

**AGENCY CONTACT:** Thomas W. Hutchison, Chief of Staff, United States Parole Commission, (301) 492-5990.

Dated: June 24, 2005.

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-11175, et al.]

#### Proposed Exemptions; Milan Uremovich, D.D.S., P.C. Profit Sharing Plan and Trust (the Plan)

**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 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

#### Written Comments and Hearing Requests

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. 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.

**ADDRESSES:** 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-5649, 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.

#### 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).

**SUPPLEMENTARY INFORMATION:** 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.

#### Milan Uremovich, D.D.S., P.C. Profit Sharing Plan and Trust (the Plan), Located in Arvada, CO.

[Application No. D-11175]

#### 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).<sup>1</sup> If

<sup>1</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the leasing (the New Lease) by the individual account in the Plan of Dr. Milan Uremovich (the Account), of certain office space (the Office Space) to Milan Uremovich, D.D.S., P.C., (the Employer), a party in interest with respect to the Plan, provided that the following conditions are met:

(a) The terms and conditions of the New Lease are at least as favorable to the Account as those the Account could obtain in a comparable arm's length transaction with unrelated parties.

(b) The fair market rental value of the Office Space leased to the Employer is determined by a qualified, independent appraiser.

(c) The rent charged by the Account under the New Lease and for each renewal term is, at all times, not less than the fair market rental value of the Office Space, as determined by a qualified, independent appraiser. The rental payments under the New Lease are adjusted once every five years after the initial term and after each renewal term by the qualified, independent appraiser to ensure that the New Lease payments are not greater than or less than the fair market rental value of the leased space. In no event may the rent be adjusted below the rental amount paid for the preceding term of such lease.

(d) The fair market value of the Office Space represents, at all times, no more than 25 percent of the total assets of the Account.

(e) The Account does not pay any real estate fees, commissions, or other expenses with respect to the New Lease.

(f) The New Lease is a triple net lease under which the Employer, as lessee, pays, in addition to the base rent, all normal operating expenses associated with the Office Space, including real estate taxes, insurance, maintenance, repairs and utilities.

(g) Dr. Uremovich is the only participant in the Plan whose Account is affected by the New Lease.

(h) Within 90 days of the publication, in the **Federal Register**, of the notice granting this exemption, the Employer files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes under section 4975(a) of the Code that are attributed to the past purchase of the Building by Dr. Uremovich's individual account in the Milan Uremovich, D.D.S., P.C. Profit Sharing Plan (the Profit Sharing Plan), a

predecessor to the current Plan, and the leasing of Office Space in the Building by the Profit Sharing Plan Account and the Account to Dr. Uremovich.

### Summary of Facts and Representations

1. The Employer (or the Applicant) is a Colorado corporation engaged in the business of providing dental services. Dr. Uremovich is the corporation's sole shareholder. Since 1974, the Employer has operated a dental practice in a single story building (the Building) containing 7,219 square feet of space. The Building is located at 11890 W. 64th Avenue. (This address is also known as "11890 Ralston, Arvada, Colorado.") Until October 1, 2001, the Employer sponsored two retirement plans, the Profit Sharing Plan and the Milan Uremovich, D.D.S., P.C. Money Purchase Plan and Trust (the Money Purchase Plan), which were then merged into the current "Milan Uremovich, D.D.S., P.C. Profit Sharing Plan and Trust" (otherwise referenced herein as "the Plan").

The Plan provides for individually directed accounts wherein each Plan participant exercises investment discretion over the assets of their respective accounts. Dr. Uremovich and Carol Uremovich, his wife, serve as the directed trustees of the Plan. As of September 30, 2004, the Plan had total aggregate assets of \$2,706,515 and 7 participants, including Dr. Uremovich. Also as of that same date, the Account had total assets of \$2,312,063. Among the assets of the Plan that are currently allocated to Dr. Uremovich's Account is the Building in which the Employer conducts its dental practice.

2. Prior to the October 1, 2001 merger of the Profit Sharing Plan and the Money Purchase Plan, Dr. Uremovich directed his Profit Sharing Plan Account to purchase the Building. The Applicant represents that the acquisition of the Building presented an opportunity for the Profit Sharing Plan Account to diversify its portfolio holdings among equity, bonds, and property assets. Furthermore, at the time of the purchase, equity and fixed income prices were falling while commercial real estate prices were rising thereby making the Building a good investment.

The Profit Sharing Plan Account acquired the Building for the total cash consideration of \$386,000. The seller was a former joint venture group (the Joint Venture Group) comprised of Donald G. Richards, Edward J. Seibert, Jr., and Dr. Uremovich. Each joint venturer held a 1/3 ownership interest in the Building, as tenants in common. The Profit Sharing Plan Account paid no real estate fees or commissions in

connection with the acquisition of the Building. At that time, the purchase price represented 58% of the Profit Sharing Plan Account's assets and 50% of the Profit Sharing Plan's total assets. The Applicant states the Building was and continues to be clear of any mortgages or encumbrances.

3. On August 20, 2000, Dr. Uremovich had the Building appraised by Mr. Richard DeFord, S.R.A., a qualified, independent appraiser, who was the President of DeFord and Associates, an independent appraisal firm located in Lakewood, Colorado. Dr. Uremovich was contemplating dissolving the Joint Venture Group and therefore requested that Mr. DeFord establish the Building's fair market value. In a limited scope appraisal, Mr. DeFord placed the fair market value of the Building at \$353,000 as of August 20, 2000. Mr. DeFord stated that the Building, based on its overall condition and 100% occupancy, would sell at the appraised value within 12 months. Therefore, he recommended the value of the Building be discounted for the period of time required to sell such property.

The Joint Venture Group also retained the services of Messrs. Basil S. Katsarous, MAI, SRA and Daniel K. Sorrells, Associate Appraiser/Certified General Appraiser, who were affiliated with West Terra (West Terra), a real estate appraisal and consulting firm located in Denver, Colorado, to determine the fair market value of the Building. In an appraisal report dated November 10, 2000, the appraisers placed the fair market value of the Building at \$375,000 and the fair market rental value of the rentable space in the Building at \$15 per square foot as of August 23, 2000.

It is represented by the Applicant that the Building's \$386,000 purchase price was ultimately determined by averaging both the DeFord and West Terra appraisals. In addition, the Profit Sharing Plan Account paid 6.5% above the averaged price for a total purchase amount of \$386,000. At the time of the January 31, 2001 purchase transaction, none of the underlying appraisals were updated to reflect the then current fair market value of the Building.

4. As part of the terms of the purchase transaction, the Profit Sharing Account assumed the existing leases in force. Among the lessees was the Employer, which was already leasing 1,366 square feet of Office Space in the Building from the Joint Venture Group under the provisions of a written lease (the First Lease). The First Lease had an expiration date of November 4, 2001 and required a monthly rental of \$1,708. The First Lease also provided for annual

adjustments to the Colorado Consumer Price Index.

The other lessees in the Building were, and continue to be, unrelated parties. They are James Gallagher, D.M.D. and Calm Spirit Acupuncture, Inc.

On June 1, 2001, the Profit Sharing Plan Account negotiated with the Employer to increase the amount of square footage under the First Lease from 1,366 square feet to 2,400 square feet pursuant to an amendment to the First Lease. The amendment was not executed in writing nor was there a corresponding increase in the rental amount.

On November 5, 2001, the Applicant explains that a new written lease (the Second Lease) was entered into between the Employer and the newly-merged Plan for an additional five year period ending on December 1, 2006. The Second Lease was allocated exclusively to Dr. Uremovich's Account in the Plan as was the First Lease.<sup>2</sup> The Second Lease provides for a monthly rent of \$4,000, which represented a rental increase to \$20 per square foot from the former rental amount of \$15 per square foot. The Second Lease also provides that the rent be adjusted each year in accordance with the Colorado Consumer Price Index. Although the Second Lease was initially silent about which party would be responsible for paying for utilities, real estate taxes and insurance with respect to the leased premises, it did provide that the Account would not be required to pay for any leasehold improvements.

In May 2003, the Second Lease was amended in order to clarify certain of its provisions. In this regard, the Plan and the Employer agreed that (a) the Employer would be responsible for paying its pro rata share of real estate taxes, insurance and leasehold improvements associated with the Office Space it occupied; (b) the annual rental payment under such lease would be adjusted each November 1 during the term of the Second Lease to reflect increases in the Colorado Consumer Price Index made during the preceding year, but not decreases; (c) at the time of expiration of the Second Lease on December 1, 2006, the Employer would be eligible to renew the lease for two additional two year terms; (d) the lease rate at the beginning of a renewal term would be determined by a qualified, independent appraiser; and (e) during the second year of each renewal term

<sup>2</sup> Because the Building and the New Lease have been allocated to Dr. Uremovich's Account in the Plan, the "Account" rather than "the Plan" is hereinafter deemed to be the lessor for the purposes of this exemption.

under the Second Lease, the rent would be adjusted upward to reflect increases in the Colorado Consumer Price Index, but would never be adjusted downward.

It is represented that all times under the Second Lease, the Employer has paid rent in a timely manner and there have been no defaults or delinquencies in rental payments.

5. The Applicant represents that legal counsel failed to inform Dr. Uremovich that the Building purchase and Lease transactions would constitute prohibited transactions in violation of the Act. In this regard, approximately 20 months after the transactions (*i.e.*, September 2002), Dr. Uremovich had a conversation with different legal counsel regarding updates to the Plan documents. In the course of the conversation, Dr. Uremovich was made aware of the prohibited transactions entered into by the Employer and the Profit Sharing Plan Account. Subsequent to the conversation, Dr. Uremovich filed an exemption application with the Department.

6. In conjunction with the preparation of the exemption application, Dr. Uremovich consulted an independent real estate broker, Mr. Charles S. Ochsner, President of REMAX Alliance of Arvada, Colorado, a commercial and residential real estate brokerage firm, to determine the fair market rental value of the Office Space occupied by the Employer. In a "look back" appraisal report dated January 21, 2003, Mr. Ochsner concluded that the fair market rental value of such Office Space was between \$18–\$21 per square foot for the period of November 2001 through January 2003. Mr. Ochsner noted that the Building was in good condition, situated in a very convenient location, and had ample parking. He also noted that the Employer occupied the prime lease space in the Building in terms of view and location. Therefore, Mr. Ochsner concluded that the lease rate paid by the Employer was within an acceptable range of fair market value rent.

7. Lease rates in the Building were also analyzed by Mr. Richard DeFord. Taking into account other comparable rentals and the condition, location, and features of the Building, Mr. DeFord concluded in a "look back" appraisal report dated May 14, 2003, that the fair market rental value of the Office Space occupied by the Employer was \$20 per square foot for the period January 30, 2001 through February 1, 2003. Mr. DeFord noted that this rate was in line with rental rates for good quality dental space in 2001. In arriving at this figure, Mr. DeFord explained that he took into account the fact that lease rates were

high for dentists and doctors because of the extra costs associated with this type of lessee. According to Mr. DeFord, dentist and doctor facilities require more water and air hookups, as well as many small "check-up" rooms.

8. Because the Building purchase and the Lease transactions appear to reflect less than arm's length dealings between the Employer and the Plan Accounts and were prohibited transactions in violation of the Act, the Department is not prepared to provide exemptive relief for such transactions. In this regard, the Profit Sharing Plan Account paid a 6.5 percent premium over the average of the two independent appraisals in order to acquire the Building. In addition, Dr. Uremovich did not obtain contemporaneous independent appraisals of the Building at the time of the acquisition, at the inception of the First and Second Leases, or when the Employer sought an increase in rental space. Further, the Department notes that the Building represented a large percentage of the Profit Sharing Plan Account's total assets at the time of acquisition.

Therefore, the Applicant represents that within 90 days of the publication, in the **Federal Register**, of the notice granting the exemption, the Employer will file a Form 5330 with the Service and pay all applicable excise taxes that are due. However, in order that the Employer may continue leasing the Office Space from the Account under the provisions of a new, written lease, the Applicant requests a prospective administrative exemption from the Department.

9. Thus, the New Lease will be effective on the date the grant notice is published in the **Federal Register**. It will have an initial term of five years and will require a minimum rent of \$4,130 per month or \$49,560 per year. Such rental amount will be based upon the fair market rental value of the Office Space as determined by Michael J. Martin, CFA, MAI,<sup>3</sup> a qualified, independent appraiser, on the date the New Lease is entered into by the parties. On April 16, 2005, Mr. Martin determined that the fair market rental value of the Office Space was \$20.65 per square foot. Following the conclusion of the initial term, the New Lease may be

<sup>3</sup> Michael J. Martin, CFA, MAI, is the founder of Meta Advisory Services, Inc. of Centennial, Colorado. He has over twenty years of experience in real estate, business and finance valuations. In May 2005, upon Mr. DeFord's unavailability, the Applicant retained the services of Mr. Martin to update the DeFord November 24, 2003 appraisal report. In addition, Mr. Martin will also update the April 16, 2005 fair market rental update on the date of the New Lease's execution.

renewed for two additional terms, each of 5 year's duration.

10. Rent for any of the two renewal periods under the New Lease will be determined at the outset of such renewal period in an amount no less than the Office Space's fair market value as established by a qualified, independent appraiser, but it will be for no less than the preceding lease term's rental value.

Under the New Lease, the Employer will pay all damages, costs and expenses which the Account may suffer or incur by reason of any default of the Employer or failure to comply with New Lease covenants, and all Office Space costs associated with real estate taxes, fire insurance premiums, water rent, sewer rent, electricity, gas, cost of maintenance, repairs, utilities and agrees to indemnify and hold the Account harmless against all claims, which might arise from the Applicant's use of the Office Space. The New Lease will also require the Employer to maintain personal and property liability insurance on the leased premises. The Account will pay no fees or commissions in connection with the administration of the New Lease.

11. The Applicant represents that the New Lease is in the best interest of the Account because it will help maintain the value of the Account's investment in commercial real estate by ensuring that the property has a strong, long-term anchor tenant. Further, the New Lease will help the Account maintain a suitable stream of income from its investment.

12. In summary, it is represented that the proposed transaction will satisfy the statutory criteria for an administrative exemption under section 408(a) of the Act because:

(a) The terms and conditions of the New Lease will be at least as favorable to the Account as those the Account could obtain in a comparable arm's length transaction with unrelated parties.

(b) The fair market rental value of the Office Space leased to the Employer at the inception of the New Lease and for each renewal term will be determined by a qualified, independent appraiser.

(c) The rent charged by the Account under the initial term of the New Lease and for each renewal term will, at all times, be no less than the fair market rental value of the Office Space, as determined by a qualified, independent appraiser. The rental payments under the New Lease will be adjusted once every five years after the initial term and after each renewal term by the qualified, independent appraiser to ensure that the New Lease payments are not greater

than or less than the fair market rental value of the leased space. In no event may the rent be adjusted below the rental amount paid for the preceding term of such lease.

(d) The fair market value of the Office Space will represent, at all times, no more than 25 percent of the total assets of the Account.

(e) The Account will not pay any real estate fees, commissions, or other expenses with respect to the New Lease.

(f) The New Lease is a triple net lease under which the Employer, as lessee, will pay, in addition to the base rent, all normal operating expenses associated with the Office Space, including real estate taxes, insurance, maintenance, repairs and utilities.

(g) Dr. Uremovich is the only participant in the Plan, whose Account will be affected by the New Lease.

(h) Within 90 days of the publication, in the **Federal Register**, of a notice granting this proposed exemption, the Employer will file a Form 5330 with the Service and pay all excise taxes applicable under section 4975(a) of the Code that are attributed to the former Profit Sharing Plan Account's purchase of the Building and leasing of the Office Space therein to Dr. Uremovich by the Profit Sharing Plan Account and the Account.

#### Notice to Interested Persons

Because Dr. Uremovich is the only participant in the Plan whose Account has been affected by the transactions, the Department has determined that there is no need to distribute the notice of proposed exemption to interested persons. Therefore, the comments and requests for a hearing are due 30 days after the date of publication of the notice of pendency in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Silvia M. Quezada of the Department, telephone (202) 693-8553. (This is not a toll-free number).

**Edward D. Jones & Co., L.P. (the Applicant), Located in St. Louis, Missouri**

[Application No. D-11216]

#### 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, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply to the extension of credit to the Applicant, by certain IRAs whose assets are held in custodian accounts by the Applicant, a party in interest and a disqualified person with respect to the IRAs, in connection with the Applicant's use of uninvested IRA cash balances (Free Credit Balance(s)) in such accounts, provided that the following conditions are met:

(a) Neither the Applicant nor any affiliate has any discretionary authority or control with respect to the investment of the cash balances of the IRA that are held in the Free Credit Balance or provides investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(b) Edward Jones credits the IRA with monthly interest on its Free Credit Balance at an annual rate no less than the bank national index rate for interest checking, as reported in the Bank Rate Monitor. This rate will be subject to a minimum rate level of 10 basis points (0.10%);

(c) The interest rate will be no less than the rate paid by Edward Jones on non-IRA Free Credit Balances;

(d) The IRA independent fiduciary has the ability to withdraw the Free Credit Balance at any time without restriction;

(e) The Applicant provides in writing, to the IRA independent fiduciary, prior to any transfer of the IRA's available cash into a Free Credit Balance account, an explanation (i) that funds invested in a Free Credit Balance are not segregated and may be used in the operation of the business of the Applicant; (ii) of the method to be used for crediting interest to the Free Credit Balance; and (iii) that the funds are payable to the IRA on demand at any time;

(f) The IRA independent fiduciary approves the transfer of the IRA's available cash into a Free Credit Balance account no less frequently than once every three months, or once every month if there is account activity for the particular month other than the crediting of interest, together with or as a part of the customer's statement of account; and

(g) The Applicant periodically provides a written statement subsequent to the proposed transaction informing the independent IRA fiduciary of the IRA that (i) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (ii) such funds are payable on the demand at the customer.

#### Summary of Facts and Representations

1. The Applicant is a brokerage firm with its principal office in St. Louis, Missouri. It is a member of the National Association of Securities Dealers, the New York Stock Exchange and the Chicago Stock Exchange. The firm serves as custodian of self-directed IRAs, to which it provides brokerage services. As of March 26, 2005, the Applicant had 2,005,000 IRA accounts, with total assets of \$99.7 billion. The IRAs fall into three categories:

Category	Number of Accounts	Assets (billion)
Traditional IRAs	1,348,000	\$90.3
Roth IRAs .....	571,000	4.4
SEP-IRAs .....	86,000	5.0

The IRA accountholder is responsible to direct the Applicant with respect to the investments to be made, retaining sole responsibility for those investment decisions.<sup>4</sup> Investments are limited to those that are legally permissible for an IRA account and that are securities that are obtainable through the Applicant in the regular course of its business, such as mutual funds, stocks, bonds, certificates of deposit and unit trusts. The Applicant charges each IRA account an administrative fee of \$30 per IRA account (which is sometimes waived), as well as fees for brokerage services and reimbursement for its reasonable expenses and any taxes paid with respect to the account.

2. Under the terms of the Applicant's retirement account agreements, the Applicant is pre-authorized to conduct daily sweeps of cash for its IRA accounts into a money market fund, to assure that all IRA account assets are fully invested. The money market fund used is the Edward Jones Money Market Fund (the Cash Fund), which currently holds total assets of \$10.8 billion. The cash may be a dividend or interest payment that is too small to invest, an annual contribution awaiting investment, or proceeds from investments, sales or maturities.

The sweep is conducted automatically, without any discretion exercised on the part of the Applicant. All available cash is swept.<sup>5</sup> The IRA accountholder determines when to withdraw the swept cash, so that the

<sup>4</sup> The Applicant will not have any authority, control or responsibility concerning the IRAs and, as a result, the Applicant has no discretion over uninvested IRA cash balances.

<sup>5</sup> The term available cash excludes, for example, the proceeds of checks that have not yet cleared, so that Edward Jones is not obligated to advance funds against amounts that ultimately may not be collected.

Applicant has no discretion over how long the cash remains in the Cash Fund.

The Cash Fund is a registered mutual fund that invests primarily in U.S. Treasury and government agency securities maturing in 397 days or less, with a dollar-weighted average maturity of 90 days or less. As a money market fund, it has the goal of maintaining a constant \$1.00 net asset value per share. It has two classes of shares, Investment Shares and Retirement Shares. IRAs for which the Applicant is custodian typically invest in the Retirement Shares.

The investment adviser to the Cash Fund is Passport Research Ltd., which is owned 50.5% by a subsidiary of Federated Investors, Inc. and 49.5% by the Applicant. It receives an annual investment advisory fee on a sliding scale of 0.500% of net assets on the first \$500 million down to 0.400% of net assets over \$2 billion—for the most recent reported period, its advisory fee was 0.41%. The Cash Fund also pays administrative and shareholder services fees to Federated Services Company and the Applicant. The Applicant serves as the transfer and dividend-disbursing agent for the Cash Fund, and receives a fee that is a fixed dollar amount multiplied by the number of shareholder accounts.<sup>6</sup>

<sup>6</sup> On December 12, 2004, the Securities and Exchange Commission (SEC) instituted cease-and-desist proceedings pursuant to Section 8a of the Securities Act of 1933 (Securities Act) and Sections 15(b) and 21(c) of the Securities Exchange Act of 1934 against the Applicant. The allegations included: (1) That the Applicant violated Section 17(a)(2) of the Securities Act, Rule 10b-10 under the Securities Exchange Act, Section 17a-4 of the Securities Exchange Act, Section 15B of the Securities Exchange Act, and MSRB Rule G-15; (2) that the Applicant effected sales in mutual fund shares and 529 Plans without disclosing its financial incentives to sell the fund shares of preferred mutual fund families which compensated the Applicant on the basis of revenue sharing; (3) that the Applicant effected sales in mutual fund shares and 529 Plans without adequately disclosing the amounts and source of remuneration received in connection with the transactions either by written document or on its public Web site; (4) that the Applicant failed to ensure that adequate disclosure was contained in prospectuses and Statements of Additional Information (SAIS) concerning revenue sharing, directed brokerage payments or other incentives offered to the Applicant; (5) that the firm failed to supervise, establish, maintain and enforce adequate written supervisory procedures and systems related to sales of preferred family mutual funds and 529 Plans, including the failure to properly review prospectuses and SAIS of preferred fund families to make sure that they contained adequate disclosures of potential conflicts of interest; and (6) that the Applicant improperly encouraged its investment representatives to favor the sale of mutual funds and 529 Plans on the basis of the amount of revenue the Applicant received in connection with those sales. To resolve these allegations, without admitting or denying any misconduct, the Applicant has agreed to pay \$75 million in disgorgement and civil penalties. Going forward,

While the Investment Share accounts are subject to a minimum average monthly account balance requirement of \$2,500, and are charged a \$3/month minimum balance fee in months when that requirement is not met, the Retirement Share accounts are not currently subject to such a requirement. As a result, as of September 30, 2003, there were 1,421,997 Retirement Share accounts holding \$2,500 or less—91.0% of the Retirement Share accounts, accounting for only 2.1% of total Cash Fund assets—and over two-thirds of those (1,088,870 accounts) held \$100 or less—accounting for under 0.1% of total Cash Fund assets. The consequence of having such a large number of small accounts with such small balances is to increase the fixed costs attributable to the Retirement Shares, particularly the transfer and dividend disbursing agent fees that are based in large part on the number of accounts and transactions. Thus, while the Investment Shares represent over four times as much assets as the Retirement Shares, the transfer and dividend disbursing agent fees deducted from the Retirement Shares exceed the amount of such fees deducted from the Investment Shares (\$4.8 million versus \$4.6 million, for the year ended August 31, 2003). The result is that the Retirement Shares currently bear an expense ratio of 118 basis points, versus 86 basis points for the Investment Shares. Because of the current low interest rates, the cost of transfer agency services can result in minimal returns for the Retirement Shares—currently down to 0.05%. To alleviate this problem, the Applicant is planning to impose on the Retirement Shares the \$2,500 minimum balance requirement, thereby subjecting accounts below that balance to the \$3/month minimum balance fee. At current market returns, the minimum balance fee would more than offset any investment income.

3. The Applicant seeks exemptive relief to maintain the IRA cash balances in the Applicant's broker-dealer

the Applicant has agreed, among other things, to place and maintain on its Web site specific disclosures showing the information regarding these disclosures to its customers. The Applicant is also required to establish procedures documenting its basis for adding or removing mutual fund families from its preferred list.

The Applicant represents that no revenue sharing is paid to the Applicant in connection with the investment in the money market fund since the investment adviser to the fund is partly owned (49.5%) by the Applicant. The Applicant further represents that the SEC investigation does not affect the proposed exemption because the investigation and settlement did not target any conduct relating to the money market fund, and the requirements of the settlement do not affect the current sweep arrangement.

account. The type of account the Applicant is proposing to use is a customer cash account that holds cash on deposit temporarily awaiting investment, drawn principally from dividends and interest paid on securities held in the customer's securities account. Unlike a subordinated loan, the cash can be withdrawn on demand and used for trading and investment activity.

The Applicant represents that according to the SEC, the Securities Investor Protection Corporation would presume that cash balances are left in the securities account for the purpose of purchasing securities, and would therefore be covered, absent substantial evidence to the contrary. The Applicant also represents the following: The cash accounts that would be used by the Applicant would not constitute loans of the type not covered by SIPC insurance. Even though interest would be paid, the accounts would be established pursuant to customer relationships for the holding of cash accumulated through dividends, interest and sales of securities, with the cash available on demand for use in investment transactions. As such, the Applicant represents that these would be free credit balances of the type that the SEC has acknowledged are covered by SIPC insurance<sup>7</sup>. SIPC covers cash claims up to \$100,000 and the Applicant represents that a customer's free credit balance, of the type Edward Jones contemplates using, would be the type of cash that, assuming a "customer" relationship, is covered as described in SEC Release No. 34-18262 (Nov. 17, 1981), "Notice to Broker-Dealers Concerning Interest-Bearing Free Credit Balances<sup>8</sup>."

4. The funds will be held by the Applicant as Free Credit Balances, and will be treated as debt obligations of the broker-dealer to its customers. The Applicant will pay the IRAs interest on

<sup>7</sup> The Department expresses no opinion as to whether the Free Credit balances are covered by SIPC insurance.

<sup>8</sup> The Applicant represents that in an effort to ensure that those persons who have contributed capital to the debtor do not receive the special protection (priority) afforded customers under the Bankruptcy Code and The Securities Investor Protection Act (SIPA), Congress has seen fit to include language in both statutes to deny this statutory priority to subordinated lenders. In *SEC v. F.O. Baroff Company*, [1973-74] Fed. Sec. L. Rep. ¶ 94,576 (S.D.N.Y. 1974) the court dealt with securities that were transferred to a broker as, in effect, a loan, to help the broker out of a cash bind. Relying in part on the statutory provision described above, the court found that because there was no reasonable expectation that the securities would be used for trading or investment activity, they were not covered by SIPC insurance—the person making the claim simply was not in a "customer" relationship with the broker.

the amounts at no less than the bank national index rate for interest checking, as reported in the Bank Rate Monitor.

This rate will remain be subject to a minimum rate level of 10 basis points (0.10%), so as not to disadvantage the IRAs transferring assets from the Retirement Shares of the Cash Fund (which currently are earning 5 basis points (0.05%)). The Applicant will commit to use, for purposes of determining the monthly Free Credit Balance interest rate, the targeted Bank Rate Monitor rate in effect on the first day of the month during which the interest is to be paid.

A Free Credit Balance can be called on demand, and cannot be treated as part of the broker-dealer's capital for minimum net capital purposes—it is not an investment in the broker-dealer, but rather customer funds. In addition, customer Free Credit Balances of the type that would be used here are subject to reserve requirements, which are designed to assure that these funds are used solely for the broker-dealer's customer-related business and are protected against misuse and insolvency.

5. Free Credit Balances are defined by federal securities law regulations as "liabilities of a broker or dealer to customers that are subject to immediate cash payment to customers on demand, whether resulting from sales of securities, dividends, interest, deposits or otherwise (17 CFR 240.15c3-3(a)(8))." Until a Free Credit Balance amount is repaid, it can be used in connection with the operation of the broker-dealer's business. Rule 15c3-2 under the Securities Exchange Act of 1934 (Rule 15c3-2) requires a broker-dealer to establish adequate procedures governing the use of its Free Credit Balances, providing as follows: (1) Each customer for whom a credit balance is carried will be given or sent, together with or as a part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing such customer of the amount due to the customer by such broker or dealer on the date of such statement; and (2) The statement must contain a written notice that (a) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (b) such funds are payable on the demand of the customer. In compliance with these requirements, the Applicant will provide a statement on customer account statement in accordance with Rule 15c3-2.

Customers with Free Credit Balances are further protected by a special reserve requirement. If the Applicant's total

amounts owed or payable to its customers that are attributable to, among other things, Free Credit Balances exceed (subject to certain adjustments) the total amounts receivable by the Applicant from certain sources related to its customer accounts, the Applicant is required to maintain a minimum level of deposits in a segregated special reserve account at a bank (17 CFR 240.15c3-3(e)). Because Free Credit Balances are treated as part of the assets and liabilities of the broker-dealer, they can be used in the Applicant's business and thereby reduce its borrowing needs. The Applicant will receive this benefit from the change; it also will lose transfer agency and other fees it will otherwise receive from the money market fund.

6. Compliance with the terms of the exemption will be monitored by IRA fiduciaries independent of the Applicant, the IRA accountholders, who will initially approve the cash sweep into the Free Credit Balance accounts and monitor the balances in those accounts through receipt of quarterly or monthly statements. For this reason, the Applicant represents that the exemption will be administratively feasible because the Department will not have to monitor the exemption's implementation or enforcement.

7. Because the Applicant plans to impose a minimum balance requirement (subject to a minimum balance fee) of \$2,500 on the Retirement Shares of the Cash Fund, uninvested cash below that level will, under current market conditions, earn income that is less than the fee imposed if swept into the Cash Fund. Absent exemptive relief, the IRAs could suffer an economic loss on this cash in the form of lost principal and/or investment income. If the requested exemption is granted, making the Free Credit Balance option available, the small amounts of cash deposited in the Free Credit Balance account will be able to earn income pending investment.

8. Under the terms of the requested exemption, those IRA accounts withdrawing from the Cash Fund will earn interest on their Free Credit Balances that will not decrease below 0.10%, a rate that exceeds the 0.05% rate they were earning in the money market fund at the time of withdrawal. The interest rate also will be no less than the same rate paid by the Applicant on non-IRA Free Credit Balances. The independent fiduciaries of those IRAs will be able to withdraw the Free Credit Balances and reinvest them in other assets upon demand at any time. The arrangement under which available cash will be invested in Free Credit Balance accounts at the

Applicant will be subject to the approval of an IRA independent fiduciary with respect to each IRA following full disclosure. The IRA independent fiduciary will be able to monitor the accumulation in the Free Credit Balance account through quarterly or monthly reports, and would be on notice of the interest rate to be earned and that the amounts are payable to the IRA on demand at any time.

9. In summary, the Applicant represents that the proposed transaction satisfies the statutory criteria for an administrative exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) Neither the Applicant nor any affiliate has any discretionary authority or control with respect to the investment of the cash balances of the IRA that are held in the Free Credit Balance or provides investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets; (b) the Applicant credits the IRA with monthly interest on its Free Credit Balance at an annual rate no less than the bank national index rate for interest checking, as reported in the Bank Rate Monitor. This rate will be subject to a minimum rate level of 10 basis points (0.10%); (c) The interest rate will be no less than the rate paid by the Applicant on non-IRA Free Credit Balances; (d) The IRA has the ability to withdraw the Free Credit Balance at any time without restriction; (e) The Applicant provides in writing to the IRA independent fiduciary, prior to any deposit of the IRA's available cash into a Free Credit Balance account, an explanation (i) that funds invested in a Free Credit Balance are not segregated and may be used in the operation of the business of the Applicant; (ii) of the method to be used for crediting interest to the Free Credit Balance; and (iii) that the funds are payable to the IRA on demand at any time; (f) The IRA independent fiduciary approves the deposit of the IRA's available cash into a Free Credit Balance account no less frequently than once every three months, or once every month if there is account activity for the particular month other than the crediting of interest, together with or as a part of the customer's statement of account; and (g) The Applicant provides a written statement subsequent to the proposed transaction informing the IRA independent fiduciary that (i) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (ii) such funds are payable to IRA on demand.

### Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

#### FOR FURTHER INFORMATION CONTACT:

Khalif Ford of the Department, telephone (202) 693-8540. (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 in Washington, DC, this 23rd day of June, 2005.

**Ivan Strasfeld,**

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

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**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Exemption Application Nos. D-10993 & L-10994, *et al.*]

#### **Prohibited Transaction Exemption; 2005-07; Grant of Individual Exemptions; PAMCAH-UA Local 675 Pension Plan (Pension Plan); PAMCAH-UA Local 675 Training Fund (Training Fund) (Collectively the Plans)**

**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 408(a) 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.

#### **PAMCAH-UA Local 675 Pension Plan (Pension Plan); PAMCAH-UA Local 675 Training Fund (Training Fund) (Collectively the Plans); Located in Honolulu, Hawaii**

[Prohibited Transaction Exemption No. 2005-07; Application Nos. D-10993 and L-10994]

#### *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 apply to: (1) The Training Fund's purchase (the Purchase) of an improved parcel of real property (the Property) located at 731 Kamehameha Highway, Pearl City, Hawaii from the Pension Plan; and (2) a loan (the Loan) from the Pension Plan to the Training Fund to finance the Purchase. This exemption is subject to the following conditions:

(a) The fair market value of the Property is established by an independent, qualified, real estate appraiser that is unrelated to the Plans or any party in interest;

(b) The Training Fund pays no more, and the Pension Plan receives no less than the fair market value of the Property as determined at the time of the transaction;

(c) The Pension Plan will, on irreversible default of the Training Fund, reassume the ownership of the Property automatically without requirement of a foreclosure and cancel the promissory note;

(d) Under the terms of the Loan, the Pension Plan in the event of default by the Training Fund has recourse only against the Property and not the general assets of the Training Fund;