

income on the Property under the Lease prior to the sale (or over the full five years) is less than (ii) the Property's value as of the date of the Contribution plus a 5% compounded rate of return on that value, then (iii) ARINC will contribute to the Plan the difference necessary to provide the 5% return. The calculation of the Make Whole Payment will take into account the status of any Monetization of the lease payments as of the time of sale or five-year anniversary of the Contribution.

(j) If the Plan desires to sell or convey the Property or its interest therein during the Lease Term, the Plan must first offer ARINC the right to purchase or otherwise acquire the Property or such interest therein on such terms and conditions as the Plan proposes to market the Property or such interest therein for sale (the Right of First Offer). If ARINC fails to exercise such right to purchase, the Plan generally is free to sell the Property to a third party. The right of first offer shall terminate upon the commencement of the exercise by the Plan of its remedies under the Lease as the result of a monetary event of default by ARINC as described in the Lease that continues uncured following notice and the expiration of applicable cure periods (and a second notice and cure period provided fifteen (15) days before the loss of such right on account of such default);

(k) The Plan pays no commissions or fees in connection with the Contribution, the Lease, the Repurchase, or the Monetization of the Property. This condition does not preclude the Plan from paying the ongoing costs associated with the holding of the Property that are not the responsibility of ARINC under the Lease;

(l) Subject to ARINC's Right of First Offer, the Plan retains the right to sell or assign, in whole or in part, any of its Property interests to any third party purchaser; and

(m) ARINC indemnifies the Plan with respect to all liability for hazardous substances released on the Property prior to the execution and closing of the Contribution of the Property.

### Section III. Definitions

(a) The term "Independent Fiduciary" means a fiduciary who is:

- (1) independent of and unrelated to ARINC or its affiliates, and
- (2) appointed to act on behalf of the Plan for all purposes related to, but not limited to (i) the in-kind contribution of the Property by ARINC to the Plan, and (ii) other transactions between the Plan and ARINC related to the Property.

For purposes of this exemption, a fiduciary will not be deemed to be

independent of and unrelated to ARINC if:

(1) such fiduciary directly or indirectly controls, is controlled by or is under common control with ARINC,

(2) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption; except that an Independent Fiduciary may receive compensation for acting as an Independent Fiduciary from ARINC in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision, and

(3) the annual gross revenue received by such fiduciary, during any year of its engagement, from ARINC and its affiliates exceeds 5 percent (5%) of the fiduciary's annual gross revenue from all sources for its prior tax year.

(b) The term "affiliate" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this 19th day of November 2004.

**Ivan L. Strasfeld,**

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

[FR Doc. 04-26067 Filed 11-23-04; 8:45 am]

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## DEPARTMENT OF LABOR

### Emergency Benefits Security Administration

[Prohibited Transaction Exemption 2004-20; Exemption Application No. D-11098, et al.]

#### Grant of Individual Exemption; Comerica Bank

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of

the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, 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 proposed to the Secretary of Labor.

### Statutory Findings

In accordance with section 4089a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Comerica Bank

Located in Detroit, Michigan

[Prohibited Transaction Exemption 2004-20; Exemption Application No. D-11098]

### Exemption

#### Section I. Exemption for Receipt of Fees

The restrictions of sections 406(a) and 406(b) 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 (F) of the Code, shall not apply to the receipt of fees by Comerica Bank and its affiliates (Comerica) from the Munder Funds (the Funds), open-end investment companies registered under the Investment Company Act of 1940 (the 1940 Act), for acting as an investment adviser for the Funds which are not investment advisory services ("Secondary Services" as defined in Section III(h) below) in connection with the purchase and sale of shares of the Funds by certain defined benefit and defined contribution pension plans and funded employee welfare benefit plans (Client Plans) for which Comerica serves as fiduciary with investment discretion, provided that the following conditions and the General Conditions set forth in Section II are met:

(a) No sales commissions, redemption fees, or other fees are paid by the Client Plans in connection with the purchase or sale of shares of the Funds.

(b) The price paid or received by a Client Plan for shares in a Fund is the net asset value per share, as defined in Section III(e), at the time of the transaction, and is the same price that would have been paid or received for the shares by any other investor at that time.

(c) Comerica, including any officer or director of Comerica, does not purchase or sell shares of the Funds from or to any Client Plan.

(d) Each Client Plan receives a credit, through a cash rebate of such Plan's proportionate share of all fees charged to the Funds by Comerica for investment advisory services, including any investment advisory fees paid by Comerica to third-party subadvisers. Cash rebates for investment advisory services provided to the Client Funds are received by a Plan on or before the date Comerica charges the Client Plan for plan-level investment management services. Comerica management fees and Munder advisory fees are paid in arrears for services provided to the Client Plans and the Funds, respectively. The crediting of all such fees is audited by Comerica through a system of internal controls to verify the proper crediting of the fees to each Client Plan.

(e) Comerica will supply, annually and upon request, to the second fiduciary acting for a Client Plan, who is independent of and unrelated to Comerica (the Second Fiduciary), all information reasonably necessary for such fiduciary to verify that the fee credit calculation is correct and any additional information that the Second Fiduciary may require to determine that

the conditions of this exemption are being met by Comerica.

(f) For each Client Plan, the combined total of all fees received by Comerica for the provision of services to a Client Plan, and in connection with the provisions of services to the Funds in which the Client Plan may invest, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of ERISA.

(g) Comerica does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions.

(h) The Client Plans are not employee benefit plans sponsored or maintained by Comerica.

(i) The Second Fiduciary receives, in advance of any initial investment by the Client Plan in a Fund, full and detailed written disclosure of information concerning the Fund, including, but not limited to:

(1) A current prospectus for each Fund in which a Client Plan is considering investing;

(2) A statement describing the fees for investment advisory or similar services and any Secondary Services as defined in Section III(h), and all other fees to be charged to or paid by the Client Plan and by the Funds, including the nature and extent of any differential between the rates of such fees;

(3) The reasons why Comerica may consider such investment to be appropriate for the Client Plan; A statement describing whether there are any limitations applicable to Comerica with respect to which assets of a Client Plan may be invested in the Funds, and if so, the nature of such limitations; and upon the request of the Second Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption once such documents are published in the **Federal Register**.

(j) After consideration of the information described in paragraph (i) above, the Second Fiduciary authorizes in writing the investment of assets of the Client Plan in each particular Fund, the fees to be paid by such Fund to Comerica, and the cash rebate to the Client Plan of fees received by Comerica from the Funds for investment advisory services.

(k) All authorizations made by a Second Fiduciary regarding investments in a Fund and the fees paid to Comerica are subject to an annual reauthorization wherein any such prior authorization referred to in paragraph (j) above shall be terminable at will by the Client Plan, without penalty to the Plan, upon receipt by Comerica of written notice of termination. A form expressly providing an election to terminate the

authorization described in paragraph (j) above (the Termination Form) with instructions on the use of the form must be supplied to the Second Fiduciary no less than annually. However, if the Termination Form has been provided to the Second Fiduciary pursuant to paragraph (m) below, then the Termination Form need not be provided again for an annual reauthorization pursuant to this paragraph unless at least six months have elapsed since the form was provided in connection with the additional service or fee increase. The instructions for the Termination Form must include the following information:

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Client Plans, upon receipt by Comerica of written notice from the Second Fiduciary; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of a Client Plan will result in continued authorization of Comerica to engage in the transactions described in paragraph (j) above on behalf of the Client Plan.

(3) A copy of the Termination Form will be sent to the Second Fiduciary for the Client Plan upon request.

(1) The Second Fiduciary receives full written disclosure, prior to the effective date, in a Fund prospectus or otherwise, of any increases in the rates of fees charged by Comerica to the Funds for investment advisory services even though such fees will be rebated as required by paragraph (d) above.

(m) In the event that Comerica provides an additional Secondary Service to a Fund for which a fee is charged or there is an increase in the rate of any fee paid by the Funds to Comerica for any Secondary Services that results from either an increase in the rate of such fee or a decrease in the number or kind of services performed by Comerica for such fees in connection with a previously authorized Secondary Service, Comerica will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide written notice (that is separate from the prospectus of the Fund) to the Second Fiduciary explaining the nature and the amount of the additional services or of the effective increase in fees of the affected Fund. Such notice shall be accompanied by the Termination Form.

(n) On an annual basis, Comerica provides the Second Fiduciary of a Client Plan investing in the Funds with: A copy of the current prospectus for the Funds and, upon such Second Fiduciary's request, a copy of the Statement of Additional Information for such Funds that contains a description

of all fees paid by the Funds to Comerica (including fees for investment advisory service);

(2) A copy of the annual financial disclosure report of the Funds in which such Client Plan is invested, which includes information about the Fund portfolios, within 60 days of the preparation of the report; and

(3) Oral or written responses to inquiries of the Second Fiduciary as they arise.

(o) All dealings between the Client Plans and the Funds are on a basis no less favorable to the client Plans than dealings with other shareholders of the Funds.

### Section II. General Conditions

(a) Comerica maintains for a period of six years the records necessary to enable the persons described in paragraph (b) of Section II to determine whether the conditions of this exemption have been met, except that: a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Comerica, the records are lost or destroyed prior to the end of the six-year period, and no party in interest other than Comerica shall be subject to the civil penalty that may be assessed under section 502(i) of ERISA or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or not available for examination as required by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) below and notwithstanding any provisions of sections 504(a)(2) and (b) or ERISA, the records referred to in paragraph (a) of Section II are unconditionally available at their customary location for examination during normal business hours by: (1) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service; (ii) Any fiduciary of a Client Plan who has authority to acquire or dispose of shares of the Funds owned by the Client Plan, or any duly authorized employee or representative of such fiduciary; and (iii) Any participant or beneficiary of a Client Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (b)(1)(ii) and (iii) above shall be authorized to examine trade secrets of Comerica, or commercial or financial information, which is privileged or confidential.

### Section III—Definitions

For purposes of this exemption:

(a) "Comerica" means Comerica Bank, a Michigan banking corporation, and

any affiliate thereof (as affiliate is defined below in paragraph (b) of this section).

(b) "affiliate" of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "Fund" or "Funds" shall include the Munder Funds, each series thereof, or any other diversified open-end investment company registered under the 1940 Act for which Comerica serves as an investment adviser and may also serve as a Fund accountant, transfer agent or provide some other Secondary Service (as defined below in paragraph (h) of Section III) which has been approved by such Funds.

(e) "Net asset value" means the amount for purposes of pricing all purchases and sales, calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and statement of additional information, and other assets belonging to the Fund or portfolio of the Fund, less the liabilities charged to each such portfolio or Fund, by the number of outstanding shares.

(f) "Relatives" means a "relative" as that term is defined in section 3(15) of ERISA (or a "member for the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) "Second Fiduciary" means a fiduciary of a Client Plan who is independent of and unrelated to Comerica. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Comerica if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Comerica;

(2) Such fiduciary, or any officer, director partner, employee, or relative of the fiduciary is an officer, director, partner, or employee of Comerica (or is a relative of such persons); or

(3) Such fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this exemption.

If an officer, director, partner, or employee of Comerica (or relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Client Plan's investment adviser, (ii) the approval of any such purchase or sale between the Client Plan the Funds, and (iii) the approval of any change in fees charged to or paid by the Client Plan in connection with any of the transactions described in Section I and Section II above, then subparagraph (g)(2) of Section III shall not apply.

(h) "Secondary Service" means a service other than an investment management, investment advisory, or similar services which is provided by Comerica to the Funds including but not limited to) custodian services, transfer and dividend disbursing agent services, administrator or sub-administrator services, accounting services, and shareholder servicing agent services.

However, for purposes of this exemption, the term "Secondary Service" will not include any brokerage services provided to the Funds by Comerica for the execution of securities transactions engaged in by the Funds.

(i) "Termination form" means the form supplied to the second Fiduciary that expressly provides an election to the Second Fiduciary to terminate on behalf of a Client Plan the authorization described in paragraph (j) of Section I above. Such Termination Form maybe used at will by the Second Fiduciary to terminate an authorization without penalty to the Plan and to notify Comerica in writing to effect a termination by selling the shares of the funds held by the Client Plan requesting such termination within one business day following receipt by Comerica of the form provided that if, due to circumstances beyond the control of Comerica, the sale cannot be executed within one business day, Comerica shall have one additional business day to complete such sale.

**DATES:** This exemption is effective on or after November 24, 2004.

The Department received no comments or requests for a public hearing. After giving full consideration to the entire record, the Department has decided to grant the exemption. For a more complete statement of the facts and representations supporting he Department's decision to grant this exemption, refer to the notice of proposed exemption published on September 10, 2004, at 69 FR 54804.

For information regarding the matters described herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption

Application No. D-11098) the Department is maintaining in this case. The complete application file is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For Further Information Contact: Ms. Wendy McColough of the Department, telephone (202) 693-8561. This is not a toll-free number.

*Camino Medical Group, Inc. matching 401(k) Plan (the 401(k) Plan) and the Camino Medical Group, Inc. Employee Retirement Plan (the Retirement Plan; together, the Plans) Located in Sunnyvale, California.*

[Prohibited Transaction Exemption 2004-21; Exemption Application Nos. D-11160 & D-11161, respectively]

#### Exemption

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 reply to (1) the leasing (the New Lease) of a medical treatment center (the Treatment Center) by the Retirement Plan to Camino Medical Group, Inc. (CMG), the sponsor of the Retirement Plan and a party in interest with respect to such Retirement Plan; and (2) the exercise, by CMG, of options to renew the New Lease for two additional terms.

This exemption is subject to the following conditions:

(a) The terms and conditions of the New Lease are no less favorable to the Retirement Plan than those obtainable by the Retirement Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Retirement Plan is represented for all purposes under the New Lease, and during each renewal term, by a qualified, independent fiduciary.

(c) The Retirement Plan's independent fiduciary has negotiated, reviewed, and approved the terms and conditions of the New Lease and the options to renew the New Lease on behalf of the Retirement Plan and has determined that the transactions are appropriate investments for the Retirement Plan and are in the best interests of the Retirement Plan and its participants and beneficiaries.

(d) The rent paid to the Retirement Plan under the New Lease, and during each renewal term, is no less than the fair market rental value of the Treatment Center, as established by a qualified, independent appraiser.

(e) The rent is subject to adjustment at the commencement of the second year of the term of the New Lease and each year thereafter by way of an independent appraisal. A qualified, independent appraiser is selected by the independent fiduciary to conduct the appraisal. If the appraised fair market rent of the Treatment Center is greater than that of the current base rent, then the base rent is revised to reflect the appraised increased in fair market rent. If the appraised fair market rent of the Treatment Center is less than or equal to the current base rent, then the base rent remains the same.

(f) The New Lease is triple net and requires all expenses for maintenance, taxes, utilities and insurance to be paid by CMG, as lessee.

(g) The Retirement Plan's independent fiduciary monitors compliance with the terms of the New Lease and the conditions of the exemption throughout the duration of the New Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of CMG under the terms of the New Lease.

(h) The Retirement Plan's independent fiduciary expressly approves any renewal of the New Lease beyond the initial term.

(i) CMG provides the Retirement Plan's independent fiduciary with documentation that the rent has been paid on a monthly basis.

(j) At all times throughout the duration of the New Lease and each renewal term, the fair market value of the Treatment Center does not exceed 25 percent of the value of the total assets of the Retirement Plan.

(k) CMG files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes, if any, within 90 days of the publication, in the **Federal Register**, of the grant notice with respect to the leasing of the Treatment Center by the Plans to CMG prior to July 1, 2003.

(l) To the extent CMG owes the 401(k) Plan or the Retirement Plan additional rent by reason of the past leasing of the Treatment Center, (i) the independent fiduciary makes all such determinations, including the payment of reasonable interest; and (ii) CMG makes such payments to the Plans.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on July 20, 2004, at 69 FR 43438.

#### Extension of Comment Period

The notice of proposed exemption invited interested persons to submit comments or requests for a hearing to the Department by September 3, 2004. The applicant agreed to provide notice to interested persons by first class mail within ten days of the date that the proposal appeared in the **Federal Register**. CMG had valid addresses for all but 28 interested persons, all of whom were former employees of CMG with interests in one or both Plans. CMG submitted those 28 names to a commercial locating service, and received addresses for 23 of them. Notice was sent by first class mail to all but the 5 "missing" interested persons on July 26, 2004.

CMG submitted the Social Security Numbers of the 5 "missing" interested persons to a second commercial locating service. The notice was sent by first class mail to the last known address provided by the second commercial locating service for these five individuals on July 29, 2004.

On September 2, 2004, the applicant decided to extend the comment period until September 10, 2004. The need for the extension arose because the applicant changed legal representation with respect to this exemption and therefore required additional time to provide its comments to the Department.

#### Written Comments

During the comment period, the Department received one written comment with respect to the proposed exemption, and no requests for public hearing. The comment, which was submitted by CMG, is intended to (1) inform the Department of certain historical substantive and procedural matters related to the exemption; (2) request retroactive relief with respect to the exemption; and (3) correct minor errors in the proposal. In this regard, CMG has provided the following additional information in order to update the proposed exemption and to support its request for retroactive relief:

1. *History of Lease of Treatment Center by CMG.* Representation 9 of the Summary of Facts and Representations (the Summary) states, in relevant part, that the 401(k) Plan and Advanced Infusion Systems (AIS), an unrelated party, entered into a new lease for the Treatment Center for a 5 year term, from March 1, 1993 through February 28, 1998. Representation 10 of the Summary further states, in pertinent part, that before the end of the lease term, the Administrative Committee for the Plans (the Administrative Committee) and AIS

engaged in discussions relating to the renewal of the lease of the Treatment Center and that the Administrative Committee anticipated that AID would renew the lease. However, Representation 10 of the Summary states that at the end of February 1998, AIS chose not to renew its lease and vacated the premises, and that on March 1, 1998, CMG stepped into the shoes of AIS in order to continue the flow of rental income and the provision of infusion therapy to the CMG patients.

CMG confirms that, in regard to the history of its lease of the Treatment Center, an unrelated third party which was leasing the Treatment Center unexpectedly abandoned the Treatment Center at the end of February 1998 and did not renew its lease. CMG explains that it believed the most prudent course of action was for it to immediately lease the Treatment Center (a medical clinic) from the 401(k) Plan. CMG opines that in leasing the Treatment Center it could (a) continue to provide its patients with infusion therapy for AIDS patients, and (b) continue to provide the 401(k) Plan with \$9,500 in monthly rental income. CMG notes that it was informed that it might take months for the 401(k) Plan to find a tenant for the medical clinic. CMG states that it did not consider it prudent, either financially for the 401(k) Plan or with regard to treating its patients, to have the Treatment Center empty for that period of time.

Notwithstanding the exigent circumstances precipitating CMG's leasing of the Treatment Center from the 401(k) Plan in 1998 and CMG's goodwill intentions, the Department wishes to emphasize that the lease became a prohibited transaction in violation of the Act at the moment CMB assumed lessee responsibilities. Due to the absence of adequate independent safeguards existing at the inception of the lease, CMB has represented that it will file a Form 5330 with the Service and pay all applicable excise taxes that may be due by virtue of its prohibited leasing arrangement with the 401(k) Plan and subsequently, with the Retirement Plan.

**2. Attorney's Concealment of Lack of Action on Application for Exemption.** CMG states that although it instructed its attorney to apply for a prohibited transaction exemption immediately to cover its lease of the Treatment Center on March 1, 1998, the attorney did not file an application for an exemption until December 1999. CMG explains that after the initial filing, the attorney did not follow up with requests by the Department for additional information. Consequently, CMG states, a second application was required to be made.

CMG represents that the second application was filed in November 2001, almost two years after the first application was filed. CMG notes that even after filing the second application, the attorney did not comply promptly with the Department's request for additional information, resulting in additional delay publishing in the proposed exemption in the **Federal Register**. CMG represents that it had no knowledge, or ability to know, of the attorney's dilatory actions since the fact that the attorney was not proceeding on this matter was not disclosed to CMG. CMG states that it was assured at all times that each of the exemption requests was in progress.

The Department can take no remedial action to remedy any harm CMG may have suffered. The Department notes that any grievance CMG may have against its former counsel should be addressed in the appropriate legal forum.

**3. Retroactive Effect of Exemption.** Representation 14 of the Summary states in relevant part that—

Due to the lack of oversight by a qualified, independent fiduciary with full investment discretion to review, approve and monitor the past and continuing leasing arrangements between the Plans and CMG, and the absence of contemporaneous independent appraisals establishing the fair market value or the fair market rental value of the Treatment Center at the inception of each lease or at the time of the sale of the Treatment Center by the 401(k) Plan to the Retirement Plan, the Department is not prepared to provide exemptive relief with respect to such transactions.

CMG notes that ERISA Technical Release 85-1 (TR 85-1) provides that if the applicant has acted in good faith (evidenced by an independent fiduciary or appraisal) and there was no loss to the plan in question the Department may favorably consider making a prohibited transaction exemption retroactive. CMG explains that all the conditions set out in TR 85-1 for a retroactive exemption are present in this case. Consequently, CMG requests that the exemption be made retroactive to November 1998, which is the date of the first appraisal of the fair market rental value of the Treatment Center after it was leased by CMG. CMG explains that the appraisal was done by a qualified independent appraiser, Hulberg & Associates (Hulberg), under the direction of two independent fiduciaries.

CMG further explains that the first lease agreement covering the lease of the Treatment Center to CMG was dated March 1, 1999. The fair market rental value of that lease was also determined

by Hulberg, under the direction of the same independent trustees. The March 1999 lease provided for rental increases (if any) each year based on an annual appraisal by the independent appraiser of market rents. Because the rental market went up and then went down for several years, under the lease agreement CMG states that it paid in excess of market rates each year except one. CMG also maintains that not only was there no loss to participants in the rental transaction, there was a significant gain. In July 2003, CMG explains that a second lease was signed for the Treatment Center. In that case, the independent fiduciary was Thomas J. Nault and the independent appraiser chosen by Mr. Nault was also Hulberg. CMG indicates that Mr. Nault has continued to serve on behalf of the Retirement Plan as the independent fiduciary.

CMG maintains that in both leases covering the Treatment Center, there was an independent appraisal of the fair market rental value of such property. Also, CMG asserts that the appraisals were under the direct supervision of independent fiduciaries. Although CMG believes the conditions are present for the exemption to be made retroactive to November 1998, at the very minimum, CMG suggest that the exemption be made retroactive to March 1, 1999, or July 1, 2003, the commencement dates of the leases, or retroactive to March 2003, the date of Mr. Nault's appointment as independent trustee for the Retirement Plan.

As an additional factor, CMG requests that the Department consider that prior to Mr. Nault's assumption of independent fiduciary duties, at all times since the Treatment Center was leased to CMG, Wells Fargo Bank, N.A. (Wells Fargo), has been the trustee of the Retirement Plan. Although the bank was and is a directed trustee, CMG states that it has provided the Department with a letter from Wells Fargo which states that the bank reviewed the Treatment Center's lease appraisal for reasonableness and adjusted the monthly rental income, accordingly. CMG notes that Wells Fargo also stated that it reviewed the terms of the leases to ensure compliance and to ensure that lease payments were received and deposited to the trust in a timely manner each month.

In response to CMG's comment, the Department wishes to emphasize that further distinctions must be made to the independent fiduciary and independent appraisal criteria set forth in TR 85-1. This is because the safeguards implemented for a prospective exemption must be in place for a

retroactive exemption. In this regard, the Department does not believe the lease can be made retroactive to March 1, 1999,<sup>1</sup> due to the lack of adequate independent safeguards. Specifically, there was no contemporaneous appraisal or other objective means to establish the fair market rental value of the Treatment Center at the inception of the 1999 lease, despite the fact that CMG has, for the most part, paid the CMG Plans more than fair market value rent. The Department notes that the only written independent appraisal of the Treatment Center existing at that time was issued by Hulberg on December 20, 1998. The appraisal, which was commissioned primarily for the sale of the Treatment Center by the 401(k) Plan to the Retirement Plan reflected, among other things, the fair market rental value of the Treatment Center as of November 24, 1998. Due to its relative staleness and the absence of documentation in the application file showing that an updated appraisal was obtained on the date the parties entered into the 1999 lease, the 1998 appraisal could not be utilized to substantiate the fair market value of the Treatment Center at the inception of the 1999 lease. Further, although Wells Fargo may have represented the interests of the 401(k) Plan and later the Retirement Plan, the Department notes that there is not indication that the bank ever possessed "full" discretion as an independent fiduciary with respect to the approval and monitoring the leasing of Treatment Center or advising CMG that it would be engaged in a prohibited transaction.

Similarly, it appears that the lease cannot be made retroactive to March 1, 2003. This is the date that Mr. Nault was appointed as the Retirement Plan's successor independent fiduciary. Again, the Department believes that independent safeguards to protect the interests of the Retirement Plan and its participants and beneficiaries were lacking. Although Mr. Nault was then serving as the independent fiduciary, his appointment could not be utilized to validate the lease, which was already in existence.

With respect to the July 1, 2003, retroactivity date, Mr. Nault has provided the Department with certain additional information. In a letter dated October 7, 2004, Mr. Nault states that a new lease (*i.e.*, the "New Lease" referred to above in the operative language) of

the Treatment Center was executed between CMG and the Retirement Plan on July 1, 2003, at the time the New Lease was executed, he explains that he relied on other objective means of valuation to determine the fair market rental value of the Treatment Center at the time this lease was executed. Such objective means included several discussions with Hulberg in order to ascertain the fair market rental value of the Treatment Center and due diligence conducted from the time of his independent fiduciary appointment onward. Specifically, Mr. Nault explains that during his discussions with Hulberg, he reviewed rental statistics for the Sunnyvale-San Jose area that clearly showed that the rent being paid for the Treatment Center was above market. Further, as part of his own due diligence, Mr. Nault states that he drove around the area to check the vacancy information he received from Hulberg, he did an online analysis of rents and market conditions to ascertain rent levels in the area, and researched the effect of the 2001 implosion of Dot-Com businesses on the office vacancy rate in that area. Mr. Nault states that his findings at the time the New Lease was executed indicated that CMG was paying above market rent prior to such lease. Consequently, Mr. Nault represents that the rental amount being paid by CMB under the New Lease provides that the rent will be changed only if the amount that CMG is paying falls below market value.

Although there was no contemporaneous, written appraisal of the Treatment Center at the inception of the New Lease, the Department believes that Mr. Nault has demonstrated that he utilized an objective means of valuation of the Treatment Center immediately prior to, and at the time of, the New Lease by analyzing the prevailing market conditions. In addition, the Department notes that for assistance, Mr. Nault obtained significant guidance from Hulberg, the Retirement Plan's independent appraiser. Therefore, the Department believes that adequate independent safeguards existed at the inception of the New Lease. Accordingly, the Department has determined that the exemption should be made retroactive to July 1, 2003.

In addition, in order that the operative language of the exemption may be consistent with the July 1, 2003, effective date, the Department has modified conditions (f), (k) and (l) of the final exemption to read as follows:

(f) The New Lease is triple net and requires all expenses for maintenance, taxes, utilities and insurance to be paid by CMG, as lessee.

(k) CMG files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes, if any, within 90 days of the publication, in the Federal Register, of the grant notice with respect to the leasing of the Treatment Center by the Plans to CMG prior to July 1, 2003.

(l) To the extent CMG owes the 401(k) Plan or the Retirement Plan additional rent by reason of the past leasing of the Treatment Center, (i) the independent fiduciary makes all such determinations, including the payment of reasonable interest; and (ii) CMG makes such payments to the Plans.

**4. Miscellaneous Comments.** CMG notes that the caption of the proposed exemption states, in relevant part, that the Plans are located in Santa Clara, California. CMG clarifies that the Plans are located in "Sunnyvale (County of Santa Clara), California."

In addition, Representation 1 of the Summary states, in pertinent part, that CMG is a "not-for-profit" organization. CMG explains that it is a "for-profit" organization and that the Palo Alto Medical Foundation, of which CMG is an affiliate, is a "not-for-profit" organization.

Further, Representation 13 of the Summary states, in relevant part, that CMG presently leases the Treatment Center and pays a monthly rental of \$1,456. CMG notes that the monthly rental which it currently pays the Retirement Plan for its lease of the Treatment Center is \$14,256.

In response to the foregoing comments, the Department notes the clarifications to the proposed exemption.

Accordingly, after giving full consideration to the entire record, including the comment letter, the Department has determined to grant the exemption as modified herein. For further information regarding the comment, additional information provided by the independent fiduciary, and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application Nos. D-11160 and D-11161) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

*For Further Information Contact:* Ms. Anna M.N. Mpras of the Department, telephone (202) 693-8565. (This is not a toll-free number.)

<sup>1</sup> In this regard, the lease had actually been entered into by CMG and the 401(k) Plan, the previous owner of the Treatment Center on March 1, 1998. However, that lease, which was executed by the Retirement Plan (the current owner of the Treatment Center) and CMG, was not reduced to writing until March 1, 1999.

### 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 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed in Washington, DC, this 19th day of November, 2004.

**Ivan Strasfeld,**

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

[FR Doc. 04-26068 Filed 11-23-04; 8:45 am]

BILLING CODE 4510-29-M

### DEPARTMENT OF LABOR

#### Occupational Safety and Health Administration

[Docket No. ICR 1218-0075(2005)]

#### Fire Brigades Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

**ACTION:** Request for public comment.

**SUMMARY:** OSHA solicits public comment concerning its request for an

extension of the information collection requirements contained in the Fire Brigades Standard (29 CFR 1910.156).

**DATES:** Comments must be submitted by the following dates:

*Hard Copy:* Your comments must be submitted (postmarked or received) by January 24, 2005.

*Facsimile and electronic transmission:* Your comments must be received by January 24, 2005.

**ADDRESSES:** You may submit comments, identified by OSHA Docket No. ICR-1218-0075(2005), by any of the following methods:

*Regular mail, express delivery, hand delivery, and messenger service:* Submit your comments and attachments to the OSHA Docket Office, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889-5627). OSHA Docket Office and Department of Labor hours are 8:15 a.m. to 4:45 p.m., e.t.

*Facsimile:* If your comments are 10 pages or fewer in length, including attachments, you may fax them to the OSHA Docket Office at (202) 693-1648.

*Electronic:* You may submit comments through the Internet at <http://ecomments.osha.gov>. Follow instructions on the OSHA Web page for submitting comments.

*Docket:* For access to the docket to read or download comments or background materials, such as the complete Information Collection Request (ICR) (containing the Supporting Statement, OMB-83-I Form, and attachments), go to OSHA's Web page at <http://www.OSHA.gov>. In addition, comments, submissions and the ICR are available for inspection and copying at the OSHA Docket Office at the address above. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

(For additional information on submitting comments, please see the "Public Participation" heading in the SUPPLEMENTARY INFORMATION section of this document.)

#### FOR FURTHER INFORMATION CONTACT:

Theda Kenney, Directorate of Standards and Guidance, OSHA, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210, telephone: (202) 693-2222.

#### SUPPLEMENTARY INFORMATION:

#### I. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments and supporting materials in response to this notice by (1) hard copy, (2) FAX

transmission (facsimile), or (3) electronically through the OSHA Web page. Because of security related problems, there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693-2350 (TTY (877) 889-5627) for information about security procedures concerning the delivery of submissions by express delivery, hand delivery and courier service.

All comments, submissions and background documents are available for inspection and copying at the OSHA Docket Office at the above address. Comments and submissions posted on OSHA's Web page are available at <http://www.OSHA.gov>. Contact the OSHA Docket Office for information about materials not available through the OSHA Web page and for assistance using the Web page to locate docket submissions.

Electronic copies of this **Federal Register** notice as well as other relevant documents are available on OSHA's Web page.

#### II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA-95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

Although OSHA does not mandate that employers establish fire brigades, if they do so, they must comply with the provisions of the Standard. The provisions of the Standard, including the paperwork requirements, apply to fire brigades, industrial fire departments, and private or contract fire departments, but not to airport crash-rescue units or forest fire-fighting operations. Paragraphs (b)(1), (b)(2), (c)(2), and (c)(4) contain the paperwork requirements of the Standard.