

Estimated average number of respondents: 700.

Estimated average burden hours per response: 2.5 hours.

Estimated annual reporting burden: 1750.

Dated: October 20, 2004.

Leonard E. Stowe,

Acting NPS, Information Collection Clearance Officer, Washington Administrative Program Center.

[FR Doc. 04-26003 Filed 11-23-04; 8:45 am]

BILLING CODE 4312-52-M

DEPARTMENT OF THE INTERIOR

National Park Service

Plan of Operations, Environmental Assessment, and Draft Floodplains and Wetlands Statements of Findings, Big Thicket National Preserve, TX

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability of a Plan of Operations, Environmental Assessment, and draft Floodplain and Wetland Statements of Findings for a 30-day public review at Big Thicket National Preserve.

SUMMARY: Notice is hereby given in accordance with § 9.52(b) of Title 36 of the Code of Federal Regulations, Part 9, Subpart B, that the National Park Service (NPS) has received from Sanchez Oil and Gas Corporation a Plan of Operations for drilling and production of the WM Rice #1 Well from a surface location north of County Road 4825 within Big Thicket National Preserve, Tyler County, Texas. Additionally, the NPS has prepared an Environmental Assessment and draft Floodplain and Wetland Statements of Findings on this proposal.

DATES: The above documents are available for public review and comment through December 27, 2004.

ADDRESSES: The Plan of Operations, Environmental Assessment, and draft Floodplain and Wetland Statements of Findings are available for public review and comment in the Office of the Superintendent, Art Hutchinson, Big Thicket National Preserve, 3785 Milam Street, Beaumont, Texas. Copies of the Plan of Operations are available, for a duplication fee; and copies of the Environmental Assessment and draft Floodplain and Wetland Statements of Findings are available upon request, and at no cost, from the Superintendent, Art Hutchinson, Big Thicket National Preserve, 3785 Milam Street, Beaumont, Texas 77701.

FOR FURTHER INFORMATION CONTACT: Mr. Dusty Pate, Range Technician, Big Thicket National Preserve, 3785 Milam Street, Beaumont, Texas 77701, Telephone: 409 839-2689 ext. 232, e-mail at *Haigler_Pate@nps.gov*.

SUPPLEMENTARY INFORMATION: If you wish to submit comments on these documents within the 30 days; mail them to the street address provided above, hand-deliver them to the park at the street address provided above, or electronically file them to the e-mail address provided above. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Dated: October 27, 2004.

John T. Crowley,

Acting Director, Intermountain Region, National Park Service.

[FR Doc. 04-26004 Filed 11-23-04; 8:45 am]

BILLING CODE 4312-CB-P

DEPARTMENT OF THE INTERIOR

National Park Service

Flight 93 National Memorial Advisory Commission

ACTION: Meeting notice.

SUMMARY: This notice announces a December 3, 2004, "interim" meeting of the Flight 93 Advisory Commission.

DATES: The public meeting will be held on December 3, 2004, from 10 to 11 a.m., eastern standard time.

Location: The meeting will be held via conference call for all out-of-town Commissioners and public participants. To call in, the call number is 866-556-6304; then enter the pass code number 487846#. For those who are able to attend in person, the Flight 93 National Memorial office will be open at 109 West Main Street, Newberry Building, Somerset, PA 15501, from where the conference call will be initiated.

Agenda: The agenda includes:

(1) Opening of the meeting.
(2) Roll call and identification of people in the Somerset Office and on the conference call line.

(3) Report by the Design Oversight Committee of the Flight 93 Memorial Task Force, with recommendations on a Stage 1 jury for the design competition for a permanent memorial.

FOR FURTHER INFORMATION CONTACT:

Joanne M. Hanley, Superintendent, Flight 93 National Memorial, 109 West Main Street, Somerset, PA 15501, telephone (814) 443-4457.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Flight 93 Advisory Commission, 109 West Main Street, Somerset, PA 15501.

This notice is being published less than 15 days prior to the meeting date because of the urgent need to complete time-sensitive work carried over from the Commission's previous meeting. In particular, the Commission must complete its consideration of Stage 1 jury recommendations by the Design Oversight Committee.

Dated: November 12, 2004.

Bernard Fagan,

Deputy Chief, National Park Service Office of Policy.

[FR Doc. 04-26002 Filed 11-23-04; 8:45 am]

BILLING CODE 4312-52-M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption (PTE) 2004-19; Exemption Application No. D-11220]

ARINC Incorporated Retirement Income Plan (the Plan) Located in Annapolis, MD

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Grant of individual exemption.

SUMMARY: This document contains a final exemption issued by the Department of Labor (the Department) from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits: (1) The in-kind contribution of the property described as the 27.5 acre headquarters

of ARINC Incorporated (ARINC or the Applicant) situated in Annapolis, MD or the ownership interests of a special purpose entity (SPE) whose only asset is this property (collectively, the Property) to the Plan by ARINC, the plan sponsor and a party in interest with respect to the Plan (the Contribution); (2) the holding of the Property by the Plan; (3) the leaseback of the Property by the Plan to ARINC (the Lease or Leaseback); (4) the repurchase of the Property by ARINC (the Repurchase) pursuant to (a) a right of first offer to ARINC should the Plan wish to sell the Property to a third party or (b) a voluntary agreement under which the Plan agrees to sell the Property to ARINC at any time during the Lease; and (5) any payments to the Plan by ARINC made pursuant to a make whole obligation as specified below (the Make Whole Payment or Obligation) (collectively, the Exemption Transactions). The exemption affects participants and beneficiaries of, and fiduciaries with respect to, the Plan.

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

FOR FURTHER INFORMATION CONTACT:

Wendy M. McColough of the Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8540. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On September 13, 2004, the Department published a notice in the **Federal Register** (69 FR 55179) of a proposed individual exemption (the Proposed Exemption). The Proposed Exemption was requested in an application filed on behalf of ARINC pursuant to 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). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 214 (2000 ed.) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this final exemption is issued solely by the Department.

The notice set forth a summary of the facts and representations contained in ARINC's application for exemptive relief (Application) 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 Proposed Exemption and/or to request

that a public hearing be held. In response to the solicitation of comments from interested persons, the Department received: Comments from ARINC; comments from Independent Fiduciary Services, Inc (IFS), the Independent Fiduciary retained to represent the Plan in connection with the exemption request; and comments from two other interested persons. None of the comments requested that a public hearing be held on the Proposed Exemption. The ARINC and IFS comments provided further information on the Exemption Transactions and are discussed below.

One comment was received from the Secretary-Treasurer of Teamsters Local 986 (Teamsters). The Teamsters represent 70 ARINC employees who participate in the Plan. The Teamsters' comment supports the Proposed Exemption, the protective conditions imposed on the Contribution by the Department, and finalizing the exemption as proposed. The other comment expressed concern about the rental rate of the Lease described in the Proposed Exemption. This concern was addressed in a response from ARINC that is summarized below.

Additionally, the following updated versions of documents discussed in the Proposed Exemption were submitted to the Department by ARINC and IFS subsequent to the publication of the Proposed Exemption in the **Federal Register**. The final transfer agreement that governs the terms upon which the Property will be contributed to and held by the Plan and is between ARINC (the Transferor), Aeronautical Radio, Inc. (ARI), a wholly-owned subsidiary of ARINC, and the Plan through its agent, IFS, executed on October 12, 2004 (the Transfer Agreement), was received by the Department on October 19, 2004. On November 5, 2004, the Department received the November 4, 2004 second addendum to the December 8, 2004 letter agreement between IFS, ARINC, and the Pension Committee of the Plan concerning the engagement of IFS as the Independent Fiduciary, as amended July 30, 2004 (the IF Agreement).

The final lease that governs the terms upon which the Property will be leased back to ARINC by the Plan (Lease) was received by the Department on November 15, 2004. In correspondence, dated November 11 and November 15, 2004, ARINC submitted the Lease and stated that the Lease is consistent with the material terms and conditions of the lease term sheet, as revised on June 11, 2004 (Lease Term Sheet). By letter dated November 15, 2004, ARINC provided additional information to the Department summarizing the provisions

in the Lease that supplement the provisions of the Lease Term Sheet described in the Proposed Exemption.

The Lease is an agreement by and between ARINC as Tenant and 2551 Riva Road, Inc., an SPE. ARINC states that under the Lease, 2551 Riva Road, Inc., a Delaware corporation, will be the Landlord. This corporation is initially being established as a subsidiary of ARI, which currently holds title to the Property. ARI will transfer title to the Property to 2551 Riva Road, Inc. on or before the date of closing when the proposed Contribution and Leaseback transactions are consummated in accordance with the Transfer Agreement (the Closing). On the date of Closing, ARI will convey all of the stock of 2551 Riva Road, Inc. to the Plan so that the Landlord will be a wholly owned subsidiary of the Plan. The Certificate of Incorporation of 2551 Riva Road, Inc. was filed in the State of Delaware on November 15, 2004. The initial officers and directors are ARINC employees. ARINC expects that new officers and directors will be appointed by IFS on behalf of the Plan the day of or the day after Closing.

ARINC notes that the Department described certain provisions of the Lease Term Sheet at Paragraph 6 of the Summary of Facts and Representations in the Proposed Exemption at column 3 of 69 FR 55181. ARINC represents that these descriptions in the Proposed Exemption generally remain accurate. However, as applicable, ARINC provides the following additional information based on modifications to the terms and conditions of the Lease Term Sheet as agreed to in the Lease.

Bondable/Triple Net Lease Structure

As noted in the ARINC comment below, during the bondable period, the Lease Term Sheet and the Lease provide for an abatement of rent in the event of a partial condemnation at article 14.4(b) of the Lease and the right to terminate the Lease under certain circumstances in the condemnation and casualty contexts (Lease, arts. 13 and 14).

The Lease Term Sheet provides that there shall be a commercially reasonable standard for determining whether capital improvements (or repair or replacement) are required for the Property during the bondable period. The Lease provides the commercially reasonable standard by requiring the preparation of a reasonable annual budget to be approved by Landlord and Tenant for items needing repair, maintenance or replacement over the coming year (Lease, art. 8.1), based on an annual inspection by a reputable building inspector and an agreed

standard of keeping the buildings in good condition and repair, in a manner befitting that of comparable buildings in the Annapolis, Maryland area and in accordance with all applicable laws and the Lease (Lease, art. 8.2). Disagreements regarding the timing or scope of any repair, maintenance or replacement, if any, are resolved in accordance with a neutral third-party arbitration process that is binding on the parties (Lease, art. 23.4).

Rental Rate

The Lease provides for base rent of \$4,290,189 during the first year of the Lease (Lease, art. 1.5), increased by 2.5% annually (Lease, art. 4.2), with an increase to \$6,488,302 for the first year of the non-bondable period (Lease, art. 4.1), increased by 2.5% annually (Lease, art. 4.2). ARINC notes that these figures are consistent with those described in the Proposed Exemption.

The terms of the Exemption Transactions, however, require an updated appraisal prior to Closing, and ARINC states that the rental amounts may be modified based on such updated appraisal. ARINC believes that a substantial change in the rent is not expected.

The Right of First Offer (ROFO)

ARINC states that article 21 of the Lease provides an additional right for the Landlord in the event the ROFO is triggered from or after the 15th anniversary of the Lease commencement date (the date of Closing under the Transfer Agreement) and a three-appraiser method is used for the determination of fair market value for the Property. In this situation, the Landlord has the right, exercisable within 10 days following the appraisers' determination, to withdraw its notice of transfer and continue to hold the Property (Lease, art. 21.2).

The Lease includes a provision whereby if the Tenant elects to purchase under the ROFO, the parties are to enter into a purchase and sale agreement that incorporates the terms of the right of first offer but is otherwise in substantially the same form as the Transfer Agreement for the initial transfer of the Property to Landlord, except that (i) no additional appraisal is required (inapplicable, since it is not necessary to set any rent), (ii) only a subset of the representations and warranties provided to the Landlord upon the initial transfer shall be required to be provided to the Tenant/purchaser (Exhibit F of the Lease), and (iii) Tenant/purchaser will not be entitled to any study period as long as title to the Property has not changed in

any manner other than as previously approved by Tenant (Lease, art. 21.4).

ARINC provides that in article 21.6 of the Lease, the ROFO terms have been clarified so that it is not applicable with respect to easements and the like, as well as to any (i) transfer to an affiliate of the Landlord, (ii) transfer to Landlord's lender (or a third party) as a result of a foreclosure or deed in lieu of foreclosure, or (iii) transfer to a third party in a condemnation proceeding, however, in the event of a transfer described in clause (i), the ROFO shall apply to the first transfer by the affiliate of the Landlord, and in the event of a transfer described in clause (ii), the ROFO shall apply to the first transfer by the lender/third party. The Tenant loses its rights altogether in the event of a transfer described in clause (iii).

Article 21 of the Lease adds a provision whereby if the purchase price of the unsolicited offer that Tenant elects to match is to be paid by other than cash, the Tenant will be required to pay the fair market value of the non-cash consideration (Lease, art. 21.7).

Indemnification

ARINC represents that the Tenant's indemnification of the Landlord during the non-bondable period has been broadened in the Lease to include violations of environmental laws, the Americans with Disabilities Act and other health and/or safety laws resulting from acts or omissions of any invitee, agent, employee, affiliate, subtenant, assignee, contractor, client, family member, licensee, customer or guest of Tenant (collectively, Invitees) as opposed solely to acts or omissions of Tenant or any sublessee or assignee (Lease, art. 12.2). Additionally, article 12.6 of the Lease provides that the liability of the Landlord is limited to its interest in the Property and any sales proceeds, rents, insurance proceeds and condemnation awards related thereto.

ARINC Default

In the event of a Tenant payment default, the Proposed Exemption stated that the Lease would contain commercially reasonable provisions regarding late fees and default interest. To address this, the Lease provides for a late fee of \$1,000 if the Tenant fails to make any payment within five days after due without regard to any notice and cure period otherwise provided under the Lease (Lease, art. 15.7) and default interest on such overdue payment from the date due until payment at the lesser of (i) one percentage point above the prime rate or (ii) the highest lawful rate per annum (Lease, arts. 15.6 and 15.7). Article 15.7

provides that the Landlord waives the late charge and default interest the first time in any 12-month period that Tenant fails to make a payment when due, provided the payment is made prior to the expiration of the five-business day notice and cure period.

By correspondence dated November 11, 2004, ARINC's real estate counsel provided the following Lease provisions that counsel believes expanded the protections for the Plan from that contemplated by the Lease Term Sheet.

Hazardous Materials

Article 6.3 of the Lease provides that ARINC take substantially increased liability for hazardous materials. The ARINC real estate counsel asserts that ARINC is taking virtually all liability for asbestos, tanks and transformers, whether or not caused by ARINC or its Invitees, and taking expanded liability for other hazardous materials violations not caused by ARINC.

Insurance

In article 11.1 of the Lease, ARINC has agreed to obtain a substantially larger amount of liability insurance from that specified in the Lease Term Sheet. The umbrella liability coverage has been increased from \$5,000,000 to \$25,000,000 in the Lease. ARINC's all-risk property insurance coverage has been increased to include \$5,000,000 of ordinance or law coverage and in addition, ARINC has agreed to purchase a separate liability policy for the Plan with excess umbrella coverage of \$10,000,000.

Casualty

ARINC's real estate counsel states that ARINC has agreed to a substantial additional condition to its ability to terminate the Lease in the event of a casualty during the non-bondable period as provided in article 13.2 of the Lease. If the Property is totally or partially damaged or destroyed, the remainder of the Property must be unsuitable for ARINC's business purposes for ARINC to have the right to terminate the Lease.

Reporting Requirements

In article 23.3 of the Lease, ARINC has agreed to additional ongoing reporting requirements by notifying the Landlord regarding defaults under ARINC loans that could materially adversely affect ARINC's ability to perform its obligations under the Lease.

Discussion of the Comments

IFS Comment

By letters dated October 19 and November 5, 2004, IFS provided the

following comments and additional information to the Department.

1. Diversification of the Plan's Assets Condition

IFS observes that subsection (h) of section II of the Proposed Exemption describes one of the duties of IFS as Independent Fiduciary as follows:

(h) The Independent Fiduciary determines on an ongoing basis that the amount of plan assets invested in employer real property and employer securities, including its interests in the Property, complies with ERISA;

IFS believes that its specific obligations in regard to the diversification of plan assets are set forth in the July 20, 2004 amendment and addendum to the IF Agreement, and as described at the first bullet in the second column at 69 FR 55187 of the Proposed Exemption, as follows:

In considering whether and on what terms to seek prudently to sell the Property, IFS shall consider the nature, value and other relevant aspects of the Property in isolation, as well as the nature and diversification of the Plan's overall investment portfolio. Insofar as IFS determines that continued ownership of the Property poses undue risk to the Plan of over concentration from an investment perspective, IFS shall determine and take appropriate action to seek prudently to reduce such risk.

IFS' concern is that section II(h) in the Proposed Exemption overstates IFS' authority. IFS notes that while IFS is required to consider the other assets of the Plan, including any employer real property and employer securities, in determining whether and to what extent continued ownership of the Property may adversely affect the diversification of the Plan's overall portfolio, the IF Agreement does not give IFS any responsibility for or authority over those other assets. Section II(h), however, could be read to mean that IFS must determine on an ongoing basis whether all investments by the Plan in employer real property and employer securities, not just the Property, comply with any aspect of ERISA, not just diversification. Under that reading, IFS would be obligated to take action if, for example, the Plan has invested in employer securities that are not qualifying employer securities under ERISA section 407. IFS asserts that this goes beyond IFS' role as contemplated by the IF Agreement, as amended.

To clarify that the objective of section II(h) is to require compliance with the fiduciary responsibility provision of ERISA, IFS proposes that the phrase "employer real property and employer securities, including its interests in" be deleted and that the phrase "section 404(a)(1) of" be inserted in section II(h),

so that the provision would read as follows:

(h) The Independent Fiduciary determines on an ongoing basis that the amount of Plan assets invested in the Property complies with section 404(a)(1) of ERISA;

IFS believes that this would be sufficient to make clear that IFS is obligated to determine on an ongoing basis that the concentration of Plan assets in the Property is consistent with the ERISA fiduciary duty of diversification, without requiring IFS to make determinations as to Plan investments other than the Property.

The Department has determined that it would be appropriate to modify section II(h) as requested by IFS.

2. Make Whole Payment Condition

IFS notes that subsection (i) of section II of the Proposed Exemption describes the Make Whole Payment using language that is based on the IFS report to the Department on June 18, 2004 (the IFS Report). The two elements of the Make Whole Payment are set forth in section II(i) as follows:

The actual return component—"the combination of the proceeds from a sale of the Property (or the change in the value of the Property if the Plan continues holding it over the full five years) plus the Plan's net income on the Property under the Lease prior to the sale (or over the full five years)"

The target return component—"the Property's value as of the date of the Contribution plus a 5% compounded rate of return on that value plus the costs of holding and maintaining the Property"

If the target return component exceeds the actual return component at the time for determining the Make Whole Payment, then ARINC is obligated to contribute the difference to the Plan.

IFS explains that the description in the IFS Report was based on an early version of the Make Whole Payment provision of the Lease Term Sheet, which has since been refined. IFS states that the final version is contained in article 22 of the Lease and that the language in section II(i), while less detailed than the final provision in the Lease, is generally consistent with that provision, except in one respect: The target return component in the Lease provision does not include the costs of holding and maintaining the Property. The reason is that these costs have already been deducted from the actual return component, as reflected in the use of the term "net income" in the above language. The Lease provision itself refers to the rental income received by Landlord under this Lease up to the Make-Whole Date, "less expenses incurred by Landlord with respect to the Premises and this Lease."

To deduct the costs from the actual return, and then add them to the target return, would be to count them twice.

Accordingly, IFS requests that section II(i) be amended to delete the phrase "plus the costs of holding and maintaining the Property" from subparagraph (ii) in the second paragraph. To the extent the IFS Report does not accurately reflect this provision, IFS states that it hereby amends the IFS Report to be consistent with this discussion and that this change does not affect the conclusions in the IFS Report.

The Department has determined that it would be appropriate to modify section II(i) as requested by IFS.

3. Status of the Monetization

IFS comments that Paragraph 11 of the Summary of Facts and Representations in the Proposed Exemption at column 3 of 69 FR 55191, in describing the IFS Report, states the following regarding the status of proposals to monetize the lease payment stream:

IFS notes that while they continue to engage financial institutions in discussions of various proposals, they do not expect that a monetization transaction will occur.

Since the date of the IFS Report, IFS represents that it has ceased to engage financial institutions in discussions. IFS remains open to proposals to monetize the stream of lease payments, but is not actively pursuing that course at this time. IFS continues to expect that it is unlikely that a monetization transaction will occur, for the reasons described in the IFS Report.

4. Status of Due Diligence

IFS notes that, in Paragraph 5 of the Summary of Facts and Representations in the Proposed Exemption at column 3 of 69 FR 55180, under the terms of the Transfer Agreement, the Plan will have a 60-day Review Period after execution of the Transfer Agreement to undertake a review and examination of all aspects of the Property prior to closing the transaction, should IFS approve going forward with the transaction.

IFS reports that the Transfer Agreement has now been executed, effective October 12, 2004, so that the 60-day review period runs until December 11th. However, prior to the execution date, and consistent with the intent of the Transfer Agreement, ARINC and ARI made the requested Property documents available to IFS for review, and IFS' representatives and consultants were permitted to enter upon the Property to conduct specific examinations, such as structural

examinations of buildings and environmental testing. If IFS completes its due diligence to its satisfaction prior to the expiration of the 60-day Review Period, it may waive any remaining portion of the Review Period, in order to close the transaction sooner so that the Plan may begin to benefit from receipt of the rental income.

By letter dated November 5, 2004, IFS informed the Department that Custer Environmental, Inc. (Custer), retained by IFS to conduct a "Phase One Environmental Site Assessment" of the Property, provided a final environmental report to IFS dated October 25, 2004. On the basis of its review of the Custer report, IFS states that it is satisfied that there are no environmental issues that would cause it not to close on the acquisition of the Property and the lease to ARINC in accordance with the provisions of the Transfer Agreement and the Lease.

5. Liability Insurance

IFS notes that in addition to the expenses that may be incurred by the special purpose entity owned by the Plan (the SPE) as the Landlord under the terms of the Lease, and by the Plan pursuant to the IF Agreement, the Plan will be incurring the expense of directors' and officers' liability insurance in connection with the ongoing operation of the SPE. This expense is presently estimated to be \$18,000 per year, which may change over time in accordance with market conditions.

ARINC Comment

By letter dated October 19, 2004, the Department received the following comments from ARINC.

1. Effective Date of the Exemption

ARINC explains that, at the request of ARINC, the Proposed Exemption provides that, if granted, the final exemption will have an effective date of September 7, 2004. This effective date was requested to allow ARINC to make the Contribution prior to the grant of a final exemption. ARINC considered making the Contribution before September 15, 2004 to, among other considerations, avoid having to make a variable rate premium payment to the Pension Benefit Guaranty Corporation in the amount of \$910,000. However, ARINC reports that it has subsequently decided not to contribute the Property until after the grant of a final exemption. By doing so, ARINC avoids the possibility that a final exemption would be granted on terms different than provided for in the Proposed Exemption, which could expose ARINC

to excise tax penalties under Code section 4975. As a result of ARINC's decision, the relief necessary under the exemption need be only prospective since the transaction will not occur until after a final exemption is granted. ARINC adds that the decision to delay the transaction, while made by ARINC, is supported by IFS, the Plan's Independent Fiduciary.

The Department concurs with the ARINC comment and has determined that the effective date of the exemption will be on or after the date of publication of this final exemption in the **Federal Register**.

2. The Lease Terms

ARINC notes that the Proposed Exemption was issued based on a Lease Term Sheet, which was submitted to the Department while ARINC and IFS negotiated the more detailed terms of the Lease. However, ARINC represented that the Lease Term Sheet would accurately reflect the provisions of the more detailed final Lease.

ARINC submits two clarifications regarding the description of the Lease in the Proposed Exemption. In Paragraph 6 of the Summary of Facts and Representations in the Proposed Exemption at column 1 of 69 FR 55182, under the discussion entitled "Bondable/Triple Net Lease Structure," the Department states "Under the bondable lease structure, the rent payable by ARINC to the Plan remains payable *under all circumstances* * * *." (emphasis added). ARINC states that this is consistent with the Lease Term Sheet, but ARINC notes that the Lease Term Sheet also provides for an abatement of rent in the event of partial condemnation (based on the portion of the property subject to condemnation) as well as a tenant right to terminate the lease under certain circumstances, such as in the event of condemnation or casualty.

Secondly, at column 2 of 69 FR 55183, under the Department's discussion entitled "The Right of First Offer," ARINC and the IFS Report described the fair market value determination for the purchase price as changing for year 15 of the Lease and beyond. ARINC clarifies that this is not entirely accurate, because the Lease Term Sheet and the Lease provides for the fair market value determination to change from and after the 15th anniversary of the Lease commencement date (which would actually be year 16 and beyond). Accordingly, the two references in the Proposed Exemption at 69 FR 55183 to "14" should instead refer to "15," and the two references to "15" should instead refer to "16."

3. Liability for Hazardous Substances

ARINC states that section II(m) of the Proposed Exemption includes a condition which provides that "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." ARINC requests that the Department confirm ARINC's understanding that the provisions of the Transfer Agreement satisfy this condition. In particular, under section 5(a)(12) of the Transfer Agreement, ARINC has represented that to its knowledge no hazardous substances have been released on the Property as of the closing date of the Transfer Agreement. Section 5(f) of the Transfer Agreement provides an indemnity in the event that ARINC breaches this representation.

ARINC notes that in response to a request by IFS, the Plan's Independent Fiduciary, ARINC agreed to modify its representation in section 5(a)(12) of the Transfer Agreement to state that, to ARINC's knowledge, the construction and condition of certain rooms in buildings on the Property that were not accessible to Custer Environmental, Inc. (IFS's environmental consultant), are the same in all material respects as other rooms in the same buildings that were inspected by Custer, and that the inaccessible rooms do not have any Hazardous Substances in violation of Environmental Laws. This change is an improvement from the Plan's perspective and provides greater assurance to IFS and the Plan of the condition of the Property. As stated previously, on the basis of IFS's review of the Custer report, IFS is satisfied that there are no environmental issues that would cause it not to close on the Exemption Transactions.

The Department confirms that the provisions of the Transfer Agreement and the Lease, IFS's due diligence regarding the Property as stated in the IFS Report, and IFS's approval of the Custer Environmental Site Assessment (as described above) appears to satisfy the condition of section II(m) of the Proposed Exemption.

4. The Make Whole Payment Condition

ARINC represents that the Make Whole Payment condition provided under the Proposed Exemption is consistent with the agreement of ARINC and IFS in the Lease Term Sheet and the Lease. ARINC notes, however, that both the Lease Term Sheet and the Lease provide ARINC 180 days from the date that is the earlier of the date of sale of the Property by the Plan or five years

from the closing of the transaction to make the Make Whole Payment. However, the 180-day period is not specifically reflected in the language of the Make Whole Payment condition in section II(i) of the Proposed Exemption. ARINC asks that the Department confirm ARINC's understanding that, consistent with the Lease Term Sheet, the Lease, and the Summary of Facts and Representations in the Proposed Exemption at column 2 of 69 FR 55183, ARINC will have 180 days to make a Make Whole Payment if any such payment is required.

The Department confirms that the Lease Term Sheet, the Lease, and the language of the Proposed Exemption provide that ARINC will have 180 days to make the Make Whole Payment.

5. Diversification of the Plan Assets Condition

ARINC states that subsection (h) of section II of the Proposed Exemption includes a condition that requires that the "Independent Fiduciary determines on an ongoing basis that the amount of plan assets invested in employer real property and employer securities, including its interest in the Property, complies with ERISA." ARINC notes that ARINC's engagement of IFS grants IFS the discretion to determine whether the holding of the Property satisfies ERISA's fiduciary requirements, and the engagement letter requires that IFS evaluate the nature and diversification of the Plan's overall investment portfolio in making this judgment. However, IFS has not been appointed Independent Fiduciary of the Plan to make decisions with respect to real property or securities other than the Property. As such, ARINC believes that this condition should be narrowed somewhat. ARINC understands that IFS concurs with this comment, and has filed its own letter requesting that this condition be narrowed. ARINC supports their request.

6. Plan Contributions Update

ARINC confirms that it made \$18 million in contributions for the 2003 Plan Year. In addition, ARINC still expects to fully fund the Plan to the ABO level after all cash contributions and the Property contribution are made for the 2004 Plan Year (subject to any unexpected declines in the market value of assets or further declines in interest rates). To date, ARINC represents that it has already contributed \$6 million for the 2004 Plan Year, which exceeds the minimum required contribution of \$2.224 million for the Plan Year.

By letter to the Department, dated November 2, 2004, ARINC further

updated its contribution information and stated that on October 29, 2004, ARINC contributed an additional \$2 million to the Plan for a cumulative total contribution of \$8 million thus far for the 2004 plan year. ARINC noted that these contributions far exceed the minimum required contribution of \$2.24 million for the 2004 Plan Year.

Rental Rate Comment

By letter to the Department, dated October 8, 2004, one commenter objected to the annual base rent of \$12.40 per square foot under the bondable structure at column 2 of 69 FR 55182.

The commenter stated that the independent appraiser, Deloitte & Touche LLP (Deloitte), recommended that the initial rate for the bondable period be set at a higher rate of \$13.35 per square foot, and provided the opinion that "[t]here is no justification for ARINC to not pay the full amount recommended by the independent appraiser."

By letter to the Department, dated November 2, 2004, ARINC responded to the October 8, 2004 comment. ARINC explained that the \$13.35 initial rent for the bondable period was set forth in the Deloitte draft report dated May 25, 2004. That appraisal set an overall property value of the ARINC headquarters Property at \$52 million. The final report by Deloitte, dated June 17, 2004, reduced the overall Property value to \$49 million. The reductions were made in response to specific concerns raised by IFS that the \$52 million valuation was too high as described in the Proposed Exemption at 69 FR 55189 to 55190. ARINC states that when Deloitte reduced the Property's appraised value, it also reduced the rental rate. For the bondable period, the reduction was from \$13.35 per square foot to \$12.40 per square foot. ARINC notes that this change in lease rates is discussed in the Proposed Exemption in the first column at 69 FR 55190. The summary table that appears on the same page did not include the changed lease rates. ARINC emphasizes that the IFS Report concludes that the \$49 million property valuation, and the corresponding \$12.40 per square foot rental rate, are appropriate and the transaction is in the interest of the Plan.

Determination of the Department

Accordingly, based upon the representations made by the Applicant, the additional documents submitted to the Department, the written comments received in response to the Proposed Exemption, and the analysis conducted by the Independent Fiduciary, the

Department has determined to grant the exemption subject to the modifications discussed above. The Department has, in transactions of this nature, placed emphasis on the need for an Independent Fiduciary and on such Independent Fiduciary's considered and objective evaluation of the transactions. In its deliberations, which included its analysis of all aspects of the transactions, the Independent Fiduciary has consistently represented for the record that no transactions concerning the Property will be accepted on behalf of the Plan unless such transactions are found by the Independent Fiduciary to be in the interests of the Plan. Finally, the Department notes that the Independent Fiduciary's satisfaction of its obligations in connection with the determination of the fair market value of the Property, the ongoing determination that the amount of Plan assets invested in the Property complies with section 404(a)(1) of ERISA as described above, and other obligations as previously described by the Department in the Summary of Facts and Representations in the Proposed Exemption is a critical factor in the Department's decision to grant a final exemption.

The Application pertaining to the exemption, the Proposed Exemption, the comments submitted to the Department and the responses to the comments, and all other documents submitted to the Department concerning this exemption have been included as part of the public record of the Application. The complete Application file, including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the September 13, 2004 Notice of Proposed Exemption at 69 FR 55179.

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 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 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 require, among other things, that a fiduciary discharge his or her 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 requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The exemption will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) In accordance with section 408(a) of the Act and 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 finds that the exemption is administratively feasible, in the interests of the plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of the plans;

(4) 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 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

(5) The availability of this exemption is subject to the express condition that the material facts and representations contained in the Application are true and complete and accurately describe all material terms of the transactions that are the subjects of the exemption.

Exemption

In accordance with section 408(a) of the Act and 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 finds that the exemption is:

- (a) Administratively feasible;
- (b) In the interests of the Plan and its participants and beneficiaries; and
- (c) Protective of the rights of the participants and beneficiaries of the Plan.

Section I. Covered Transactions

The restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act, and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) the transfer of the property described as the 27.5 acre headquarters of ARINC Incorporated (ARINC) situated in Annapolis, MD or the ownership interests of a special purpose entity (SPE) whose sole asset is this property (collectively, the Property) to the Plan through the in-kind contribution of such Property by ARINC, the plan sponsor and a party in interest with respect to the Plan (the Contribution);

(b) the holding of the Property by the Plan;

(c) the leaseback of the Property by the Plan to ARINC (the Lease or Leaseback);

(d) the repurchase of the Property, by ARINC (the Repurchase) pursuant to (1) a right of first offer as specified in the Lease should the Plan wish to sell the Property to a third party or (2) a voluntary agreement under which the Plan agrees to sell the Property to ARINC at any time during the Lease; and

(e) any payments to the Plan by ARINC made pursuant to the make whole obligation as specified in the Lease (Make Whole Payment) (collectively, the Exemption Transactions).

Section II. Conditions

This exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following requirements:

(a) A qualified independent fiduciary (the Independent Fiduciary) acting on behalf of the Plan, represents the Plan's interests for all purposes with respect to the Contribution and determines, prior to entering into any of the Exemption Transactions described herein, that each such transaction is in the interests of the Plan;

(b) The Independent Fiduciary negotiates and approves the terms of any of the transactions between the Plan and ARINC that relate to the Property;

(c) The Independent Fiduciary manages the holding, leasing, and disposition of the Property and takes whatever actions it deems necessary to protect the rights of the Plan with respect to the Property;

(d) The terms and conditions of any transactions between the Plan and ARINC concerning the Property are no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated third parties;

(e) The contribution value of the Property is the fair market value of the Property as determined by the Independent Fiduciary on the date the Property is contributed to the Plan. In

determining the fair market value of the Property, the Independent Fiduciary obtains an updated appraisal from a qualified, independent appraiser selected by the Independent Fiduciary, and ensures that the appraisal is consistent with sound principles of valuation;

(f) The Lease has an initial term of twenty years, with a three-year renewal term. The Lease is a bondable lease for the first ten years of the Lease (or such earlier date specified in the Lease as agreed to between the Lessor and ARINC). During the bondable period ARINC, as lessee, pays, in addition to the base rent, all costs associated with the Property, including capital expenditures. After the bondable period expires, the Lease shall convert to a traditional triple net lease under which ARINC, as lessee, pays, in addition to the base rent, all normal operating expenses of the Property, including taxes, insurance, maintenance, repairs, and utilities, but does not pay capital expenditures;

(g) The Independent Fiduciary has sole authority to determine if it is in the interest of the Plan to enter into a transaction to sell the stream of lease income on the Property to a third party for cash (the Monetization);

(h) The Independent Fiduciary determines on an ongoing basis that the amount of Plan assets invested in the Property complies with section 404(a)(1) of ERISA;

(i) At the earlier of: (i) The date the Plan sells the Property for fair market value or (ii) the date five years from the date of the Contribution, ARINC will transfer to the Plan a Make Whole Payment, as described below, in order to guarantee the Plan a minimum rate of return of 5% compounded per annum on the initial contributed value of the Property; provided that, if a Make Whole Payment is due and if, for the taxable year of ARINC in which the Make Whole Payment is to be made, such Make Whole Payment (i) would not be deductible under section 404(a)(1) of the Code or (ii) would result in the imposition of an excise tax under section 4972 of the Code, such Make Whole Payment would not be made until the next taxable year of ARINC for which the Make Whole Payment is deductible under section 404(a)(1) of the Code and does not result in an excise tax under section 4972 of the Code;

ARINC will guarantee a minimum return of 5% to the Plan by agreeing that if (i) the combination of the proceeds from a sale of the Property (or the change in the value of the Property if the Plan continues holding it over the full five years) plus the Plan's net

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.*

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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