nelson is a vice-president and secretary of the Employer.

The Employer is a Minnesota corporation that provides residential services for people with developmental disabilities. The Employer owns a subsidiary, ACR Mississippi, Inc., that provides similar services.

2. The Employer has only one class of shares of the Stock (a/k/a, the Class A Shares). As of December 31, 2000 (*i.e.*, before the Stock Redemption), there were 1,000,000 Class A Shares authorized and a total of 40,000 shares issued and outstanding with the following ownership:

Shareholder	Type	No. of shares	% Ownership
ESOP	Class A	19,600	49
James Nelson	Class A	10,400	26
Dorothy Nelson	Class A	10,400	25
Total	40,000	100

An appraisal for the Stock dated June 15, 2001 (the Appraisal), was prepared by the Hawthorne Company, an independent and qualified appraising firm in Minneapolis, Minnesota. The Appraisal stated that each Share of the Stock was worth \$140, as of December 31, 2000. Therefore, as of December 31, 2000, the ESOP's ownership interest in the Stock (*i.e.*, 19,600 shares) was worth \$2,744,000.

3. Under a Stock Redemption Agreement dated August 28, 2001 (the Agreement), the ESOP sold 3,600 shares of the Stock (*i.e.*, the Shares) to the Employer for a purchase price of \$511,200 or \$142 per Share. This

purchase price was determined by an update of the Appraisal, as discussed more fully below. The Employer paid the entire purchase price in cash.

The applicant represents that the cash received by the ESOP in the Stock Redemption was immediately credited to the accounts of participants in proportion to the Shares that were sold from their accounts in the Stock Redemption.² The applicant represents that the Stock Redemption was in the best interest of the ESOP's participants and beneficiaries. The specific reasons are discussed more fully below.

The Employer financed its purchase of the Shares through two simultaneous

sales of 1,800 of newly-issued shares of the Stock to Mr. Nelson and Mrs. Nelson, respectively, at the same price of \$142 per Share (the Nelson Sale).³

The applicant represents that the Stock Redemption and the Nelson Sale decreased the ESOP's ownership of the total outstanding Stock of the Employer from 49% to 40%, and increased the Nelsons' combined ownership of the Stock from 51% to 60%.

Following the Stock Redemption on August 28, 2001, the total outstanding shares of the Stock were owned as follows:

¹ Section 407(d)(6) of the Act defines the term "employee stock ownership plan" as an individual account plan (A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of the Code, and which is designed to invest primarily in qualifying employer securities,

and (B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

The Department is providing no opinion herein as to whether such requirements have been met.

² For example, if a participant had 100 Shares allocated to her account and 18 had been redeemed,

after the Stock Redemption, such account would have been allocated an additional \$2,556 of cash (*i.e.*, \$142 per share × 18 shares).

³ The applicant represents that the Nelsons were advised, by a prior law firm (see discussion in Paragraph 7), to structure the Stock Redemption as a two-step transaction.