

transaction which is the subject of the exemption.

Signed at Washington, DC, this 13th day of December 2010.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions 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 exemptions: D-11592, TD Ameritrade, Inc. (TD Ameritrade or the Applicant); and D-11638, Owens & Minor, Inc.; *et al.*

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 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, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 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) 219-0204 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-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate). The proposed exemptions were requested in applications 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 (55 FR 32836, 32847, August 10, 1990). 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, these notices of proposed 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.

TD Ameritrade, Inc. (TD Ameritrade or the Applicant) Located in Omaha, NE.

[Application No. D-11592]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or 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).¹

SECTION I. SALES OF AUCTION RATE SECURITIES FROM PLANS TO TD AMERITRADE: UNRELATED TO A SETTLEMENT AGREEMENT

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective July 20, 2009, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to TD Ameritrade, where such sale (an Unrelated Sale) is unrelated to, is not made in connection with, and is entered into after the finalization of, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.

SECTION II. CONDITIONS APPLICABLE TO TRANSACTIONS DESCRIBED IN SECTION I

(a) The Plan acquired the Auction Rate Security in connection with brokerage services provided by TD Ameritrade to the Plan;

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

(c) The Unrelated Sale is made pursuant to a written offer by TD Ameritrade (the Unrelated Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due with respect to the Auction Rate Security; and (3) the most recent information for the Auction Rate Security (if reliable information is available).

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any

¹ For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Unrelated Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in Section V(d)) of TD Ameritrade.²

(h) Neither TD Ameritrade nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to the decision to accept the Unrelated Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) TD Ameritrade and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), 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 which engages in an Unrelated Sale, other than TD Ameritrade and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

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

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding

² The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act 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, the decision to sell the Auction Rate Security to TD Ameritrade for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by TD Ameritrade of all relevant information.

any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) 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 (the Commission);

(B) Any fiduciary of any Plan, including any IRA owner, that engages in an Unrelated Sale, or any duly authorized employee or representative of such fiduciary; or

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

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of TD Ameritrade, or commercial or financial information which is privileged or confidential; and

(3) Should TD Ameritrade refuse to disclose information on the basis that such information is exempt from disclosure, TD Ameritrade 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.

SECTION III. SALES OF AUCTION RATE SECURITIES FROM PLANS TO TD AMERITRADE: RELATED TO A SETTLEMENT AGREEMENT

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code shall not apply, effective July 20, 2009, to the sale by a Plan of an Auction Rate Security to TD Ameritrade, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

SECTION IV. CONDITIONS APPLICABLE TO TRANSACTIONS DESCRIBED IN SECTION III

(a) The terms and delivery of the offer (the Purchase Offer) are consistent with the requirements set forth in the Settlement Agreement;

(b) The Purchase Offer or other documents available to the Plan

specifically describe, among other things:

(1) How a Plan may determine: the Auction Rate Securities held by the Plan with TD Ameritrade; the number of shares and par value of the Auction Rate Securities; the interest or dividend amounts that are due with respect to the Auction Rate Securities; purchase dates for the Auction Rate Securities; and (if reliable information is available) the most recent rate information for the Auction Rate Securities;

(2) The background of the Purchase Offer;

(3) That neither the tender of Auction Rate Securities nor the purchase of any Auction Rate Securities pursuant to the Purchase Offer will constitute a waiver of any claim of the tendering Plan;

(4) The methods and timing by which Plans may accept the Purchase Offer;

(5) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Purchase Offer;

(6) The timing for acceptance by TD Ameritrade of tendered Auction Rate Securities;

(7) The timing of payment for Auction Rate Securities accepted by TD Ameritrade for payment;

(8) The methods and timing by which a Plan may elect to withdraw tendered Auction Rate Securities from the Purchase Offer;

(9) The expiration date of the Purchase Offer;

(10) The fact that TD Ameritrade may make purchases of Auction Rate Securities outside of the Purchase Offer following the termination or expiration of the Purchase Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the Auction Rate Securities;

(11) A description of the risk factors relating to the Purchase Offer as TD Ameritrade deems appropriate;

(12) How to obtain additional information concerning the Purchase Offer; and

(13) The manner in which information concerning material amendments or changes to the Purchase Offer will be communicated to the Plan.

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All the conditions of Section II have been met.

SECTION V. DEFINITIONS

For purposes of this proposed exemption:

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

(c) The term “*Auction Rate Security*” 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;

(d) A person is “*independent*” of TD Ameritrade if the person is (1) not TD Ameritrade or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term “*Plan*” means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by section 3(42) of the Act; and

(f) The term “*Settlement Agreement*” means a legal settlement involving TD Ameritrade and a U.S. state or federal authority that provides for the purchase of an Auction Rate Security by TD Ameritrade from a Plan.

Effective Date: If granted, this proposed exemption will be effective as of July 20, 2009.

Summary Of Facts And Representations

1. The Applicant, TD Ameritrade, is a New York corporation headquartered in Omaha, Nebraska. The Applicant is an online broker-dealer that provides market access and electronic tools to self-directed investors. The Applicant is registered as a broker-dealer with the Commission pursuant to section 15(c) of the Securities Exchange Act of 1934 and is a member of the Financial Industry Regulatory Authority. The Applicant is also a wholly-owned subsidiary of TD Ameritrade Holding Corporation (TD Ameritrade Holding). As of September 30, 2009, TD Ameritrade Holding had total assets of \$18,371,810,000. As of the same date, TD Ameritrade had total assets of \$3,240,360,000.

The Applicant was formed as a result of the consolidation of retail brokerage operations of Ameritrade, Inc. and TD Waterhouse Investors Services, Inc. following TD Ameritrade Holding’s acquisition of TD Waterhouse Group, Inc. on January 24, 2006. The Applicant and its affiliates and subsidiaries provide a wide range of investment-related services, including discount

brokerage and investment advisory services. In this regard, the Applicant acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities, as discussed herein.

2. The Applicant describes Auction Rate Securities (or ARS) and the arrangement by which ARS are bought and sold as follows. Auction Rate Securities are preferred stock or bonds that are generally issued with maturities of thirty years, but the maturities can range from five years to perpetuity. ARS interest rates or dividend yields are determined and periodically reset at auctions commonly referred to as “Dutch Auctions,” during which ARS are auctioned at par. Ordinarily, ARS can be bought or sold only at a Dutch Auction. Dutch Auctions are customarily held every seven, twenty-eight, or thirty-five days.

Under the typical procedures for a Dutch Auction, investors who wish to purchase ARS submit a bid to a broker-dealer selected by the entity that issued the ARS, which includes the minimum interest or dividend rate that the investors will accept. Holders of ARS may either choose to keep their securities until the next auction or submit an offer to sell their ARS. An auction agent collects all of the bids and offers for a particular auction. The final rate at which all of the ARS offered for sale are sold in the auction is the “clearing rate” that applies to that particular ARS until the next auction. Bids with the lowest rate and then successively higher rates are accepted until all of the sell orders are filled.

If there are not enough bids to cover the securities offered for sale in a Dutch Auction, then the auction will fail. In a failed auction, investors who want to sell securities are not able to do so, and hold their ARS until at least the next auction. In this event, the issuer pays the holders a maximum rate or “penalty” rate. These rates might be higher or lower than the prior clearing rate or market rates on similar products.

3. The Applicant states that to facilitate the auction process, the issuers of the ARS selected one or more broker-dealers to underwrite the offering and to manage the auction process. In many instances, these broker-dealers submitted their own bids to support the auctions and to prevent the auctions from failing. The Applicant states that it did not act as an underwriter, manager or agent for any issuer of ARS. Instead, the Applicant represents that it acted solely as an agent, both on a solicited and unsolicited basis, for its customers by submitting their bids to purchase and orders to sell ARS. Specifically, the

Applicant would act as an order taker and process client-generated requests to purchase ARS. As a so-called “distributing” or “downstream” broker-dealer, the Applicant represents that it did not submit bids in an effort to support any of the Dutch Auctions or to prevent them from failing. The Applicant further represents that it did not hold any significant inventory of ARS in its proprietary accounts.³ However, the Applicant represents that, in certain instances, it may have previously advised or otherwise caused a Plan to acquire and hold ARS.⁴

4. According to the Applicant, in the early part of 2008, the broker-dealers that acted as underwriters of the ARS offerings or as lead managers for the Dutch Auctions stopped submitting their own bids in support of the Dutch Auctions. As a result, by February 13, 2008, the ARS market began experiencing widespread auction failures, leaving investors unable to sell their ARS holdings. Consequently, Plans holding ARS may or may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.⁵

³ The Applicant states that it did not have a practice of holding ARS in inventory or for investment purposes. The Applicant explains that at any given time and in the ordinary course of business, its Fixed Income Trading Desk (the Desk) may have held a nominal number of ARS units in proprietary accounts in between auctions as a result of data entry or communications errors that may have resulted in a customer account receiving more ARS units than the customer intended to purchase. The Applicant further explains that it was the Desk’s practice to sell such units in the next auction. The Applicant also states that on other isolated occasions, it received the opportunity to obtain a nominal number of ARS units in connection with an initial public offering by the issuer. On such occasions, the Applicant states that it would obtain those units at a discount and sell them at par to clients seeking to purchase such securities.

The Applicant represents that the sales of ARS units out of its inventory to plans are exempt transactions under Part II of Prohibited Transaction Exemption (PTE) 75–1 (40 FR 50845, October 31, 1975, 71 FR 5883, February 3, 2006), with respect to principal transactions. In those isolated situations when it had ARS units in its inventory, the Applicant explains that it sold them to plans at par, which satisfies the condition of PTE 75–1 that the transaction be at least as favorable to the plan as an arm’s length transaction with an unrelated party. This is because a plan would have paid the same price for the particular ARS unit regardless of where it purchased such unit.

The Department expresses no opinion herein on whether these transactions comply with the provisions of PTE 75–1. Accordingly, the Department is not proposing any relief beyond that offered by PTE 75–1.

⁴ The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

⁵ The Department notes that PTE 80–26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)), permits interest-free loans or other

5. The Applicant further states that from February 13, 2008 through the present, the ARS market continues to experience widespread failures, making many ARS holdings illiquid. Although ARS have been redeemed by their issuers since that time, numerous investors, including some of TD Ameritrade's customers, currently hold ARS that they have been unable to sell through the auction process or redeem by the issuers.

6. The Applicant is requesting exemptive relief for the sale of ARS under two different circumstances: (a) Where a Plan sells ARS to TD Ameritrade and such sale (*i.e.*, an Unrelated Sale) is unrelated to, is not made in connection with, and is entered into after the finalization of, a Settlement Agreement; and (b) where a Plan sells ARS to TD Ameritrade and such sale (*i.e.*, a Settlement Sale) is related to, and made in connection with, a Settlement Agreement. If granted, the exemption would be effective as of July 20, 2009.

7. With respect to Unrelated Sales, the Applicant represents that it may purchase ARS from its customers outside the Purchase Offer at times and on terms other than those provided in the Purchase Offer (*i.e.*, an Unrelated Offer). For example, TD Ameritrade may purchase ARS from Plans who failed to respond to the Purchase Offer prior to the expiration of the Purchase Offer or from Plans not covered by the Settlements and the Purchase Offer.⁶ In determining whether to make an Unrelated Offer, TD Ameritrade will consider the relevant facts and circumstances. With respect to Plans covered by the Settlements and the Purchase Offer as well as Plans not covered by the Settlements and the Purchase Offer, any Unrelated Offer will

extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the plan.

⁶ The Applicant states that there has been only one Unrelated Sale since the close of the Purchase Offer under the Settlement Agreement and that the purchase occurred as if there had been a timely tender of the securities under the Purchase Offer. In that case, the widow of an IRA holder, who did not realize that her husband held ARS in his IRA, discovered the holding after the deadline had passed. TD Ameritrade waited until the tender period had closed and bought back the ARS on April 12, 2010. TD Ameritrade treated the Unrelated Sale as though the ARS holder had timely tendered under the Purchase Offer and used the pricing methodology set forth in the Settlement Agreement (*i.e.*, par plus accrued and unpaid interest and/or dividends).

be made at the same price offered under the Purchase Offer (*i.e.*, par plus accrued and unpaid interest and/or dividends). Therefore, TD Ameritrade is requesting retroactive relief (and prospective relief) for an Unrelated Sale that has occurred outside the Settlement process and in the event a sale of ARS by a Plan to TD Ameritrade occurs outside the Settlement process in the future.

8. With respect to Settlement Sales, the Applicant represents that it entered into Settlement Agreements with certain U.S. state and federal authorities in connection with TD Ameritrade's role in the acquisition and holding of ARS by various TD Ameritrade customers (the Eligible Customers), including Plans. As of July 20, 2009, the date that the Settlements were publicly announced, the Applicant's Eligible Customers held approximately \$456 million in ARS. Of this amount, \$5.8 million was held in 87 brokerage accounts for Eligible Customers of the Applicant that were Plans.

9. Pursuant to the Settlement Agreements, among other things, TD Ameritrade was required to send a written offer (*i.e.*, the Purchase Offer) to certain Plans that held ARS in connection with the brokerage services provided by TD Ameritrade. Only ARS purchased from the Applicant on or before February 13, 2008 that had failed at auction at least once since February 13, 2008 were considered "Eligible ARS" for purposes of the Purchase Offer. The Purchase Offer explained what Eligible Customers had to do to participate and it informed them of the relevant terms of the Settlement Agreement and other material terms regarding their rights. The Settlement Agreements required that the Purchase Offer be sent by August 10, 2009.

10. Eligible Customers had different lengths of time to respond to the Purchase Offer depending on various factors described in the Settlement Agreements. In general, Eligible Customers with assets of \$250,000 or less as of March 13, 2009 had 75 days from the date the Purchase Offer was sent to respond; Eligible Customers with more than \$250,000 had until March 23, 2010, which gave them as much as seven months or more to respond, depending on when they were identified as eligible.⁷ As described in further detail below, Eligible Customers that accepted the Purchase Offer were permitted to sell the ARS to TD Ameritrade for cash equal to the par

⁷ Pursuant to the Settlement Agreement, TD Ameritrade was permitted to extend the Purchase Offer period up until, but not beyond, June 30, 2010 for those Eligible Customers with more than \$250,000 in "Eligible ARS".

value of such securities, plus any accrued interest and/or dividends. Eligible Customers that did not respond to the Purchase Offer within a specified period of time were sent a second notice informing them of the Applicant's Purchase Offer, the relevant terms of the Settlement Agreement, and any other material issues regarding such customer's rights. To assist Eligible Customers, the Applicant established a dedicated toll-free telephone assistance line and a public Internet page to provide information and to respond to questions concerning the terms of the Settlement Agreements. The Applicant maintained the telephone assistance line and Internet page through March 31, 2010, the date of the Applicant's last payment under the Settlement Agreement.

11. The Applicant states that ARS units have been tendered by Plans to TD Ameritrade pursuant to a Purchase Offer issued by TD Ameritrade under a Settlement Agreement. In this regard, the Applicant states that with respect to the Purchase Offer that closed on March 23, 2010, it purchased approximately \$302.9 million of ARS from approximately 1,180 Eligible Customers, which includes \$5,525,000⁸ in ARS held by thirty Eligible Customers that were Plans. The Applicant estimates that as of the close of the tender offer period on March 23, 2010, approximately \$81.9 million in "Eligible ARS" remained outstanding, including ARS that had been transferred away from TD Ameritrade and that could not be confirmed. Accordingly, the Applicant is requesting exemptive relief retroactive to July 20, 2009 for Settlement Sales.

12. The Applicant opines that Settlement Sales and Unrelated Sales (hereinafter, each, a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales allow Plans to normalize their investments. The Applicant represents that each Covered Sale has been and will be for no consideration other than cash payment against prompt delivery of the ARS, and such cash has equaled and will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans have not paid and will not pay any commissions or transaction costs with respect to any Covered Sale.

13. The Applicant also represents that the proposed exemption is protective of the Plans. The Applicant states that each Covered Sale has been made and

⁸ The Applicant represents that the amount of ARS involved in the Unrelated Sale described in Footnote 6 above is included in this amount.

will be made pursuant to a written Purchase Offer and the decision to accept such offer or retain the ARS has been made and will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of TD Ameritrade. Additionally, each Purchase Offer has been delivered and will be delivered in a manner designed to alert a Plan fiduciary that TD Ameritrade is willing to purchase ARS from the Plan. Purchase Offers made in connection with a Settlement Agreement have specifically included, among other things: The background of the Purchase Offer; the method and timing by which a Plan may accept the Purchase Offer; the expiration date of the Purchase Offer; a description of certain risk factors relating to the Purchase Offer; how to obtain additional information concerning the Purchase Offer; and the manner in which information concerning material amendments or changes to the Purchase Offer will be communicated. Further, the Applicant states that, neither TD Ameritrade nor any affiliate has exercised or will exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to a Plan's decision to accept the Purchase Offer or to retain the ARS.⁹

In addition, an Unrelated Offer made in connection with an Unrelated Sale has included and will include all of the material terms of the Unrelated Sale as follows: The identity and par value of the ARS; the interest or dividend amounts that are due with respect to the ARS; and the most recent information for the ARS (if reliable information is available). The Applicant represents further that Plans have not waived and will not waive any rights or claims in connection with any Covered Sale.

14. The Applicant further represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale has occurred and will occur at the par value of the affected ARS, plus accrued but unpaid interest and dividends, to the extent applicable, and such value is readily ascertainable. The Applicant represents further that TD Ameritrade has maintained and will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

⁹The Applicant states that while there may have been or may be communication between a Plan and TD Ameritrade subsequent to a Purchase Offer, such communication has not involved and will not involve advice regarding whether the Plan should accept the Purchase Offer.

15. In summary, the Applicant represents that the transactions described herein have satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because, among other things:

(a) Each Covered Sale has been made and shall be made pursuant to a written Purchase Offer;

(b) Each Covered Sale has been and shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale has equaled and shall equal the par value of the ARS, plus any accrued but unpaid interest or dividends;

(d) No Plan has waived nor shall waive any rights or claims in connection with any Covered Sale;

(e)(1) The decision to accept a Purchase Offer or retain the ARS has been made and shall be made by a Plan fiduciary or Plan participant or IRA owner who is independent of TD Ameritrade; and (2) neither TD Ameritrade nor any affiliate has exercised or shall exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to the decision to accept the Purchase Offer or retain the ARS;

(f) Plans have not paid and shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale has not been part of and shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Purchase Offer, and the terms of Settlement Sale, have been consistent with and shall be consistent with the requirements set forth in the Settlement Agreement;

(i) TD Ameritrade has made and shall make available in connection with an Unrelated Sale the material terms of the Unrelated Sale, including: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due but unpaid with respect to the Auction Rate Security; and (3) the most recent information for the Auction Rate Security (if reliable information is available).

(j) Each Purchase Offer made in connection with a Settlement Agreement has described or shall describe the material terms of the Settlement Sale, including the following (and shall not constitute a waiver of any claim of the tendering Plan): (1) How the Plan can determine: The ARS held by the Plan with TD Ameritrade, the

number of shares and par value of the ARS, interest or dividend amounts, and purchase dates for the ARS, and (if reliable information is available) the most recent rate information for the ARS; (2) the background of the Purchase Offer; (3) the methods and timing by which the Plan may accept the Purchase Offer; (4) the purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Purchase Offer and the timing for acceptance by TD Ameritrade of tendered ARS for the payment; (5) the expiration date of the Purchase Offer; and (6) how to obtain additional information concerning the Purchase Offer.

Notice to Interested Persons

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified, and, therefore, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**.

Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Anna Mpras Vaughan of the Department, telephone (202) 693-8565. (This is not a toll-free number.) Owens & Minor, Inc., Located in Mechanicsville, Virginia. [Application No. D-11638]

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 proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 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), (D), and (E) of the Code, shall not apply to the sale of certain shares in a hedge fund (the Shares) by the Owens & Minor, Inc. Pension Plan (the Plan) to Owens & Minor, Inc. (the Employer), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

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

(b) The terms and conditions of the sale are at least as favorable to the Plan as those that the Plan could obtain in an arm's-length transaction with an unrelated third party;

(c) The sales price is the greater of: (1) \$1,029.93 per Share (the highest per share purchase price paid by the Plan), or (2) the net asset value of the Shares reported in the most recently available monthly statement, as determined by the hedge fund manager, who is independent and unrelated to the Employer, (which is supported by the report of the independent auditors);

(d) The Plan pays no commissions, fees, or other expenses in connection with the sale;

(e) Upon termination of the Plan, the Plan participants and beneficiaries will be paid 100% of their accrued benefits from the assets of the Plan, as a result of the Employer's sufficiency contribution to the Plan;

(f) The Plan has not waived or released and does not waive or release any claims, demands, and/or causes of action that the Plan may have against the Employer, the Plan Fiduciary, or the hedge fund manager in connection with the acquisition, holding and sale of the Shares to the Employer; and

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

(1) No party in interest with respect to the Plan other than the Employer 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 (h); and

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

(h)(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 (g), 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) Any fiduciary of the Plan, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are

covered by the Plan or any authorized employee or representative thereof;

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

(3) Should the Employer refuse to disclose information on the basis that such information is exempt from disclosure, the Employer 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.

Summary of Facts and Representations

1. The Owens & Minor, Inc. Pension Plan (the Plan) is a defined benefit plan sponsored by Owens & Minor, Inc. (the Employer or the applicant), a distributor of national name-brand medical and surgical supplies who serves its healthcare provider customers from 55 distribution centers located throughout the United States. The Plan was originally established effective March 31, 1957 and was last amended and restated effective January 1, 2002. The Plan was frozen effective December 31, 1996. The aggregate fair market value of the Plan's assets was approximately \$31,276,861, as of April 30, 2010. The Plan had 1,789 participants and beneficiaries, as of June 4, 2010. The Plan's trustee is Reliance Trust Company. The Employer sponsors two defined contribution plans, a 401(k) profit sharing plan and an employee stock purchase plan, in addition to the Plan.

On April 30, 2010, the Employer filed a request for a determination as to the Plan's qualified status with the Internal Revenue Service (IRS). The Employer filed PBGC Form 500 (Standard Termination Notice) with the Pension Benefit Guaranty Corporation (PBGC) by July 30, 2010. If PBGC does not object to the proposed termination of the Plan within the 60-day period following the filing of the Standard Termination Notice, the Plan must distribute all its assets by its "Distribution Date," which is the later of (i) 180 days after the end of PBGC's 60-day review period, or (ii) 120 days after receipt of a favorable determination from the IRS.

2. As of April 30, 2010, the assets of the Plan consisted of: (i) FDIC-guaranteed bank notes in the amount of \$25,540,900, (ii) money market accounts valued at \$1,835,666, (iii) a brokerage account consisting of several alternative investments valued at \$3,058,882, and (iv) 943.66 shares of a non-publicly

traded hedge fund (the Shares), with a value of \$841,413 (based upon a net asset value (NAV) of \$891.65 per share). The Plan's investments, including the Shares, are approved by the Compensation and Benefits Committee (the Committee) of the Employer's Board of Directors. The Plan purchased 2,570.42 Shares at \$1,029.931 per share on November 28, 2007 and 99.56 Shares at \$1,004.381 per share on July 30, 2008, at a total cost of approximately \$2,747,351.37.¹⁰ The Employer owns no shares in the Fund.

The hedge fund is the Selectinvest Institutional ARV ASW Fund (the Fund), which, in turn, invests substantially all its assets in a "fund of funds," (the Master Feeder Fund).

The Fund manager is Alternate Strategies Group (ASG), a wholly-owned subsidiary of Wells Fargo. The Master Feeder Fund is unrelated to ASG and is managed by Union Bancaire Privee Asset Management LLC (UBPAM), which is also its investment advisor. The Master Feeder Fund invests in the following three funds: Selectinvest ARV Ltd. (Master Fund I); Selectinvest ARV II Ltd. (Master Fund II); and Selectinvest ARV L.P. (Master Fund III). UBPA is the investment manager for Master Fund I, Master Fund II, and Master Fund III (collectively, the Master Funds).¹¹ In February 2009, ASG announced that it intended to terminate all Selectinvest ARV Funds, including the Fund.¹²

ASG began the process of redeeming all interests in the Fund on March 31, 2009. Since that time, ASG has redeemed approximately 1,781 of the

¹⁰ The Department expresses no opinion herein as to whether the acquisition and holding of the Shares by the Plan have met the requirements of Part 4 in Title I of the Act.

¹¹ It is represented that, in general, the standard investment management fees assessed by the Fund had been a 1.25% Advisory Fee per annum and a 0.35% Program Fee per annum. Because ASG is liquidating all investments in the Fund, however, the Advisory Fee was reduced to 0.50% per annum starting on March 31, 2009. The Limited Liability Company Agreement defines the term "Program" as comprised of Feeder Funds that provide access to underlying Master Funds; thus, the "Program Fee" is an annual fee charged to Fund members to participate in the Program. As is typical with mutual funds and other collective funds, the Advisory Fee and the Program Fee are netted out of the Fund's investment performance and published net asset value (NAV). The applicant further represents that the Plan is not paying duplicative fees at the underlying funds level.

¹² The exemption application states: "Although a secondary market exists for the Feeder Fund's investments, it is not active and individual transactions are typically not observable. When transactions do occur in this limited secondary market, they may occur at discounts to the reported net asset value. It is therefore reasonably possible that if the Feeder Funds were to sell these investments in the secondary market, a buyer may require a discount to the reported net asset value, and the discount could be significant."

Plan's Shares, approximately 67% of the Plan's interest in the Fund, in five separate redemptions. The Plan received its first redemption payment of \$811,700 on May 13, 2009, in exchange for 972.11 shares, which represents a per share value of \$834.988. On September 10, 2009, the Plan received its second redemption payment of \$319,500, in exchange for 367.01 shares, which represents a per share value of \$870.548. On January 21, 2010, the Plan received its third redemption payment of \$203,100, in exchange for 225.09 shares, which represents a per share value of \$902.306. On April 27, 2010, the Plan received its fourth redemption payment of \$148,000, in exchange for 162.10 shares, which represents a per share value of \$913.016. On October 20, 2010, the Plan received its most recent redemption payment of \$48,100, in exchange for 54.79 shares, which represents a per share value of \$877.897.

In order for ASG to redeem shares in the Fund, the Master Feeder Fund must have sufficient cash reserves. Because ASG's complete redemption request exceeded such reserves, the redemption of the Plan's Shares will likely not be finalized until a sufficient portion of the underlying assets of the Master Feeder Fund and its "down-stream" investments in the Master Funds are liquidated.

3. The Employer represents that all the assets of the Plan, including the remaining Shares, must be liquidated and the proceeds used to fund the purchase of annuity contracts and distributions of lump sum benefit amounts. The Plan is contractually prohibited from selling its Shares to a third party without the permission of ASG. There is only a very limited secondary market for the Shares. In the event that the Plan's Shares are not entirely redeemed by the Fund prior to the Distribution Date, the Employer proposes to purchase the remaining Shares from the Plan for a price that is the greater of: (1) \$1,029.93 per Share (the highest per share purchase price paid by the Plan), or (2) the NAV of the Shares as determined by ASG. It is represented that the Plan will pay no commissions, fees, or other expenses in connection with the sale.

4. The applicant represents that ASG determines the Fund's NAV, which it publishes at the end of each month in its monthly statements, according to the Fund's membership agreement, based upon the current fair market value of the underlying investments (based on the NAV of the Master Feeder Fund, which in turn is based upon the Master Feeder Fund's interest in the Master Funds based upon their underlying

investments). The applicant further represents that ASG is the only qualified appraiser to determine the value of the Plan's interest in the Fund because ASG is solely responsible for the determination of the Fund's NAV. It is represented that ASG's method of calculating the Fund's NAV meets the requirements of FAS 157.¹³ It is also represented that ASG is independent from the Employer and receives no income from the Employer. The Fund's independent auditor is KPMG LLP, located in Boston, Massachusetts and the applicant represents that the net asset value of the Shares reported in the most recently available monthly statement, as determined by ASG, is supported by the report of KPMG.

The value of the Plan's membership interest in the Fund is calculated as the number of Shares owned by the Plan relative to all outstanding Fund shares. According to ASG's determination of the Fund's NAV as of April 30, 2010, the Plan's remaining Shares have a value of approximately \$792,561.

The applicant represents that the Fund's NAV as set forth in ASG's most recently available statement prior to the date of the sale would be used to determine the dollar value of the Plan's Shares. Furthermore, the Committee, as the Plan fiduciary, will review and approve the valuation methodology used by ASG, ensure that such methodology is properly applied in determining the value of the Shares, and will also determine whether it is prudent to go forward with the proposed transaction. The proposed sale of the Shares is anticipated to take place on or about the Distribution Date, contingent upon obtaining the requested exemption from the Department.

5. Because of the Plan's underfunded status, as the final step in the Plan termination process, the Employer has made a commitment to contribute an estimated additional \$1,000,000 to the Plan to ensure that the Plan has sufficient assets to satisfy all its accrued benefit obligations.

In accordance with the requirements for a Standard Termination under section 4041(b) of the Act and the PBGC guidelines, the amount that the Employer will contribute to the Plan to make it sufficient will be calculated as follows: The actuarial present value of the total Plan liabilities for accrued benefits less (the amount received for

the remaining Shares, either through the redemption process or consummation of the proposed sale, plus the value of all other Plan assets).

The applicant represents that, if it completes the standard termination process for the Plan, the PBGC will not be liable or responsible for paying any Plan benefits, and, in fact, will not pay any Plan benefits. Upon termination of the Plan, the Plan participants and beneficiaries will receive 100% of their accrued benefits, as a result of the Employer's sufficiency contribution to the Plan.

6. According to the applicant, if the requested exemption is denied and the Shares are not fully redeemed prior to the Distribution Date, the Plan will lack sufficient liquid assets to satisfy the distribution deadline. The failure to distribute all accrued benefits by the Distribution Date could result in the PBGC issuing the Plan a notice of noncompliance, which would require re-starting the standard termination process and nullify all actions taken to date to terminate the Plan, including the re-issuance of the required multiple notices to the Plan participants and beneficiaries required by the termination process, and delay the distribution of plan benefits.

The applicant represents that the proposed transaction is in the best interests of the Plan and its participants and beneficiaries because it will enable the Plan to convert an illiquid, non-marketable asset into cash in order to complete the standard termination process and purchase of annuity contracts and lump-sum distributions to satisfy all its accrued benefit obligations. The proposed transaction would also allow the Plan to avoid the discount that would be expected if the Shares were sold in the secondary market. The Employer is also bearing the costs of the exemption application and of notifying interested persons.

7. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (a) The sale will be a one-time transaction for cash; (b) the terms and conditions of the sale will be at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated third party; (c) the sales price will be the greater of: (1) \$1,029.93 per Share (the highest per share purchase price paid by the Plan), or (2) the net asset value of the Shares reported in the most recently available monthly statement, as determined by the hedge fund manager, who is independent and unrelated to the Employer, (which is

¹³ FAS 157 provides guidance for measuring the fair value of assets and liabilities, including hard-to-value alternative investments. Effective January 1, 2008, the Fund, the Master Feeder Fund, and each of the Master Funds adopted FAS 157. The description of these accounting policies appears in the financial statements of each fund.

supported by the report of the independent auditors); (d) the Plan will pay no commissions, fees, or other expenses in connection with the sale; and (e) upon termination of the Plan, the Plan participants and beneficiaries will be paid 100% of their accrued benefits from the assets of the Plan, as a result of the Employer's sufficiency contribution to the Plan.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 693-8557. (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 exemptions, 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 exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the

transaction which is the subject of the exemption.

Signed at Washington, DC, this 13th day of December 2010.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2010-0012]

National Advisory Committee on Occupational Safety and Health (NACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Announcement of meeting of the National Advisory Committee on Occupational Safety and Health (NACOSH) and NACOSH subgroup meetings.

SUMMARY: The National Advisory Committee on Occupational Safety and Health (NACOSH) will meet January 19 and 20, 2011, in Washington, DC.

DATES: *NACOSH meeting:* NACOSH will meet from 8:15 a.m. to 5 p.m., on Wednesday, January 19, and from 8:15 a.m. to 4:15 p.m., on Thursday, January 20, 2011.

Submission of comments, requests to speak, and requests for special accommodation: Comments, requests to speak at the NACOSH meeting, and requests for special accommodations for the NACOSH meeting must be submitted (postmarked, sent, transmitted) by January 12, 2011.

ADDRESSES: *NACOSH meeting:* NACOSH will meet in Room N-4437 A/B/C/D, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Submission of comments and requests to speak: You may submit comments and requests to speak at the NACOSH meeting, identified by docket number for this **Federal Register** notice (Docket No. OSHA-2010-0012), by one of the following methods:

Electronically: You may submit materials, including attachments, electronically at <http://www.regulations.gov>, the Federal eRulemaking Portal. Follow the online instructions for making submissions.

Facsimile: If your submission, including attachments, does not exceed 10 pages, you may fax it to the OSHA Docket Office at (202) 693-1648.

Mail, express delivery, messenger or courier service: Submit three copies of your submissions to the OSHA Docket Office, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693-2350 (TTY (887) 889-5627). Deliveries (hand, express mail, messenger, courier service) are accepted during the Department of Labor's and OSHA Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m. e.t.

Requests for special accommodation: Submit requests for special accommodations for the NACOSH meeting by hard copy, telephone, or e-mail to Ms. Veneta Chatmon, OSHA, Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999; e-mail chatmon.veneta@dol.gov.

Instructions: All submissions must include the Agency name and docket number for this **Federal Register** notice (Docket No. OSHA-2010-0012). Because of security-related procedures, submission by regular mail may result in a significant delay in receipt. Please contact the OSHA Docket Office for information about security procedures for making submissions by hand delivery, express delivery, messenger or courier service. For additional information about submitting comments and requests to speak, see the **SUPPLEMENTARY INFORMATION** section of this notice.

Comments and requests to speak, including personal information provided, will be placed in the public docket and may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

Docket: To read or download documents in the public docket for this NACOSH meeting, go to <http://www.regulations.gov>. All documents in the public docket are listed in the index; however, some documents (e.g., copyrighted material) are not publicly available to read or download through <http://www.regulations.gov>. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office at the address above.

FOR FURTHER INFORMATION CONTACT: *For press inquiries:* MaryAnn Garrahan, OSHA, Office of Communications, U.S. Department of Labor, Room N3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999.

For general information: Ms. Deborah Crawford, OSHA, Directorate of Evaluation and Analysis, U.S.