

MEMO# 13051

January 18, 2001

DOL ISSUES FINAL INDIVIDUAL EXEMPTION FOR PLAN'S PURCHASE OF MUTUAL FUNDS ADVISED BY PLAN FIDUCIARY

[13051] January 18, 2001 TO: PENSION COMMITTEE No. 5-01 RE: DOL ISSUES FINAL INDIVIDUAL EXEMPTION FOR PLAN'S PURCHASE OF MUTUAL FUNDS ADVISED BY PLAN FIDUCIARY The Department of Labor has published a final individual exemption providing prohibited transaction relief for the receipt of fees by Allfirst Bank for its provision of investment advisory and "secondary services"¹ to the ARK Funds ("Funds"), in connection with investments in the Funds by plans for which Allfirst serves as a fiduciary.² The transactions covered by the final exemption are largely similar to those addressed by PTE 77-4. Based on a conversation with DOL staff, it is our understanding that this exemption differs from PTE 77-4 in that it permits the investment adviser to use a "negative consent" approach in obtaining an independent fiduciary's approval of changes regarding fee rates and the provision of additional services to the plan. Allfirst acts as a trustee, directed trustee, investment manager and/or custodian for a number of pension plans. The plans pay fees in accordance with schedules negotiated with Allfirst depending on the type of services provided. Allfirst (through its affiliate) also serves as the investment adviser to the Funds, which are registered open-end investment companies. Under the exemption, a plan fiduciary that is independent of Allfirst may authorize the investment of a plan's assets in the Funds. The fee arrangements and limitations are similar to the approach found in PTE 77-4. Specifically, each plan either (i) must receive a cash credit of the plan's proportionate share of all fees charged to the Funds by Allfirst for investment advisory services, including investment advisory fees paid by Allfirst to third-party subadvisers, or (ii) may not pay any plan-level investment management, investment advisory or 1 The exemption defines the term to mean "a service other than an investment management, investment advisory, or similar service, which is provided by Allfirst to the ARK Funds, including but not limited to custodial, accounting, brokerage, administrative, or any other service." 2 Background information on the exemption request is provided in greater detail in the proposed exemption, which was previously published. See 64 Fed. Reg. 57129 (Oct. 22, 1999). It appears that Allfirst requested the exemption to obtain relief similar to that in PTE 96-45, which was granted to an entity that was acquired by Allfirst's affiliate in 1998. See 61 Fed. Reg. 28244 (June 4, 1996). 2similar fees to Allfirst with respect to any of the plan assets invested in the Funds.3 Additionally, Allfirst must provide extensive initial and continuing disclosures regarding the Funds to the independent fiduciary, including a prospectus and a description of the fees charged for services. The independent fiduciary may terminate its authorization at will and without penalty to the plan, using a "Termination Form" required

to be provided at least annually to the independent fiduciary. Under the final exemption, failure to return the Termination Form will result in the continued authorization of Allfirst — by “negative consent” — to continue to engage in transactions with respect to the plan. The exemption also permits Allfirst to increase the rate of fees it charges the Funds for investment management, investment advisory or similar services, and also to add “secondary services” (for which a fee is charged), so long as the changes are disclosed to the independent fiduciary and the fiduciary has similar opportunity to terminate the arrangement. A copy of PTE 2000-66 is attached. Thomas T. Kim Assistant Counsel Attachment Attachment (in .pdf format) 3 The Funds, however, may pay investment advisory fees to Allfirst under the terms of an investment management agreement adopted in accordance with section 15 of the Investment Company Act of 1940. Allfirst also may receive fees for “secondary services” pursuant to a duly adopted agreement between Allfirst and the Funds.

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