

**Painters District Council No. 4
Apprenticeship, Upgrading &
Retraining Trust Fund (the Plan)
Located in Cheektowaga, New York**

[Application No. L-11190]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act shall not apply to a lease (the Lease) of certain space (the Leased Premises) in a building (the Building) owned by the Plan to Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP (the Applicant), a party in interest with respect to the Plan; provided that the following conditions are satisfied:

(a) All terms and conditions of the Lease are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(b) The decision by the Plan to enter into the Lease will be made by the trustees of the Plan (the Trustees); and

(c) The fair market rental amount for the Lease will be determined by an independent, qualified appraiser as of the date of the commencement of the Lease; and

(d) After commencement of the Lease, an additional fair market rental appraisal of the Leased Premises will be performed by an independent, qualified appraiser every thirty months with the rental rate being adjusted accordingly.

Summary of Facts and Representations

1. The Plan is a defined contribution plan, covering members of the Painters District Council No. 4 whose employers contribute to the Plan under the terms of Collective Bargaining Agreements with the Painters District Council. The Plan is subject to the provisions of ERISA, and became effective on September 25, 1966. The Plan provides apprenticeship training and journeyman upgrading to participants. In addition, the Plan offers training and certification in the following Health and Safety Disciplines: OSHA Hazard Awareness, Scaffolding, Welding, Fall Protection, Ergonomics, Confined Space, Respirator Fit Testing, Hazwoper, Lead Abatement, Asbestos and CPR-First Aid for the Painting and Glazing Industry. The Plan currently has approximately 500 active participants. The Applicant provides legal services to the Plan and to other multi-employer pension and welfare plans.

The Applicant is a law firm that practices in a broad range of legal concentrations. The Applicant has an employment law practice that represents a number of jointly administered employee benefit funds. One of the Applicant's clients is the Plan.

2. The Leased Premises and the Building are located at 585 Aero Drive, Cheektowaga, New York. The Building is a one-story office and warehouse facility containing 11,922 square feet. The Leased Premises has 1,500 square feet of office area. On December 11, 2002, the Plan purchased the Building for \$450,000 from the Niagara Frontier Transportation Authority, an unrelated third party. The Plan continues to lease the other office space to the same parties to whom it was previously subleased including multi-employer funds (the Funds) who are parties in interest to the Plan. The Applicant represents that the lease agreements with the Funds operate pursuant to the guidelines established by Prohibited Transaction Exemption 76-1 (41 FR 12740, 12744, March 26, 1976) (PTE 76-1).²

Due to the Applicant's hiring of a new attorney who now seeks to rent the Leased Premises, the Applicants will become parties in interest with respect to the Plan upon the inception of the Lease. The Applicants seek to enter into a five-year lease agreement for the Leased Premises. The decision by the Plan to enter into the Lease will be made by the Trustees who are independent of the Applicant. The fair market rental amount for the Lease will be determined by an independent, qualified appraiser. Additionally, fair market rental appraisals will be performed at the commencement of the Lease and at thirty month intervals thereafter by an independent, qualified appraiser. Rental rates will be adjusted in accordance with each subsequent appraisal.

3. The fair market rent of the Leased Premises has been established by an appraisal dated February 25, 2003 and will be updated prior to the commencement of the Lease. The appraisal was prepared by Howard P. Schultz & Associates. The appraisal relied on the market sales comparison approach to determine the fair market rental value of the Leased Premises. The appraisal states that the fair market rent for the Leased Premises is \$15/square foot, which equates to \$22,500 annually. The rental rate includes real estate taxes, insurance, utilities, cleaning and

janitorial service all of which will be paid by the Applicant. The Lease will be on the terms no less favorable to the Applicant than an arm's length transaction with an unrelated party.

4. The Applicant states that the Lease will be protective of the Plan and consistent with the Plan's investment needs and objectives. The exemption would be protective of the rights of the Plan participants and their beneficiaries because the Lease will provide rental income to the Plan as owners of the Building. Moreover, the Applicant will pay rent in an amount determined to be commercially identical to an arm's length business transaction. Not only would the Lease constitute an arm's length business transaction, but having legal counsel close to the Plan would be beneficial for the Plan fiduciaries. Legal issues typically arise with some of the Plan participants that require immediate legal attention or advice. Having the Applicant located next to the office for the Plan's employees would reduce telephone costs and the time needed to get answers for legal questions that require immediate assistance.

The location of the office is also extremely beneficial for trustee meetings, and meetings with other Plan officials who normally would have to assume the cost for travel for the Applicant's employees. In addition, many of the apprenticeship standards and procedures for Plan operations are changed on a regular basis. These changes are not made effective until legal counsel has reviewed the changes to all of the corresponding documents. Having the Applicant within the same Building as the Plan's employees would decrease the expenses and time associated with multiple mailings. Documents can be reviewed instantly without redlined copies having to be mailed back and forth.

5. In summary, the Applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act because:

(a) All terms and conditions of the Lease are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(b) The decision by the Plan to enter into the Lease will be made by the Trustees;

(c) The fair market rental value for the Lease will be determined by an independent, qualified appraiser as of the date of the commencement of the Lease; and

(d) Thirty months after commencement of the five year lease an additional fair market rental appraisal of the Leased Premises will be performed

² The Department expresses no opinion herein as to whether the lease agreements between the Funds and the Plan satisfy the provisions of PTE 76-1.