their capacity, develop new and improved products, and focus on improving overall customer service. No firm could provide superior products to customers at a sustained loss.

The government understands this, though they're loathe to admit it. In paragraph 17 of the complaint in this case, the Department of Justice describes some of the reasons for the dominance of just three firms in the boom truck market: ''superior production capacity and capability, strong dealer networks, broad product lines and strong reputation for safety and reliability.'' The government notes, correctly, that it would be difficult for any new competitor to quickly enter the market because they would need to ''establish a strong reputation'' in order to effectively compete with the dominant firms.[7] But this is not a weakness of the market, but a strength. Every factor the government lists above is the result of honest, ethical activity. Manitowoc's superior production capacity is not the result of coercion. National Crane's strong reputation is not derived from violent acts against competitors. This, essentially, is the difference between ''market power'' derived from free trade, and ''political power'' derived from the use of force. The government's case fails to make this crucial distinction.

The remedy in the proposed final judgment replaces market power with political power. The defendants are forced to divest one of their crane businesses to a yet-to-be-determined third party. The government says this will protect competition. It does no such thing. ''Competition'' only exists in a capitalist economy; a forced divestiture is hardly capitalist, since it's neither voluntary nor based on respect for property rights. In a capitalist system, the marketplace decides economic outcomes. In the Department of Justice's system, however, economic outcomes are decided by government mandates. Such is the case here. The government dislikes the potential post-merger structure of the boom truck market, so they brought this case to rearrange things to their liking. If the government did not have a monopoly on the use of political force, it would not be able to obtain this result.

And far from ''protecting'' consumers, the government's remedy here denies consumers the fundamental right to act for themselves. The government assumes consumers won't pay any price increase that may result from the merger. But there's no proof of this hypothesis in the record. Consumers often pay higher prices if they feel the product is worth it, or it they believe that the product will improve in the future. Consumers are certainly a far better judge of these things than attorneys at the Department of Justice. The final judgment's remedy wrecks all that, however. By employing its political power, the government has stripped consumers of their economic power.

Finally, there is an obvious contradiction in the government recognizing the factors behind Manitowoc's dominance on the one hand, but ignoring these same factors in fashioning the final judgment's remedy. The government says a new firm is unlikely to enter the market because of the need to ''establish a strong reputation,'' among other things. So how does creating a new competitor by force accomplish this? Does the government believe that a reputation can be established simply by handing a corporation assets and customers they didn't actually earn? If that's the case, why doesn't the Department of Justice simply allocate resources and market shares in all sectors of American industry? They obviously consider their judgment superior to consumers.

Conclusion

The government claims to serve the ''public interest'' in presenting this proposed final judgment. But it's unclear what those interests are. It's certainly not legal interests, since no constitutional or statutory right of consumers was violated by the defendants. And it's not economic interests, since a capitalist economy is built on voluntary actions free of government interference. ''Free competition enforced by law is a grotesque contradiction in terms,''[8] not to mention a highly unstable way to govern an economy. The companies prosecuted in this case did compete and are competing. The government just doesn't like the outcome of that competition, so they've come to court seeking to overrule the judgment of consumers and producers. The result of the government's actions is to introduce fear and uncertainty into a market that previously functioned well. It's hard to see how that serves any identifiable ''public interest.''

Since it is unlikely the Department of Justice will see the error of its ways, CVT respectfully asks the Court to consider our comments and take appropriate action. We believe the only just action here is to reject entry of the proposed final judgment, and to dismiss the government's complaint with prejudice.

Dated: October 18, 2002.

Respectfully Submitted,

Citizens for Voluntary Trade

S.M. Oliva,

President, 2000 F Street, N.W., Suite 315, Washington, DC 20006; Telephone: (202) 223–0071; Facsimile: (760) 418–9010; E-mail: *info@voluntarytrade.org.*

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[7] Complaint at 7.

[8] Ayn Rand, Antitrust: The Rule of Unreason, in The Voice of Reason 255 (Leonard Peikoff, ed., 1990).

PENSION AND WELFARE BENEFITS ADMINISTRATION

[Prohibited Transaction Exemption 2002–51; Application No. D–10933]

Class Exemption to Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program

AGENCY: Pension and Welfare Benefits Administration, U.S. Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final exemption from certain prohibited transaction restrictions of the Internal Revenue Code of 1986 (the Code). The exemption was proposed in conjunction with the Department's Voluntary Fiduciary Correction (VFC) Program, the final version of which was published in the March 28, 2002, issue of the **Federal Register**. The VFC Program allows certain persons to avoid potential civil actions under the Employee Retirement Income Security Act of 1974 (ERISA) initiated by the Department and the assessment of civil penalties under section 502(l) of ERISA in connection with investigation or civil action by the Department. The exemption will affect plans, participants and beneficiaries of such plans and certain other persons engaging in such transactions.

EFFECTIVE DATE: The exemption is effective November 25, 2002.

FOR FURTHER INFORMATION CONTACT: Karen E. Lloyd, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5649, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693–8540 (not a toll free number) or Cynthia Weglicki, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693–5600 (not a toll free number).

SUPPLEMENTARY INFORMATION: On March 28, 2002, the Department published a notice in the **Federal Register** (67 FR 15083) of the pendency of a proposed class exemption from 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. The Department proposed the class exemption on its own motion pursuant to 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).[1]

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. Two (2) public comments were received by the Department. Upon consideration of the comments received, the Department has determined to grant the proposed class exemption subject to certain modifications. These

[1] Section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

modifications and the comments are discussed below.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it was determined that this action is ''significant'' under Section 3(f)(4) of the Executive Order. Accordingly, this action has been reviewed by OMB.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520)(PRA 95), the Department submitted the information collection request (ICR) included in the Proposed Class Exemption to Permit Certain Transactions Identified in the Voluntary Fiduciary Correction to the Office of Management and Budget (OMB) for review and clearance at the time the Notice of the Proposed Class Exemption was published in the **Federal Register** (March 28, 2002, 67 FR 15083). OMB approved the Notice under OMB control number 1210–0118. The approval will expire on November 30, 2003.

The Department solicited comments concerning the ICR in connection with the Notice of Proposed Class Exemption. The Department received no comments addressing its burden estimates and no substantive changes have been made in the final exemption that would affect the Department's earlier burden estimates.

Agency: Pension and Welfare Benefits Administration, Department of Labor.

Title: Voluntary Fiduciary Correction Program.

OMB Number: 1210–0118.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Respondents: 700.

Frequency of Response: On occasion.

Responses: 700.

Estimated Total Burden Hours: 5,710 hours.

Total Burden Cost (Operating and Maintenance): $272,928.

Discussion of Comments Received

The Department received two comments regarding the proposed class exemption. The commenters requested specific modifications to the proposal in the following areas:

1. Notice to Interested Persons

Both commenters addressed Section IV of the proposed exemption which required applicants to provide notice to interested persons of the transaction and the method of correction. It was noted that, in many cases, applicants who may be subject to the excise taxes under section 4975 of the Code will not be the employer whose employees are covered by the plan, and may be unrelated to the employer.

In this regard, one of the commenters stated that, without the cooperation of the employer, applicants might find it difficult to provide notice to participants and beneficiaries because they would not have access to the participants' and beneficiaries' names and addresses. The commenter further noted that employers might not be willing to provide access to such information due to privacy concerns or concerns that receipt of the notice might cause confusion among the participants and beneficiaries.

In the commenter's view, relief under the exemption should not be conditioned on the cooperation of an employer or other person that is unrelated to the applicant, particularly since the underlying prohibited transaction will have been corrected pursuant to the VFC Program. The commenter proposed that, in the case of an applicant unrelated to the employer whose employees are covered by the plan, the exemption permit notice to be provided to the employer or other plan fiduciary unrelated to the applicant who was not involved in the transaction that is the subject of the VFC Program application, rather than each participant and beneficiary. The commenter noted that the unrelated fiduciary could then determine whether plan participants and beneficiaries should be notified of the underlying transaction and its correction under the VFC Program.

The other commenter stated generally that the notice requirement was unnecessary and burdensome, but subsequently clarified that it had the same concerns as the first commenter.

The Department concurs with the commenters' views on the notice issue. In this regard, the Department notes that the proposed exemption does not contain a definition of interested persons to whom notice must be provided. It is the view of the Department that, where an applicant is unaffiliated with, and unrelated to, the employer whose employees are covered by the plan, the notice requirement will be deemed satisfied if the applicant provides notice to a fiduciary of the plan who is unrelated to the applicant and all other parties involved in the prohibited transaction. In many cases, this may be the employer or an administrative committee composed of officers and employees of the employer. However, the Department cautions that the notice requirement will not be considered satisfied if notice is given to an employer who is not unrelated to all parties involved in the prohibited transaction. Under no circumstances should plan assets be used to pay for the notice.

2. Three Year Rule

One of the commenters also was concerned about Section II.F. of the proposed exemption, which provided that an applicant seeking relief under the exemption could not have taken advantage of the relief provided under the VFC Program and this exemption for a similar type of transaction identified in the current application during the period which is three years prior to the submission of the current application. The commenter argued that applicants that are service providers, as opposed to plan officials, should be permitted to take advantage of the VFC Program as often as necessary without regard to the three year rule.

The commenter stated that subjecting service providers to the three year rule would not, in all cases, further the rule's purpose of ensuring that relief is not provided to fiduciaries who repeatedly make the same legal mistake. In contrast to plan sponsors, for example, service providers such as broker-dealers, banks and insurance companies may engage in numerous transactions with plans each day which could be prohibited except for the availability of a statutory or administrative exemption. The commenter noted that, if the plan fiduciary directing the transaction is relying on an exemption to deal with a party in interest, and that fiduciary is factually incorrect on an element of the exemption, the broker-dealer may

engage in many transactions that would need relief under this exemption.

As an example, the commenter explained that a service provider could enter into a transaction that otherwise would be prohibited based on a fiduciary's representation that the QPAM class exemption (PTE 84–14) (49 FR 9494, March 13, 1984) applied. The QPAM class exemption requires, among other things, that neither the QPAM, an affiliate, nor any owner of a 5% or more interest in the QPAM, have been convicted or released from imprisonment as a result of certain crimes within the ten years immediately preceding the transaction. Information regarding past crimes of affiliates and 5% owners of the QPAM is not likely to be within the knowledge of the service provider, and the service provider must rely on the QPAM for assurance that the condition is satisfied.

The commenter suggested that Section II.F. be modified to provide an exception from the three year rule for applicants that are banks, broker-dealers or insurance companies (or affiliates thereof) which did not exercise discretionary authority or control to cause the plan to enter into the transaction. The commenter proposed that the exception be limited to applicants that were parties in interest (including fiduciaries) solely by reason of providing services to the plan (or solely by reason of a relationship to such service provider described in section 3(14)(F), (G), (H), or (I) and the corresponding provisions of the Code), and that ''did not believe that an exemption was unavailable'' with respect to the transaction. The commenter suggested that the applicant must have established written policies and procedures reasonably designed to ensure compliance with the prohibited transaction rules, and have engaged in periodic monitoring for compliance, at the time of the transaction.

The Department agrees that, in the narrow circumstances described above, such service providers should not be excluded from obtaining relief under the exemption by the three year rule. Accordingly, the Department has modified Section II.F. to clarify that the exemption will continue to be available notwithstanding the applicant's inability to satisfy the three year rule, provided that:

- The applicant was a broker-dealer registered under the Securities Exchange Act of 1934, a bank supervised by the United States or a State thereof, a broker-dealer or bank subject to foreign government regulation, an insurance company qualified to do business in a State, or any affiliate thereof;
- The applicant was a party in interest (including a fiduciary) solely by reason of providing services to the plan or solely by reason of a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) (and/or the corresponding provisions of section 4975 of the Code);
- Neither the applicant nor any affiliate (i) was a fiduciary (within the meaning of section 3(21)(A) of ERISA) with respect to the assets of the plan involved in the transaction, and (ii) used its discretion to cause the plan to engage in the transaction;
- The individuals acting on behalf of the applicant in connection with the transaction had no actual knowledge or reason to know that the transaction was not exempt pursuant to a statutory or administrative exemption under ERISA and/or the Code; and
- Prior to the transaction, the applicant established written policies and procedures that were reasonably designed to ensure compliance with the prohibited transaction rules and the applicant engaged in periodic monitoring for compliance.

3. Participant Loan Repayments

The Department has made one additional modification to the final exemption. As discussed more fully below, the exemption provides relief for certain transactions described in the VFC Program, including the failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulations at 29 CFR 2510.3–102. Subsequent to the publication of the final VFC Program, the Department issued guidance stating that applicants may correct the failure to forward participant loan repayments to a plan in a timely fashion under the VFC Program in the same manner.[2] Accordingly, the Department revised the language of Section I.A. of the exemption to explicitly cover the failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer.

[2] *See* Frequently Asked Questions on the VFC Program, at *http://www.dol.gov/pwba/faqs/faq_vfcp2.html.* For the Department's views on the time frames for repayment of participant loans to pension plans, *see* the preamble to the final participant contribution regulation, 29 CFR section 2510.3–102, published at 61 FR 41220, 41226 (August 7, 1996). *See* also DOL Advisory Opinion No. 2002–02A (May 17, 2002).

Description of the Exemption

1. Scope

The exemption provides relief from the sanctions imposed under section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for certain eligible transactions identified in the VFC Program. The exemption does not provide relief for any transactions identified in the VFC Program that are not specifically described as eligible transactions under Section I of the exemption.

The four eligible transactions described in the exemption are as follows:

(A) The failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulations at 29 CFR section 2510.3–102 and/or the failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer.

(B) The making of a loan by a plan at a fair market interest rate to a party in interest with respect to the plan.

(C) The purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value.

(D) The sale of real property to a plan by the employer and the leaseback of such property to the employer, at fair market value and fair market rental value, respectively.

The eligible transactions may be illustrated by the following examples:

Example (1): Corporation A sponsors a pension plan for its employees. Corporation A borrowed $100,000 from the plan. The loan was made at an interest rate no less than that available for a loan with similar terms (for example, the amount of the loan, amount and type of security, repayment schedule, and duration of loan) obtainable in an arm's-length transaction between unrelated parties. Example (2): Corporation B sponsors a pension plan for its employees. The plan sold a parcel of real property to Corporation B. The price Corporation B paid to the plan was the fair market value of the property as determined by a qualified independent appraiser as of the date of the transaction and reflected in a qualified appraisal report. (If there is a generally recognized market for the property, such as the New York Stock Exchange, the fair market value of the property is the value objectively determined by reference to the price on such market on the date of the transaction, and a determination by a qualified independent appraiser is not required.)

Example (3): Corporation C sponsors a pension plan for its employees. Corporation C sold a parcel of real property to the plan which was simultaneously leased back to Corporation C. The price paid by the plan for the property was its fair market value, and

the rent paid by Corporation C to the plan is the fair market rental value, as determined by a qualified independent appraiser and reflected in a qualified appraisal report. The terms of the lease (for example, rent, duration and allocation of expenses) are not less favorable to the plan than those obtainable in an arm's-length transaction between unrelated parties.

2. General Conditions

Section II of the exemption contains general conditions, as discussed below, which the Department views as necessary to ensure that any transaction covered by the exemption would be in the interests of plan participants and beneficiaries, and to support a finding that the exemption met the statutory requirements of section 4975(c)(2) of the Code.

With respect to a transaction involving delinquent transmittal of participant contributions and/or participant loan repayments to a pension plan, the exemption requires that the contributions or repayments be transmitted to the pension plan not more than 180 calendar days from the date the amounts were received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date the amount otherwise would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

Second, the exemption requires that, with respect to the transactions described in Sections I.B., I.C. and I.D., the amount of plan assets involved in the transaction did not exceed 10 percent of the fair market value of all the assets of the plan at the time of the transaction. For purposes of this requirement, the 10 percent limitation would apply after aggregating the value of a series of related transactions.

Third, under the exemption, the fair market value of any plan asset involved in a transaction described in Sections I.C. or I.D. must have been determined in accordance with section 5 of the VFC Program. Section 5 of the VFC Program requires that the valuation meet the following conditions: (1) If there is a generally recognized market for the property (*e.g.*, the New York Stock Exchange), the fair market value of the asset is the average value of the asset on such market on the applicable date, unless the plan document specifies another objectively determined value (*e.g.*, the closing price); and (2) if there is no generally recognized market for the asset, the fair market value of that asset must be determined in accordance with generally accepted appraisal standards by a qualified independent appraiser and reflected in a written appraisal report signed by the appraiser. For purposes of these requirements under the VFC Program, an appraiser is considered qualified if the appraiser has met the education, experience and licensing requirements that are generally recognized for appraisal of the type of asset being appraised. An appraiser is ''independent'' if the appraiser is not one of the following, does not own or control any of the following, and is not owned or controlled by, or affiliated with, any of the following: (i) The prior owner of the asset, if the asset was purchased by the plan; (ii) the purchaser of the asset, if the asset was or is now being sold by the plan; (iii) any other owner of the asset, if the plan is not the sole owner; (iv) a fiduciary of the plan; (v) a party in interest with respect to the plan (except to the extent the appraiser becomes a party in interest when retained to perform this appraisal for the plan); or (vi) the VFC Program applicant.

Fourth, under the exemption, the terms of a transaction described in Sections I.B., I.C., or I.D., must have been at least as favorable to the plan as the terms generally available in arm's-length transactions between unrelated parties.

Fifth, with respect to all of the eligible transactions, the transaction may not have been part of an agreement, arrangement or understanding designed to benefit a party in interest. The Department notes that the intent of this condition is not to deny a direct benefit to the party in interest but, rather, to exclude relief for transactions that are part of a broader overall agreement, arrangement or understanding designed to benefit parties in interest.

Sixth, with respect to all of the eligible transactions, the applicant may not have taken advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction identified in the application during the three-year period prior to the submission of the application. As modified, however, the final exemption contains a limited exception from this condition for service providers. Pursuant to the amended Section II.F., a broker-dealer, bank or insurance company that is a service provider to a plan would not be subject to this condition if it engaged in a prohibited transaction described in Section I, provided that: it was not a fiduciary that used its discretion to cause the plan to engage in the transaction; individuals acting on its behalf in connection with the transaction had no actual knowledge or reason to know that the transaction was not exempt pursuant to a statutory or administrative exemption under ERISA and/or the Code; and, prior to the transaction, it established written policies and procedures that were reasonably designed to ensure compliance with the prohibited transaction rules and it engaged in periodic monitoring for compliance.

3. Compliance with VFC Program

In addition to compliance with the general conditions set forth above, Section III of the exemption requires that the applicant meet the requirements set forth in the VFC Program that are applicable to the particular transaction. The exemption also requires that the applicant have received a no action letter issued by PWBA with respect to such transaction, which must be an eligible transaction otherwise described in Section I of the exemption. However, the fact that an applicant receives a no action letter issued by PWBA should not be viewed as a determination by PWBA that the applicant has satisfied all of the conditions of the exemption. Each applicant must determine whether the pertinent conditions of the exemption have been met.

4. Notice

Notice under the exemption must be given to interested persons within 60 calendar days following the date of the submission of an application under the VFC Program to the Department. Plan assets may not be used to pay for the notice. The exemption does not specify the format or specific content of the notice. However, the notice must include an objective description of the transaction and the steps taken to correct it, written in a manner reasonably calculated to be understood by the average plan participant or beneficiary. The notice also must provide for a period of 30 calendar days, beginning on the date the notice is distributed, for interested persons to provide comments to the appropriate Regional Office of the United States Department of Labor, Pension and Welfare Benefits Administration. The notice must include the address and telephone number of such Regional Office.

A copy of the notice to interested persons, along with an indication of the date on which it was distributed, must be provided to the appropriate Regional Office within the same 60-day period following the date of the submission of the application. Accordingly, applicants under the VFC Program who intend to take advantage of the relief provided under this exemption would indicate on the checklist submitted as part of the VFC Program application that they will, within 60 calendar days following the

date of the submission of the application, provide the Department's Regional Office with a copy of the notice to interested persons.

Notice may be given in any manner that is reasonably calculated, taking into consideration the particular circumstances of the plan, to result in the receipt of such notice by interested persons, including but not limited to posting, regular mail, or electronic mail, or any combination thereof.

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 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply, the requirement that all assets of an employee benefit plan be held in trust by one or more trustees, and the general fiduciary responsibility provisions of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; 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) The exemption does not extend to transactions prohibited under section 4975(c)(1)(F) of the Code.

(3) In accordance with section 4975(c)(2) of the Code, the Department finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plans.

(4) The exemption is supplemental to, and not in derogation of other provisions of ERISA and 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.

(5) The exemption is applicable to a transaction only if the conditions specified in the class exemption are satisfied.

Exemption

Accordingly, the following exemption is granted under the authority of 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).

Section I: Eligible Transactions

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 the following eligible transactions described in section 7 of the Voluntary Fiduciary Correction (VFC) Program (67 FR 15061, March 28, 2002), provided that the applicable conditions set forth in Sections II, III and IV are met:

A. Failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulation at 29 CFR section 2510.3–102, (*see* VFC Program, section 7.A.1.), and/or the failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer.

B. Loan at a fair market interest rate to a party in interest with respect to a plan. (*See* VFC Program, section 7.B.1.).

C. Purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value. (*See* VFC Program, sections 7.C.1. and 7.C.2.).

D. Sale of real property to a plan by the employer and the leaseback of the property to the employer, at fair market value and fair market rental value, respectively. (*See* VFC Program, section 7.C.3.).

Section II: Conditions

A. With respect to a transaction involving participant contributions or loan repayments to pension plans described in Section I.A., the contributions or repayments were transmitted to the pension plan not more than 180 calendar days from the date the amounts were received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date the amounts otherwise would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

B. With respect to the transactions described in Sections I.B., I.C., or I.D., the plan assets involved in the transaction, or series of related transactions, did not, in the aggregate, exceed 10 percent of the fair market value of all the assets of the plan at the time of the transaction.

C. The fair market value of any plan asset involved in a transaction described in Sections I.C. or I.D. was determined in accordance with section 5 of the VFC Program.

D. The terms of a transaction described in Sections I.B., I.C., or I.D. were at least as favorable to the plan as the terms generally available in arm's-length transactions between unrelated parties.

E. With respect to any transaction described in Section I, the transaction was not part of an agreement, arrangement or understanding designed to benefit a party in interest.

F. (1) With respect to any transaction described in Section I, the applicant has not taken advantage of the relief provided by the VFC Program and this exemption for a similar type of transaction(s) identified in the current application during the period which is three years prior to submission of the current application.

(2) Notwithstanding the foregoing, Section II.F.(1) shall not apply to an applicant provided that:

(a) The applicant was a broker-dealer registered under the Securities Exchange Act of 1934, a bank supervised by the United States or a State thereof, a broker-dealer or bank subject to foreign government regulation, an insurance company qualified to do business in a State, or an affiliate thereof;

(b) The applicant was a party in interest (including a fiduciary) solely by reason of providing services to the plan or solely by reason of a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) (and/or the corresponding provisions of section 4975 of the Code);

(c) Neither the applicant nor any affiliate (i) was a fiduciary (within the meaning of section 3(21)(A) of ERISA) with respect to the assets of the plan involved in the transaction and (ii) used its discretion to cause the plan to engage in the transaction;

(d) Individuals acting on behalf of the applicant had no actual knowledge or reason to know that the transaction was not exempt pursuant to a statutory or administrative exemption under ERISA and/or the Code; and

(e) Prior to the transaction, the applicant established written policies and procedures that were reasonably designed to ensure compliance with the prohibited transaction rules and the applicant engaged in periodic monitoring for compliance.

Section III: Compliance with VFC Program

A. The applicant has met all of the applicable requirements of the VFC Program.

B. PWBA has issued a no action letter to the applicant pursuant to the VFC Program with respect to a transaction described in Section I.

Section IV: Notice

A. Written notice of the transaction(s) for which the applicant is seeking relief pursuant to the VFC Program and this exemption, and the method of correcting the transaction, was provided to interested persons within 60 calendar days following the date of the submission of an application under the VFC Program. A copy of the notice was provided to the appropriate Regional Office of the United States Department of Labor, Pension and Welfare Benefits Administration within the same 60-day period, and the applicant indicated the date upon which notice was distributed to interested persons. Plan assets were not used to pay for the notice. The notice included an objective description of the transaction and the steps taken to correct it, written in a manner reasonably calculated to be understood by the average plan participant or beneficiary. The notice provided for a period of 30 calendar days, beginning on the date the notice was distributed, for interested persons to provide comments to the appropriate Regional Office. The notice included the address and telephone number of such Regional Office.

B. Notice was given in a manner that was reasonably calculated, taking into consideration the particular circumstances of the plan, to result in the receipt of such notice by interested persons, including but not limited to posting, regular mail, or electronic mail, or any combination thereof. The notice informed interested persons of the applicant's participation in the VFC Program and intention of availing itself of relief under the exemption.

Signed at Washington, DC, this 11th day of November, 2002.

Ivan L. Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 02–29799 Filed 11–22–02; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL LABOR RELATIONS BOARD

Order Delegating Authority to the General Counsel; Before Members Wilma B. Liebman, William B. Cowen, and Michael J. Bartlett

November 19, 2002.

The Board is faced with the prospect that it may for a temporary period have fewer than three Members of its statutorily prescribed full complement of five Members. The Board recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations, the Board has decided to temporarily delegate to the General Counsel full authority to certify the results of any secret ballot election conducted under the National Emergency provisions of the Labor Management Relations Act, sections 206–210, 29 U.S.C. 176–180.[1] This delegation shall be effective during any time when the Board has fewer than three Members and is made under the authority granted to the Board under sections 3, 4, 6, and 10 of the National Labor Relations Act.

Accordingly, the Board delegates to the General Counsel full and final authority and responsibility on behalf of the Board to certify to the Attorney General the results of any secret ballot elections held among employees on the question of whether they wish to accept the final offer of settlement made by their employer pursuant to section 209(b) of the Labor Management Relations Act, 29 U.S.C. 179(b). This delegation shall cease to be effective whenever the Board has at least three Members.

This delegation relates to the internal management of the National Labor Relations Board and is therefore, pursuant to 5 U.S.C. 553, exempt from the notice and comment requirements of the Administrative Procedure Act. Further, public notice and comment is impractical because of the immediate need for Board action. The public interest requires that this delegation take effect immediately.

All existing delegations of authority to the General Counsel and to staff in effect prior to the date of this order remain in full force and effect, including the December 14, 2001, delegation regarding court litigation authority and the April 1, 1955, delegation by the Board to the General Counsel of the authority and responsibility to conduct secret ballots pursuant to section 209(b) of the Labor Management Relations Act, 29 U.S.C. 179(b). For the reasons stated above, the Board finds good cause to make this order effective immediately in accordance with 5 U.S.C. 553(d).

By direction of the Board.

[1] On December 14, 2001, the Board previously delegated to the General Counsel, on the same basis, full authority on all court litigation matters that would otherwise require Board authorization, effective during any time when the Board has fewer than three Members. *See* 66 FR 65998 (December 21, 2001).

Dated in Washington, DC, November 19, 2002.

Lester A. Heltzer,

Acting Executive Secretary, National Labor Relations Board.

[FR Doc. 02–29917 Filed 11–22–02; 8:45 am]

BILLING CODE 7545–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On October 11, 2002, the National Science Foundation published a notice in the **Federal Register** of a permit applications received. Permits were issued on November 19, 2002 to: Arthur L. DeVries, Permit No. 2003–013; Joan Myers, Permit No. 2003–2003–015.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 02–29875 Filed 11–22–02; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Notice of Issuance of Director's Decision Under 10 CFR 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has issued a Director's Decision with regard to a petition dated March 11, 2002, and supplements dated March 21, 22, and 27, 2002 (the Petition), submitted by Mr. David A. Lochbaum, a Nuclear Safety Engineer in the Washington, DC Office of the Union of Concerned Scientists (UCS), and the co-petitioners identified in the petition supplements dated March 21 and March 22, 2002 (the Petitioners). The Petitioners have requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) take action with regard to the nuclear power facilities listed in Attachment 1 to the Petition (multiple nuclear power facilities). The