

The INA requires that the Department make available for public examination in Washington, DC, a list of employers which have filed labor condition applications.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collections techniques or other forms of information, *e.g.*, permitting electronic submissions of responses.

III. Current Actions

On January 5, 1999, the Department published a Notice of Proposed Rulemaking (NPRM) and a request for comments in the **Federal Register** (64 FR 628). The purpose of the NPRM was to implement statutory changes in the H-1B visa program made to the INA by the American Competitiveness and Workforce Improvement Act of 1998. The Department is currently in the process of reviewing comments received in response to the NPRM and preparing a final rule to implement the statutory changes, including changes to the Form ETA 9035. The Department will be requesting OMB approval of the changes to the information collection request at the time that rule is published. However, since the current OMB approval for the Form ETA 9035 expires June 30, 1999, there is a need for an extension of the existing collection of information pertaining to employers' seeking to use H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability. This action is necessary in order for the Department to meet its statutory responsibilities under the INA.

Type of Review: Extension of a currently approved collection without change.

Agency: Employment and Training Administration, Labor.

Title: Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models.

OMB Number: 1205-0310.

Affected Public: Businesses or other for-profit; not-for-profit institutions; Federal government; State, Local or Tribal government.

Form: Form ETA 9035.

Total Respondents: 250,000.

Frequency of Response: On occasion.

Total Responses: 250,050.

Average Burden Hours Per Response: 1.25.

Estimated Total Annual Burden Hours: 250,050.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Signed at Washington, DC, this 27 day of May, 1999.

John R. Beverly III,

Director, Employment Service.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D09708, et al.]

Proposed Exemptions; RREEF America L.L.C. (RREEF)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's

interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, NW, Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

**RREEF America L.L.C. (RREEF),
Located in San Francisco, California**

[Application No. D-9708]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990.)

Part I—Exemption for Payment of Certain Fees to RREEF

The restrictions of sections 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply, effective as of (i) May 16, 1994, with respect to a single client, separate account established on behalf of the Shell Pension Trust (the Shell Account), and (ii) the date the final exemption is published in the **Federal Register**, with respect to any single client, separate account (Single Client Account) or any multiple client account (Multiple Client Account) formed on, or after, such a date, to the payment of certain initial investment fees (the Investment Fee), annual management fees based upon net operating income (the Asset Management Fee), and performance fees (the Performance Fee) to RREEF by employee benefit plans for which RREEF provides investment management services (the Client Plans)¹ pursuant to an investment management agreement (the Agreement) entered into between RREEF and the Client Plans either individually, through an establishment (or amendment) of a Single Client Account, or collectively as participants in a newly established Multiple Client Account (collectively, the Accounts), provided that the conditions set forth below in Part III are satisfied.

Part II—Exemption for Investments in a Multiple Client Account

The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(c)(1)(A) through (D) of the Code, shall not apply to any investment by a Client Plan in a Multiple Client Account managed by RREEF formed on, or after, the date the final exemption is published in the **Federal Register**,

¹ The Client Plans (including employee benefit plans that may become Client Plans in the future) consist of various pension plans as defined in section 3(2) of the Act and other plans as defined in section 4975(e)(1) of the Code with respect to which RREEF serves as a trustee or an investment manager.

provided that the conditions set forth below in Part III are satisfied.

Part III—General Conditions

(a)(1) The investment of plan assets in a Single or Multiple Client Account, including the terms and payment of any Investment Fee, Asset Management Fee and Performance Fee (collectively; the Fees), shall be approved in writing by a fiduciary of a Client Plan which is independent of RREEF and its affiliates (the Independent Fiduciary).

(2) For purposes of the Fees, the fair market value of the Accounts' real property assets (other than in the case of actual sales) will be based on appraisals prepared by independent qualified appraisers that are Members of the Appraisal Institute (MAI Appraisers). In this regard, every agreement by which an appraiser is retained will include the appraiser's representation that: (1) Its ultimate client is the Account and its underlying Client Plan (and non-Plan) investors, and (2) it will perform its duties in the interest of such Account (and investors). In addition, following the date this proposed exemption is granted, every agreement shall advise the appraiser that it owes a professional obligation to the Account when making an appraisal for properties held by the Account.

(b) The terms of any investment in an Account and of the Fees, shall be at least as favorable to the Client Plans as those obtainable in arm's-length transactions between unrelated parties.

(c) At the time any Account is established (or amended) and at the time of any subsequent investment of assets (including the reinvestment of assets) in such Account:

(1) Each Client Plan in a Single Client Account shall have total net assets with a value in excess of \$100 million, and each Client Plan that is an investor in a Multiple Client Account shall have total net assets with a value in excess of \$50 million; and provided that seventy-five percent (75%) or more of the units of beneficial interests in a Multiple Client Account are held by Client Plans or other investors having total assets of at least \$100 million. In addition, 50 percent (50%) or more of the Client Plans investing in a Multiple Client Account shall have assets of at least \$100 million. A group of Client Plans maintained by a single employer or controlled group of employers, any of which individually has assets of less than \$100 million, will be counted as a single Client Plan if the decision to invest in the Account (or the decision to make investments in the Account available as an option for an individually directed account) is made

by a fiduciary other than RREEF, who exercises such discretion with respect to Client Plan assets in excess of \$100 million.

(2) No Client Plan shall invest, in the aggregate, more than 5% of its total assets in any Account or more than 10% of its total assets in all Accounts established by RREEF.

(d) Prior to making an investment in any Account (or amending an existing Account), the Independent Fiduciary of each Client Plan investing in an Account shall have received offering materials from RREEF which disclose all material facts concerning the purpose, structure, and operation of the Account, including any Fee arrangements (provided that, in the case of an amendment to the Fee arrangements, such materials need address only the amended fees and any other material change to the Account's original offering materials).

(e) With respect to its ongoing participation in an Account, each Client Plan shall receive the following written information from RREEF:

(1) Audited financial statements of the Account prepared by independent public accountants selected by RREEF no later than 90 days after the end of the fiscal year of the Account;

(2) Quarterly and annual reports prepared by RREEF relating to the overall financial position and operating results of the Account and, in the case of a Multiple Client Account, the value of each Client Plan's interest in the Account. Each such report shall include a statement regarding the amount of fees paid to RREEF during the period covered by such report;

(3) Periodic appraisals (as agreed upon with the Client Plans) indicating the fair market value of the Account's assets as established by an MAI appraiser independent of RREEF and its affiliates. In the case of any appraisal that will serve as the basis for any "deemed sale" of such property for purposes of calculating the Performance Fee payable to RREEF (as discussed in paragraph (j) below), then:

(i) In the case of any Single Client Account, such MAI appraiser shall be either (A) Selected by the Independent Fiduciary of the Client Plan subject to the affirmative approval of RREEF, or (B) selected by RREEF subject to approval by the Independent Fiduciary of the Client Plan;

(ii) In the case of any Multiple Client Account, such MAI appraiser shall be approved in advance by the Responsible Independent Fiduciaries (as defined in Part IV(e) below) owning a majority of the interests in the Accounts, determined according to the latest

valuation of the Account's assets performed no more than 12 months prior to such appraisal, which approval may be by written notice and deemed consent by such Fiduciaries' failure to object to the appraiser within 30 days of such notice; and

(iii) In either case, the selected MAI appraiser shall acknowledge in writing that the Client Plan(s) and other investors (in the case of a Multiple Client Account), rather than RREEF, is (are) its clients, and that in performing its services for the Account it shall act in the sole interest of such Client Plan(s) and other investors. In addition, following the date this proposed exemption is granted, every appraiser selected shall acknowledge that it owes a professional obligation to the Client Plan(s) and other investors in the Account in performing its services as an appraiser for properties in the Account. If an MAI appraiser selected by RREEF, or an appraisal performed by a previously approved appraiser, is rejected by the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for the Multiple Client Account, determined according to the latest valuation of the Account's assets performed no more than 12 months prior to such appraisal, the fair market value of the assets for any "deemed sale", relating to the payment of a Performance Fee (as described in paragraphs (i) and (j) below) shall be determined as follows: (A) the Client Plans shall appoint a second appraiser and, if the value established for the property does not deviate by more than 10% (or such lesser amount as may be agreed upon between RREEF and the Client Plan(s)), then the two appraisals shall be averaged; (B) if the values differ by more than 10%, then the two appraisers shall select a third appraiser, that is independent of RREEF and its affiliates, who will attempt to mediate the difference; (C) if the third appraiser can cause the first two to reach an agreement on a value, that figure shall be used; however, (D) if no agreement can be reached, the third appraiser shall determine the value based on procedures set out in the governing agreements of the Account or, if no such procedures are established, shall conduct its own appraisal and the two closest of the three shall be averaged;

(4) In the case of any Multiple Client Account, a list of all other investors in the Account;

(5) Annual operating and capital budgets with respect to the Account, to be distributed to a Client Plan within 60 days prior to the beginning of the fiscal year to which such budgets relate; and

(6) An explanation of any material deviation from the budgets previously provided to such Client Plan for the prior year.

(f) The total fees paid to RREEF shall constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(g) The Investment Fee shall be equal to a specified percentage of the net value of the Client Plan assets allocated to the Account which shall be payable either:

(1) At the time assets are deposited (or deemed deposited in the case of reinvestment of assets) in the Account; or

(2) In periodic installments, the amount (as a percentage of the aggregate Investment Fee) and timing of which have been specified in advance based on the percentage of the Client Plan's assets invested in real property as of the payment date; provided that (i) The installment period is no less than three months, and (ii) if the percentage of the Client Plan assets which have actually been invested by a payment date is less than the percentage required for the aggregate Investment Fee to be paid in full through that date (both determined on a cumulative basis), the Investment Fee paid on such a date shall be reduced by the amount necessary to cause the percentage of the aggregate Investment Fee paid to equal only the percentage of the Client Plan assets actually invested by that date. The unpaid portion of such Investment Fee shall be deferred to and payable on a cumulative basis on the next scheduled payment date (subject to the percentage limitation described in the preceding sentence).

(h) The Asset Management Fee shall be payable for each quarter from the net operating income (NOI) of the Account. The amount of the Asset Management Fee, expressed as a percentage of the NOI of the Account, shall be established by the Agreement and agreed to by the Independent Fiduciaries of the Client Plans:

(1) The Asset Management Fee for any Account will be calculated as follows. The Asset Management Fee for a specific Account real property will be based solely on items of operating income and expense that are identified as line items on an operating budget for such property disclosed to each Client Plan that participates in the Account. The disclosures have to be made at least 30 days in advance of the fiscal year to which the budget relates, and approved in the manner described in (2) below;

(2) Each Client Plan must provide affirmative approval of the operating budget. Specifically, when the proposed budget (or any material deviation

therefrom) is sent to a Client Plan, it will be accompanied by a written notice that the Client Plan may object to the budget or any specific line item therein, for purposes of calculating the Asset Management Fees for the next fiscal year. The written notice will contain a statement that affirmative approval of the budget is required prior to the end of the 30-day period following such disclosure. In the case of a Multiple Client Account, affirmative approval by a majority of investors (by interest) will constitute approval of the proposed budget (or deviation); and

(3) In the event of any subsequent decrease in previously approved budgeted operating expenses for the fiscal year in excess of the limits previously described (15% for any line item, 5% overall), then the resulting increase in NOI (i.e., over and above the allowable deviation) will not be taken into account in calculating RREEF's management fee unless affirmative approval for the payment of such fee is obtained in writing from the Independent Fiduciary for the Client Plan in the Single Client Account or the Responsible Independent Fiduciaries for the Multiple Client Account.

(i) In the case of any Multiple Client Account, the Performance Fee shall be payable after the Client Plan has received distributions from the Account in excess of an amount equal to 100% of its invested capital plus a pre-specified annual compounded cumulative rate of return (the Threshold Amount or Hurdle Rate). However, in the case of RREEF's removal or resignation, RREEF shall be entitled to receive a Performance Fee payable either at the time of removal or, in the event of RREEF's resignation, upon sale of the assets to which the Performance Fee is allocable or upon termination of the Account as the case may be, subject to the requirements of paragraph (l) below, as determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value (in accordance with independent appraisals), only to the extent that the Client Plan would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of RREEF's removal or resignation. Both the Threshold Amount and the amount of the Performance Fee, expressed as a percentage of the net proceeds from a capital event distributed (or deemed distributed) from the Account in excess of the Threshold Amount, shall be established by the Agreement and agreed to by the Independent Fiduciaries of the Client Plans.

(j) In the case of any Single Client Account, the Performance Fee shall be determined and paid either: (1) In the same manner as in the case of a Multiple Client Account, as described in paragraph (i) above; or (2) at the end of any pre-specified period of not less than one year, provided that such Fee is based upon the sum of all actual distributions from the Account during such period, plus deemed distributions of the assets of the Account based on an assumed sale of all such assets at their fair market value as of the end of such period (in accordance with independent appraisals performed within 12 months of the calculation) which are calculated to be in excess of the Threshold Amount or the Hurdle Rate through the end of such period. For this purpose, the Performance Fee measuring period shall be established by the Agreement and agreed to by the Independent Fiduciary of the Client Plan, provided that such period is not less than one year. In addition, RREEF shall provide notice to the Client Plan within 60 days of each Performance Fee calculation for a Single Client Account that the Independent Fiduciary of the Client Plan has the right to request updated appraisals of the properties held by the Account if such Fiduciary determines that the existing independent appraisals (performed within 12 months of the calculation) are no longer sufficient.

(k) The Threshold Amount for any Performance Fee shall include at least a minimum rate of return to the Client Plan, as defined below in Part IV, paragraph (f).

(l) In the event RREEF resigns as investment manager for an Account, the Performance Fee shall be calculated at the time of resignation as described above in paragraph (i) above and allocated among each property, based on the appraised value of such property in relationship to the total appraised value of the Account. Each amount arrived at through this calculation shall be multiplied by a fraction, the numerator of which will be the actual sales price received by the Account on subsequent disposition of the property (or in the case of a property which has not been sold prior to the termination of a Multiple Client Account, the appraised value of the property as of the termination date), and the denominator of which will be the appraised value of the property which was used in connection with determining the Performance Fee at the time of resignation, provided that this fraction shall never exceed 1.0. The resulting amount for each property shall be the Performance Fee payable to RREEF upon the sale of such property or

termination of the Multiple Client Account, as the case may be.

(m) In cases where RREEF does have discretion to reinvest proceeds from capital events, the reinvested amount shall not be treated as a new contribution of capital by the Client Plan for purposes of the Investment Fee, as described above in paragraph (g), or having been distributed for purposes of the payment of Performance Fee as described above in paragraphs (i) and (j);

(n) RREEF or its affiliates shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (o) of this Part III to determine whether the conditions of this exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of RREEF or its affiliates, the records are lost or destroyed prior to the end of the six year period; and (2) no party in interest, other than RREEF, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (o) below.

(o)(1) Except as provided in paragraph (o)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (n) of this Part III shall be unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of a Client Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any contributing employer to a Client Plan or any duly authorized employee or representative of such employer; and

(iv) Any participant or beneficiary of a Client Plan or any duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above in paragraph (o)(1)(ii)-(iv) shall be authorized to examine the trade secrets of RREEF and its affiliates or any commercial or financial information which is privileged or confidential.

(p) RREEF shall provide a copy of the proposed exemption and a copy of the final exemption to all Client Plans that invest in any Single Client Account or any Multiple Client Account formed on, or after, the date the final exemption is published in the **Federal Register**.

Part IV—Definitions

(a) An "affiliate" of a person includes:

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

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

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

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

(c) The term "management services" means:

(1) Development of an investment strategy for the Account and identification of suitable real estate-related investments;

(2) Directing the investments of the assets of the Account, including the determination of the structure of each investment, the negotiation of its terms and conditions and the performance of all requisite due diligence;

(3) Determination of the timing of, and directing, the disposition of assets of the Account and directing the liquidation of the Account upon termination;

(4) Administration of the overall operation of the investments of the Account, including all applicable leasing, management, financing and capital improvement decisions;

(5) Establishing and maintaining accounting records of the Account and distributing reports to Client Plans as described in Part III; and

(6) Selecting and directing all service providers of ancillary services as defined in this Part IV; provided, however, that some or all of the foregoing management services may be subject to the final discretion of the Independent Fiduciary(ies) for the Client Plan(s).

(d) The term "ancillary services" means:

(1) Legal services;

(2) Services of architects, designers, engineers, construction managers, hazardous materials consultants, contractors, leasing agents, real estate brokers, and others in connection with the acquisition, construction, improvement, management and disposition of investments in real property;

(3) Insurance brokerage and consultation services;

(4) Services of independent auditors and accountants in connection with auditing the books and records of the Accounts and preparing tax returns;

(5) Appraisal and mortgage brokerage services; and

(6) Services for the development of income-producing real property.

(e) The term "Independent Fiduciary" with respect to any Client Plan means a fiduciary (including an in-house fiduciary) independent of RREEF and its affiliates. With respect to a Multiple Client Account, the terms "Independent Fiduciary" or "Responsible Independent Fiduciaries" mean the Independent Fiduciaries of the Client Plans invested in the Account and other authorized persons acting for investors in the Account which are not employee benefit plans as defined under section 3(3) of ERISA (such as governmental plans, university endowment funds, etc.) that are independent of RREEF and its affiliates, and that collectively hold more than 50% of the interests in the Account.

(f) The terms "Threshold Amount" or "Hurdle Rate" mean, with respect to any Performance Fee, an amount which equals all of a Client Plan's capital invested in an Account plus a pre-specified annual compounded cumulative rate of return that is at least a minimum rate of return determined as follows:

(1) A "floating" or non-fixed rate which is at least equal to the lesser of seven percent, or the rate of change in the consumer price index (CPI), during the period from the deposit of the Client Plan's assets into the Account until the determination date; or

(2) A fixed rate which is at least equal to the lesser of seven percent or the average rate of change in the CPI over some period of time specified in the Agreement, which shall not exceed 10 years.

(g) The terms "Net Operating Income" or "NOI" means all operating income of the Account (i.e., rents, interest, and other income from day-to-day investment activities of the Account) less operating expenses, determined on an accrual basis in accordance with generally accepted accounting principles, but without regard to depreciation (or other non-cash) expense and capital expenditures and without regard to payments of interest and principal with respect to any acquisition indebtedness relating to the property.

(h) The term "Net Proceeds of a Capital Event" means all proceeds from capital events of an Account (i.e., sales or non-recourse refinances of real property investments owned by the Account) less repayment of debt with respect to such property, closing expenses paid, and reasonable reserves established in connection therewith,

whether such reserves are for repayment of existing or anticipated obligations or for contingent liabilities.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective as of (i) May 16, 1994, with respect to the Shell Account, and (ii) the date the final exemption is published in the **Federal Register**, with respect to any Single Client Account and any Multiple Client Account formed on, or after, such date.

Summary of Facts and Representations

1. RREEF America L.L.C. and its affiliate, RREEF Management Company, provide investment and property management services to institutional investors, including employee benefit plans and other tax-exempt entities, through various separate accounts and commingled accounts.

On January 27, 1998, RREEF America L.L.C. and its affiliate, RREEF Corporation (collectively, RREEF), were acquired by RoProperty Services, B.V. (RoProperty), a major Dutch investment advisory firm. As a result, the RREEF entities were combined into a newly created Delaware limited liability company which continues to use the name "RREEF America L.L.C." RREEF operates as an autonomous entity which continues to provide investment management services, and its affiliate, RREEF Management Company, continues to provide property management services.

2. RREEF is generally appointed as an investment manager (the Manager) as defined in section 3(38) of the Act with respect to each Client Plan that invests in a Single Client Account or a Multiple Client Account. Although RREEF has discretion with respect to the day-to-day operation of each Account and, in many cases, RREEF has full discretion over Account acquisition and/or disposition decisions, in certain cases final investment authority may remain with the Client Plans.

3. A Client Plan may enter into one or more separate account relationships with RREEF (each, a Single Client Account) pursuant to one or more individually negotiated investment management agreements with RREEF, or by investing in a commingled investment fund (Multiple Client Account, collectively; the Accounts) managed by RREEF.² The Accounts to

²The applicant represents that in some instances a Client Plan's investment in a Multiple Client Account that is a common or collective trust fund maintained by a bank would be exempt from the restrictions of section 406(a) of the Act by reason of section 408(b)(8). The Department expresses no opinion herein whether all the conditions of section 408(b)(8) will be satisfied in such transactions.

date have been blind investment relationships established for the purpose of identifying and acquiring real property investments that meet certain investment criteria. However, specified-property investment relationships may be established to invest in pre-identified real property investments. The responsibilities of RREEF in a typical blind discretionary Account would include:

(a) Development of an investment strategy for the Account and identification of suitable real estate investments.

(b) Directing the investment of the assets of the Account, including the determination of the structure of each investment, the negotiation of its terms and conditions, and the performance of requisite due diligence.

(c) Determining the timing of, and directing, the disposition of assets of the Account and directing the liquidation of the Account upon termination.

(d) Administering the overall operation of the investments of the Account, including all applicable leasing, management, financing, and capital improvement decisions.

(e) Establishing and maintaining accounting records of the Account, and distributing reports to Client Plans.

(f) RREEF also has complete discretion in the selection and direction of the ancillary services (Ancillary Services) defined in Part IV, paragraph (d) above.³

RREEF's primary investment objective is to acquire income-producing real property which will generate current return through cash distributions and will offer a potential for profit through gain on resale.

Currently, Multiple Client Accounts consist primarily of tax-exempt group trusts organized pursuant to IRS Revenue Ruling 81-100 and limited partnerships. However, other Multiple Client Accounts may be organized in the

³RREEF or its affiliates may, from time-to-time, provide certain Ancillary Services to the Accounts, such as in connection with the development or redevelopment of real property, preparation of tax returns, environmental consulting, or other services. Occasionally, RREEF has provided construction management and development services with respect to non-ERISA governmental plan accounts. However, upon special request from a client, RREEF may agree to provide ancillary services, such as construction management or development services based upon its knowledge of the Client Plan's investments and its particular expertise. It represented that the Ancillary Services are provided in accordance with section 408(b)(2) and the regulations thereunder (see 29 CFR 2550.408b-2). However, the Department expresses no opinion as to whether the selection of RREEF to provide Ancillary Services or the payment of fees for such Ancillary Services, as described herein, would meet the conditions of section 408(b)(2) of the Act.

future, including, but not limited to, title-holding corporations, real estate investment trusts, or limited liability corporations. In the case of Multiple Client Accounts that are group trusts, individual principals and officers of RREEF generally serve as trustees thereof. Similarly, RREEF principals and officers may serve as directors and/or officers of other vehicles. RREEF currently does not serve as general partner with respect to any of its limited partnership accounts that are subject to ERISA. Typically, the general partner is a corporation owned by one or more of the limited partners. However, in each case, the primary investment discretion is delegated to RREEF pursuant to an investment management agreement between RREEF and the Account (the Agreement).

4. RREEF proposes to have the Client Plans pay for investment management services it renders to the Accounts based upon a multi-fee structure which will be approved in advance by the Independent Fiduciaries of the Client Plans.⁴ Each Client Plan in a Single Client Account shall have total net assets with a value in excess of \$100 million, and each Client Plan that is an investor in a Multiple Client Account shall have total net assets with a value in excess of \$50 million. In addition, seventy-five percent (75%) or more of the units of beneficial interests in a Multiple Client Account must be held by Client Plans or other investors having total assets of at least \$100 million, and 50 percent (50%) or more of the Client Plans investing in a Multiple Client Account must have assets of at least \$100 million. A group of Client Plans maintained by a single employer or controlled group of employers, any of which individually has assets of less than \$100 million, will be counted as a single Client Plan if the decision to invest in the Account (or the decision to make investments in the Account available as an option for an individually directed account) is made by a fiduciary other than RREEF, who

⁴Section 404 of the Act requires, among other things, that a plan fiduciary act prudently and solely in the interest of the plan's participants and beneficiaries. Thus, the Department expects a plan fiduciary, prior to entering into any performance based compensation arrangement with an investment manager, to fully understand the risks and benefits associated with a compensation formula following disclosure by the investment manager of all relevant information pertaining to the proposed arrangement. In addition, a plan fiduciary must be capable of periodically monitoring the actions taken by the investment manager in the performance of its duties. The plan fiduciary must consider prior to entering into any such arrangement, whether it is able to provide adequate oversight of the investment manager during the course of the arrangement.

exercises such discretion with respect to Client Plan assets in excess of \$100 million. No Client Plan shall invest, in the aggregate, more than 5% of its total assets in any Account or more than 10% of its total assets in all Accounts established by RREEF.

The relief provided by this proposed exemption for the multi-fee structures described herein will apply prospectively to any newly formed Multiple Client Account, if such arrangement is approved in advance by the appropriate Independent Fiduciaries of the Client Plans and other investors that invest in the Account. In addition, the relief provided by this proposed exemption will apply retroactively to the Shell Pension Trust for its existing Single Client Account (i.e., the Shell Account), as of May 16, 1994, and prospectively for other Single Client Accounts if the conditions of the exemption are met. Therefore, with regard to any Account, the Independent Fiduciary(ies) of the Client Plan(s) will have final approval as to whether the Agreement between the Client Plan(s) and RREEF will provide for any Investment Fees, Asset Management Fees, or Performance Fees. Similarly, in the case of any Account, the final decision to invest the assets of any Client Plan in such Account will be made by an Independent Fiduciary. RREEF will not exercise its discretion with respect to any Single Client Account to invest those assets in any Multiple Client Account. With respect to the Shell Account, RREEF represents that this Single Client Account has complied with all the applicable conditions contained herein for, among other things, approval by an Independent Fiduciary for investment in such an Account, the payment of any Fees to RREEF, the retention of any appraiser (as discussed further below) for the valuation of properties held in the Account,⁵ and the minimum plan

⁵RREEF's Quarterly Report for the Shell Account, dated December 31, 1998, describes a portfolio consisting of the following six properties: (1) the Bellaire Place Apartments, a residential property located in Redmond, Washington, with a fair market value of approximately \$18.6 million; (2) the San Diego Business Center, an industrial property located in San Diego, California, with a fair market value of approximately \$17.7 million; (3) the West Sacramento Industrial Center, an industrial property located in Sacramento, California, which was sold on December 23, 1998 for \$6.4 million; (4) the Broadway Business Park, an industrial property located in Phoenix, Arizona, with a fair market value of \$26.5 million; (5) 1627 K Street, N.W., an office building located in Washington, D.C., with a fair market value of approximately \$9.4 million; and (6) Wendemere at the Ranch Apartments, a residential property located in Westminster, Colorado, with a fair market value of approximately \$16 million. The fair market value of the properties

asset size required for participation in such Accounts.⁶

5. The multi-fee structure will include: (i) The Investment Fee, a one-time initial fee paid either at the time the Client Plan invests in, or allocates additional assets to, the Account, or in periodic installments while such assets are invested by the Account, as described below; (ii) the Asset Management Fee, an annual fee for asset management charged as a percentage of the net operating income produced by properties held in the Account (defined below), which will be payable to RREEF without regard to the return to the Client Plans of their invested capital; and (iii) the Performance Fee, a fee charged upon actual or deemed distributions of capital proceeds from the Account in excess of a Client Plan's invested capital, plus a negotiated cumulative, compounded annual hurdle rate of return on such invested capital (i.e., the Threshold Amount or Hurdle Rate). In a Single Client Account, an Independent Fiduciary may agree to allow RREEF to receive a periodic Performance Fee based on the Account's performance prior to the Client Plan receiving actual distribution of capital back from the Account in amounts which exceed the prescribed Threshold Amounts. Such Fees will be based on deemed distributions of the assets in such Accounts at periodic intervals, with all property valuations determined by qualified real estate appraisers independent of RREEF and its affiliates. Any property valuation used in the calculation of the Performance Fee will be performed within 12 months of that calculation.

6. RREEF requests an individual exemption for Client Plans that invest in an Account to pay an Investment Fee, Asset Management Fee, and a Performance Fee to RREEF under circumstances described below. RREEF represents that Fee rates and Threshold Amounts will be negotiated on an Account-by-Account basis.

The Investment Fee will be a one-time fee intended to cover the expense of organizing the Account, identifying suitable investments, and completing the initial purchases of real properties for the Account, based on the assets invested by the Client Plan in the Account. The Investment Fee may be paid either (i) At the time the Client

still held in the Shell Account, as of December 31, 1998, was approximately \$88,268,000.

⁶The Shell Pension Trust contained approximately \$5.7 billion in total assets, of which approximately 2% were invested in real estate, as of January, 1999. These real estate assets are managed by three primary investment managers, one of which is RREEF.

Plan invests assets in the Account, or (ii) in installments at the end of pre-specified periods of not less than three months (over a specified period of years). However, if the pre-specified percentage of the Account's assets has not been invested by the payment date for the Investment Fee, the amount of such fee payable on that date will be reduced to reflect the percentage of assets which have been invested by that date. In such instances, the remainder of the Investment Fee will be deferred until the next pre-specified installment date. At that time, the Investment Fee for the current and past installment dates will be paid (subject to further deferral if the relevant assets in the Account have not been invested at that time). The Investment Fees will generally range from 0% to 2% of the capital committed for investment by the Client Plans. However, the exact percentage for any Investment Fee will be negotiated between RREEF and the relevant Client Plans in the Account.

7. The Asset Management Fee will be paid quarterly throughout the term of the Account. As with the Investment Fee, the exact terms of the Asset Management Fee will be negotiated between RREEF and the Client Plan(s) prior to the initial investment of any Client Plan(s)' assets in the Account. The Asset Management Fee will be calculated with respect to the net operating income (NOI) from properties owned by the Account. In this regard, NOI will not include gains made on properties from capital events. The Asset Management Fee will be paid without regard to the return of the Client Plan's invested capital.

The Asset Management Fee will compensate the Investment Manager for the following services: (i) Selection of properties and other assets for acquisition or disposition in an Account, (ii) day-to-day investment and administrative operations of an Account, (iii) performance of property management and leasing services for the properties held by the Account, (iv) obtaining and maintaining insurance for the properties and other assets in the Account, (v) establishing tax-exempt title-holding corporations under section 501(a) of the Code for the properties, (vi) obtaining independent MAI appraisals of the properties every three years, and performing annual internal valuations of the properties, as necessary; and (vii) preparing quarterly and annual written reports concerning assets, receipts, and disbursements of the Account.

As stated above, the Asset Management Fee will be charged as a percentage of the NOI on the properties held by the Account for each quarter.

The Asset Management Fees are determined by negotiation for each Account, but generally will be between 5% to 8% of the NOI per quarterly payment period for properties in the Account. NOI for an Account will be determined on the basis of recurring operating (non-capital) income (i.e., rents, interest, and other income from the day-to-day investments of the Account) less recurring operating expenses (i.e., utilities, taxes, insurance and maintenance) determined on an accrual basis in accordance with generally accepted accounting principles. RREEF states that these recurring revenue items and operating expenses will be set forth in annual budgets that are reviewed and approved in advance by the Client Plans and other investors.

The NOI for an Account will be determined without regard to capital expenditures and non-cash expenditures for the Account, such as depreciation on properties held by the Account or amortization of capital expenditures. In addition, NOI will not be reduced by debt service. Therefore, capital items, such as debt service and non-cash expense items, will have no effect on RREEF's Asset Management Fees. Instead, as discussed more fully below, these items will be reflected in the Performance Fee because any capital expenditure will increase the Threshold Amount for purposes of any subsequent Performance Fee calculation, and any capital distribution will reduce the Threshold Amount.⁷

With respect to each Account, RREEF will prepare annual operating and capital budgets for each of the Account's properties, which will be distributed to each Client Plan invested in the Account, within 60 days prior to the beginning of the fiscal year to which such budgets apply. At the end of each year, RREEF will also distribute to each Client Plan an explanation of any material deviation from the budgets previously provided to the Client Plan for such year.

8. RREEF agrees that in calculating its Asset Management Fee for any Account, the Fee for any individual real property in the Account will be determined solely on the basis of those items of operating income and expense that are identified as line items in the operating budget for such property, which shall be disclosed to each Client Plan that

⁷ As noted above, the determinations of which items are "operating" and which are "capital" will be determined by generally accepted accounting principles. Such determinations are subject to annual review and confirmation by independent Certified Public Accountants retained to audit RREEF's annual financial statements.

participates in the Account. Such disclosures have to be made at least 30 days in advance of the fiscal year to which the budget relates, and approved by the Client Plans in the manner described below.

If, during such year for any previously disclosed line item of operating expense in the budget for a property, there is any material deviation between such line item and the actual amount of such expense for the current year, such deviation will not be taken into account in calculating the Asset Management Fee unless it is first disclosed to, and approved by, the Client Plan(s) in the same manner as the original budgeted line item. For this purpose, a determination of what is considered a "material" deviation will be established by the investment or property management agreement between RREEF and the Client Plan(s) for any real property held by the Account. Property management agreements used by RREEF permit no more than a 15% variance between any individual line item expense in the operating budget from year to year. In addition, overall budgeted expenses may vary no more than 5% from year to year.

If the requisite percentage of investors in an Account fails to approve the proposed budget or any line item therein, then RREEF will continue to utilize the prior year's budget figures (generally with a permitted deviation of 5%). In the event of any subsequent material deviation from a line item expense in a previously approved budget, or the addition of a new line item, RREEF would use the expense figures as budgeted for purposes of its fee calculation, and the variance would have no effect on its current Asset Management Fee calculation, unless a revised budget reflecting the deviation (or new line item) is approved. Any such variance would be reflected only in the subsequent Performance Fee calculation (by increasing or decreasing the Threshold Amount).⁸

The Client Plan approval for these purposes will be by an affirmative approval in advance by the Independent Fiduciary of a Single Client Account or

⁸ For example, if RREEF were to budget landscaping expenses at \$100 for an Account, but the actual figure turns out to be \$80, unless RREEF obtains the approval of its Client Plans, the amount it uses for calculating its Asset Management Fee would be limited to \$85 (applying the 15% deviation, as described above). Although the additional \$5 cost savings directly benefits the Client Plans, it would not be reflected in the Asset Management Fee. Rather, to the extent that this cost savings increases the amount available for distribution to the Client Plans, it would be reflected in the Threshold Amount for purposes of calculating RREEF's future Performance Fee.

the Responsible Independent Fiduciaries for a Multiple Client Account representing at least a majority of the interests in such Account.⁹ Specifically, when the proposed budget (or any material deviation therefrom) is sent to a Client Plan, it will be accompanied by a written notice that the Client Plan must approve the budget, and any specific line item therein, for purposes of calculating the Asset Management Fees for the next fiscal year. The written notice will contain a statement that affirmative approval of the current budget is required prior to the end of the 30-day period following such disclosure. In the case of a Multiple Client Account, affirmative approval by a majority of investors (by interest) will constitute approval of the proposed budget (or deviation). In the event of any subsequent decrease in previously approved budgeted operating expenses for the fiscal year in excess of the limits previously described (15% for any line item, 5% overall), then the resulting increase in NOI (i.e., over and above the allowable deviation) will not be taken into account in calculating RREEF's management fee unless affirmative approval for the payment of such fee is obtained in writing from Independent Fiduciary for the Client Plan in the Single Client Account or the Responsible Independent Fiduciaries for the Client Plans and other investors in the Multiple Client Account.

With respect to the Shell Account, RREEF represents that annual budgets have been presented to an Independent Fiduciary for the Shell Pension Trust for review and approval each year since May 16, 1994. In this regard, RREEF states that although the annual budget approvals for properties held in the Shell Account may not have been in writing in all cases, both parties (i.e., RREEF and the Independent Fiduciary for the Shell Account) have made contemporaneous written confirmations

⁹In this regard, the Department notes that an Independent Fiduciary for a Single Client Account should closely scrutinize budget estimates for both the NOI of the Account and the Asset Management Fees payable to RREEF each year based on the actual NOI. With respect to a Multiple Client Account, the Responsible Independent Fiduciaries should collectively scrutinize such budgets and NOI-based Fees, and raise appropriate objections to those Fees which result from actual operating expenses that materially deviate from previously approved budgets for such expenses. Thus, the Department emphasizes that an Independent Fiduciary for a Client Plan investing in either a Single or Multiple Client Account must adequately monitor the payment of any Asset Management Fees to RREEF by closely reviewing how the NOI that results from each property held by the Account may be affected by any actions taken by RREEF for such property.

of their discussions regarding the annual budgets.

9. The applicant states that in lieu of the Investment Fee and/or the Asset Management Fee, RREEF and the Client Plans may agree to an alternative fee arrangement for an Account (the Alternative Fee) which is based either upon a fixed amount or amounts, or an objective formula to be negotiated (in either case) between RREEF and the Client Plan prior to the initial investment of any Client Plan assets in an Account. RREEF represents that any Alternative Fee will be covered by section 408(b)(2) and the regulations thereunder (29 CFR 2550.408b-2). Accordingly, no exemption is being requested by RREEF for any Alternative Fees.

10. In a Single Client Account, the Performance Fee will be determined and paid either (i) in the same manner as in the case of a Multiple Client Account, or (ii) at the end of any pre-specified period of not less than one-year, provided that the Fee is based upon the sum of all actual distributions from the Account during such period, plus deemed distributions of the assets of the Account based on an assumed sale of all such assets at their fair market value as of the end of such period (in accordance with independent appraisals performed within 12 months of the calculation) which are calculated to be in excess of the Threshold Amount through the end of such period.

In the case of a Multiple Client Account, the Performance Fee will be charged against all distributions of net proceeds from capital events, as defined in Part IV(h), only after the Client Plans and other investors have received distributions (from all sources) from the Account in excess of the Threshold Amount agreed to by the Responsible Independent Fiduciaries.

Most of RREEF's Single Client Accounts are long-term open-ended relationships under which the Client Plans may continue to invest new funds on an ongoing basis. For this reason, RREEF states that certain Client Plans that invest in Single Client Accounts will negotiate for the payment of a Performance Fee that would be calculated and payable periodically, not less frequently than once a year (generally, every three years, commencing on the third anniversary of the first acquisitions of properties made by the Account). As noted above, this periodic Performance Fee would be based on all actual sales of properties by the Account and distributions made back to the investors during such period, as well as deemed or constructive sales of all properties held

in the Account at their most recent appraised values, and the deemed distributions of the net proceeds from such constructive sales plus earnings which are considered to be at or above the Threshold Amount.¹⁰ In such instances, the periodic Performance Fee will take into account both realized and unrealized net gains on properties held in a Single Client Account, and would be payable to RREEF for deemed distributions of unrealized net gains on properties held by the Account for a pre-specified period. Therefore, if agreed to by the Independent Fiduciary for the Client Plan, RREEF would earn a Performance Fee based on the Single Client Account's performance which occurs prior to a return to the Client Plan of its invested capital plus earnings at or above the designated Threshold Amount or Hurdle Rate.

11. For purposes of the Fees, the fair market value of the Accounts' real property assets (other than in the case of actual sales) will be based on appraisals prepared by independent MAI appraisers. In this regard, every agreement by which an appraiser is retained will include the appraiser's representation that: (1) Its ultimate client is the Account and its underlying Plan (and non-Plan) investors, and (2) it will perform its duties in the interest of such Account (and investors). The applicant states that in the case of any appraisal that will serve as the basis for any "deemed sale" of such property for purposes of calculating the periodic Performance Fee payable to RREEF, then the following procedure shall be utilized:

(a) In the case of any Single Client Account, such MAI appraiser shall be either (i) Selected by the Independent Fiduciary of the Client Plan subject to the approval of RREEF, or (ii) selected by RREEF subject to the affirmative approval by the Independent Fiduciary of the Client Plan;

(b) In the case of any Multiple Client Account, such MAI appraiser shall be approved in advance by the Responsible Independent Fiduciaries (as defined in Part IV(e) above) owning a majority of the interests in the Account according to the latest valuation of the Account's assets performed no more than 12 months prior to such appraisal, which

¹⁰In this regard, RREEF represents that while it anticipates that most Client Plans establishing a Single Client Account will elect to pay a periodic Performance Fee based on deemed distributions, RREEF will not preclude any such Client Plan from paying a Performance Fee only after the Client Plan has received actual distributions from an Account equal to its initial invested capital plus earnings at the Threshold Amount. However, a periodic Performance Fee arrangement will not be available for Multiple Client Accounts.

approval may be by written notice and deemed consent by such Fiduciaries' failure to object to the appraiser within 30 days of such notice; and

(c) In either case, the selected MAI appraiser shall acknowledge in writing that the Client Plan(s) and other investors (in the case of a Multiple Client Account), rather than RREEF, is (are) its clients, and that in performing its services for the Account it shall act in the sole interest of such Client Plan(s) and other investors. In addition, following the date this proposed exemption is granted, every appraiser selected shall acknowledge that it owes a professional obligation to the Client Plans and other investors in the Account in performing its services as an appraiser for properties in the Account.

If an MAI appraiser selected by RREEF, or an appraisal performed by a previously approved appraiser, is rejected by the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for the Client Plans owning the majority of the interests in the Multiple Client Account according to the latest valuation of the Account's assets performed no more than 12 months prior to such appraisal, the fair market value of the assets for any "deemed sale" relating to the payment of a Performance Fee will be determined as follows: (i) The Client Plans shall appoint a second appraiser and, if the value established for the property does not deviate by more than 10% (or such lesser amount as may be agreed upon between RREEF and the Client Plan(s)), then the two appraisals shall be averaged; (ii) if the values differ by more than 10%, then the two appraisers shall select a third appraiser, that is independent of RREEF and its affiliates, who will attempt to mediate the difference; (iii) if the third appraiser can cause the first two to reach an agreement on a value, that figure shall be used; however, (iv) if no agreement can be reached, the third appraiser shall determine the value based on procedures set out in the governing agreements of the Account or, if no such procedures are established, shall

conduct its own appraisal and the two closest of the three shall be averaged.

In all cases, the Client Plan will retain the right to challenge any appraiser or appraisal. In the case of a Single Client Account, the frequency and timing of the required appraisals will be determined by the Independent Fiduciary of the Client Plan at the time it enters into an Account relationship with RREEF. However, all Performance Fee calculations will be based on contemporaneous appraisals of properties held by the Account, which will be performed within 12 months of the calculation. Thus, for example, RREEF maintains that a three year appraisal cycle will correspond to a three year periodic Performance Fee measuring period for an Account. In addition, RREEF will provide notice to the Client Plan within 60 days of each Performance Fee calculation for a Single Client Account that the Independent Fiduciary of the Client Plan has the right to request updated appraisals of the properties held by the Account if such Fiduciary determines that the existing independent appraisals (performed within 12 months of the calculation) are no longer sufficient.

12. With respect to the calculation of any Threshold Amount for the payment of a Performance Fee, RREEF states that a bookkeeping account will be maintained for each Client Plan which will show at all times the amount that has to be distributed to satisfy the Threshold Amount. When a certain amount is invested in the Account on a particular date, this bookkeeping account will initially equal the invested amount and will thereafter be increased to reflect the hurdle/threshold rate of return for the Account compounded on an annual basis. Whenever a distribution (from any source) is made from the Account to the Client Plan, the amount of this bookkeeping account will be reduced by the full amount of the distribution. Thereafter, the Threshold Amount will be calculated with respect to and added to this reduced amount. Only when the bookkeeping account is reduced to zero will the Threshold Amount be satisfied.

With all Multiple Client Accounts, and those Single Client Accounts that elect to have a Performance Fee paid only after actual distributions are paid from the Account, once the Threshold Amount has been satisfied, the Performance Fee will be payable to RREEF with respect to all further distributions of net proceeds from capital events from the Account. With respect to any Single Client Accounts which elect to pay periodic Performance Fees based upon deemed distributions of the proceeds from an assumed sale of the properties by the Account, any such deemed distribution would reduce the Threshold Amount only for purposes of such Fee payment. Thus, immediately after such calculation, the Threshold Amount would be increased by the full amount of the deemed distribution for purposes of determining any later Performance Fee based on either deemed or actual distributions to the Client Plans.

13. The applicant submitted hypothetical examples of how the Performance Fee would work in a Multiple Client Account and a Single Client Account context.

In the first example, RREEF establishes a Multiple Client Account to which the Client Plans contribute \$100 million (Initial Contribution) and agree to pay RREEF a Performance Fee equal to 15% of all amounts distributable from the Account after the investors have received distributions equal to their initial invested capital plus a real (CPI-adjusted) annual Threshold Amount of return of 4%. Assuming that CPI remains constant at 4% annually, the nominal annual Threshold Amount is 8% (the Threshold Amount). The Multiple Client Account acquires two real properties at a cost of \$90 million (Property I) and \$10 million (Property II, collectively; the Properties). Annual cash flow from operations is 7% of the Initial Contribution of \$100 million, or 7% million (Annual Cash Flow).

For a Multiple Client Account, the Threshold Amount is calculated as follows:¹¹

	Calculation	Threshold amount (in millions of \$)
Year 1	$100.00 + (.08 \times 100.00) - 7 =$	\$101.00
Year 2	$101.00 + (.08 \times 101.00) - 7 =$	102.08
Year 3	$102.08 + (.08 \times 102.08) - 7 =$	103.25
Year 4	$103.25 + (.08 \times 103.25) - 7 =$	104.51
Year 5	$104.51 + (.08 \times 104.51) - 7 =$	105.87

¹¹ This example has been simplified. In reality, distributions would be made periodically

throughout the year, reducing the amount on which the hurdle is calculated.

	Calculation	Threshold amount (in millions of \$)
Year 6	0	

At the end of year 5, Property I is sold for \$110 million, and there is an actual distribution of \$110 million. Accordingly, RREEF will receive a Performance Fee of 15% times \$110 million less \$106 million (i.e., the approximate Threshold Amount at year 5), or \$600,000. Numerically, this is as follows: (\$110 million – \$106 million) × 15% = \$600,000. Because the Threshold Amount has been reduced to \$0 at year 6, an additional Performance Fee will be payable with respect to any subsequent distribution of cash from a capital event, i.e., any sale or refinancing of the remaining property. Accordingly, if

Property II is sold in year 10 for \$15 million, RREEF will receive an additional Performance Fee of 15% times \$15 million, or \$2.25 million. Numerically, as follows: \$15 million × 15% = \$2.25 million. Therefore, the total Performance Fee received by RREEF in this example is \$2,850,000. In the second example, a large Client Plan establishes a Single Client Account with RREEF to which it contributes \$100 million (Initial Contribution), and agrees to pay RREEF a Performance Fee every five years equal to 15% of all amounts distributed or deemed distributed from the Account after the

Client Plan has received actual or deemed distributions equal to its invested capital plus a real (CPI-adjusted) annual Threshold Amount of return of 4%. If CPI remains constant at 4% annually, the nominal annual rate is 8% (the Threshold Amount). The Account acquires two real property assets at a cost of \$90 million (Property I) and \$10 million (Property II). Annual cash flow from operations is 7% of the Initial Contribution of \$100 million, or 7% million (Annual Cash Flow). For a Single Client Account, the Threshold Amount is calculated as follows:

	Calculation	Threshold amount (in millions of \$)
Year 1	100.00+(.08 × 100.00) – 7 =	\$101.00
Year 2	101.00+(.08 × 101.00) – 7 =	102.08
Year 3	102.08+(.08 × 102.08) – 7 =	103.25
Year 4	103.25+(.08 × 103.25) – 7 =	104.51
Year 5	104.51+(.08 × 104.51) – 7 =	105.87
Year 6	120.00 ¹² +(.08 × 120.00) – 7 =	122.60
Year 7	122.60+(.08 × 122.60) – 7 =	125.41
Year 8	125.41+(.08 × 125.41) – 7 =	128.44
Year 9	128.44+(.08 × 128.44) – 7 =	131.72
Year 10	131.72+(.08 × 131.72) – 7 =	135.25

After five years, the Threshold Amount will increase to approximately \$106 million. At this time, if the two Properties are appraised for \$110 million and \$10 million, respectively, the deemed distributions are \$120 million. Accordingly, at this time RREEF will receive a Performance Fee of: 15% × (\$120 million—\$106 million) = \$2.1 million.

After the first periodic Performance Fee is paid out, the Threshold Amount is calculated as follows: First, the Threshold Amount is restored by the full amount of the deemed distribution, i.e., to \$120 million, for purposes of the next five-year Performance Fee calculation. At the end of 10 years, the Threshold Amount will be approximately \$135 million, and no additional Performance Fee will be payable unless the combined appraised value of the two Properties exceeds that amount.

14. All proceeds from capital events of an Account (i.e., sales or refinancings

of real property investments owned by the Account) will be first applied to pay expenses of the Account. These expenses will include repayment of debt, payment of closing expenses, and establishment of reasonable reserves in connection with the Account's assets, whether such reserves are for repayment of existing or anticipated obligations or for contingent liabilities, other than the Performance Fee. Such proceeds, net of these expenses and reserves, generally will be the distributable net proceeds of capital events upon which the Performance Fee may be payable.

15. With respect to its Single Client Accounts, RREEF generally does not have discretion to reinvest proceeds from capital events, and any such reinvestment will occur at the direction of the Client Plan's Independent Fiduciary. The amount reinvested will be treated as having been recontributed by the Client Plan for purposes of the Investment Fee and the Performance Fee. Thus, RREEF represents that where capital proceeds are reinvested they will be treated as new invested capital for

the purpose of the Threshold Amount and the payment of any future Performance Fee. RREEF also states that where it does not have reinvestment discretion, capital proceeds will be distributed to the Client Plan, unless such Client Plan affirmatively consents to the reinvestment. In cases where RREEF does have discretion to reinvest proceeds from capital events, the reinvested amount would not be treated as a new contribution of capital by the Client Plan for purposes of the Investment Fee, or having been distributed for purposes of the payment of Performance Fee. Therefore, such reinvested amounts will not be considered distributions under the bookkeeping account maintained for the Client Plan for purposes of calculating whether the Threshold Amount has been reached.

16. RREEF may be removed as the investment Manager for an Account at any time (generally upon 30 days notice), without cause, upon delivery of a notice of removal to RREEF by the Client Plan in the case of a Single Client

¹² \$120.00 is the amount of deemed distributions.

Account, or by the Client Plans owning at least a majority of the interests in a Multiple Client Account. In addition, a Multiple Client Account may terminate upon failure to appoint a replacement investment manager following the removal or resignation of RREEF. The details and mechanics of the removal or resignation process will vary from Account to Account. In the case of an Account procedure for removal for cause (e.g., breach of contract), removal generally will be immediate. In most cases, however, removal will result from a desire to appoint a replacement manager and RREEF may be asked or required to stay on for a period of time (e.g., up to 120 days) until a replacement is in place. Similarly, if RREEF resigns, it may be asked to stay on until a replacement is appointed.

Upon removal of RREEF as investment Manager, RREEF will be entitled to receive the Performance Fee as if: (a) The assets of an Account had been sold at a price which is then-agreed to by RREEF and the Client Plan (or, with respect to a Multiple Client Account, Client Plans and other investors owning at least a majority of the interests in the Multiple Client Account); and (b) the deemed proceeds from the deemed sale were to be distributed from the Account. If RREEF and the Client Plan(s) cannot agree on a price, then the price shall be determined by an independent MAI appraiser mutually agreed to by RREEF and the Client Plan(s). If RREEF and the Client Plan(s) cannot agree on an appraiser, then the governing documents of the Account will provide for a means of selecting one or more appraisers or for seeking binding arbitration, as discussed more fully in paragraph 11 above.

In addition, RREEF may generally resign as investment Manager with respect to any Account at any time, without cause, by providing written notice to the Client Plan(s) with an interest in the Account. In this event, the Performance Fee will be tentatively calculated in the same manner as if RREEF were removed as investment manager, and allocated among each real property investment of the Account in proportion to the respective differences in their appraised values from their original cost (i.e., deemed unrealized appreciation, if any, for each property). The amount of the Performance Fee tentatively allocated to each property will be multiplied by a fraction, the numerator of which will be the actual sales price of the property received by the Account upon the disposition/sale of the property, and the denominator of which will be the appraised value of the

property which was used in connection with determining the Performance Fee at the time of resignation, provided that this fraction will never exceed 1.0 (that is, the Performance Fee may be decreased to reflect any subsequent decline in the value of a property, but not increased to reflect any subsequent increase in value).¹³ No Performance Fee will be payable until distributions (deemed or actual) from the Account exceed the Threshold Amount.

The Performance Fee will be calculated with respect to each property held by an Account at the time of resignation. However, the Performance Fee will not be paid for any property until the earlier of: (i) The sale of the property from the Account, or (ii) with respect to a Multiple Client Account, the termination of the Account. The Performance Fee will be paid only after the Client Plans have received their initial invested capital plus earnings at the Threshold Amounts. The replacement investment manager of the Account (unrelated to RREEF) will have discretion as to when the property is sold or when the Account is terminated.

17. A Single Client Account generally may be terminated at any time by the Client Plan upon not more than 30 days written notice to RREEF, by RREEF's resignation, or by expiration of the period of years specified in the investment management agreement governing the Account (unless extended at the request of the Client Plan). In the case of a Single Client Account termination, the assets of the Account may be liquidated for cash or distributed in-kind to the Client Plan.

A Multiple Client Account generally may be terminated upon: (a) The affirmative decision of the Client Plans and other investors owning at least a majority of the interests in the Multiple Client Account, or (b) expiration of the period of years specified in the Account's organizational documents. In addition, a Multiple Client Account may terminate upon failure to appoint a replacement investment manager following the removal or resignation of RREEF. Upon termination of a Multiple Client Account, RREEF is generally obligated to dispose of its assets and distribute net sales proceeds in an orderly fashion.

In the case of the Multiple Client or Single Client Account termination, RREEF's Performance Fee would be calculated in the same manner as

¹³ If a Multiple Client Account is terminated prior to the sale of all the Account's assets (i.e., each Client Plan is distributed an undivided interest in each such asset), each remaining asset in the Account at the time of termination will be treated as having been sold at its then-appraised value.

discussed above with respect to the removal of RREEF.

18. Each Client Plan will receive throughout the term of the Account the following information:

(a) Quarterly and annual reports prepared by RREEF relating to the overall financial position and operating results of the Account (annual reports are audited by independent certified public accountants as required by the terms of the Account's governing documents), a statement regarding the total amount of fees paid by the Account to RREEF for the period, and, in the case of a Multiple Client Account, the value of the Client Plan's interest in the Account;

(b) An annual statement of the current fair market value of all properties owned by the Account based most recent MAI appraisals of such properties;

(c) In the case of a Multiple Client Account, a list of investors in the Account and, when applicable, a notice of any change thereto; and

(d) Operating and capital budgets for the subsequent year, plus (where applicable) an explanation of any material deviation from the prior year's budgets.

Any fiduciary for the Client Plan, as well as other authorized persons described above in paragraph (o)(1) of Part III, will have access during normal business hours to RREEF's records concerning the Accounts in which such persons have an interest, subject to the condition that each such person agree in writing that the information contained in such records shall be kept confidential except to the extent disclosure is authorized in writing by RREEF or is necessary to preserve or protect the assets of an Account or the interests of the Client Plans. The Department and the Internal Revenue Service will have access to all RREEF records concerning the Accounts. The Client Plan(s) having an interest in an Account will also, upon request, be provided with a report of all compensation paid to RREEF by the Account.

19. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The investment of plan assets in a Single or Multiple Client Account, including the terms and payment of any Investment Fee, Asset Management Fee and Performance Fee, shall be approved in writing by an Independent Fiduciary of a Client Plan which is independent of RREEF and its affiliates.

(b) At the time any Account is established (or amended) and at the time of any subsequent investment of assets (including the reinvestment of assets) in such Account:

(1) Each Client Plan in a Single Client Account shall have total net assets with a value in excess of \$100 million, and each Client Plan that is an investor in a Multiple Client Account shall have total net assets with a value in excess of \$50 million, subject to certain additional requirements as stated in paragraph (1) of Part III(c) above; and

(2) No Client Plan shall invest, in the aggregate, more than 5% of its total assets in any Account or more than 10% of its total assets in all Accounts established by RREEF.

(d) Prior to making an investment in any Account (or amending an existing Account), the Independent Fiduciary of each Client Plan investing in an Account shall have received offering materials from RREEF which disclose all material facts concerning the purpose, structure, and operation of the Account, including any Fee arrangements (*provided that*, in the case of an amendment to the Fee arrangements, such materials need address only the amended fees and any other material change to the Account's original offering materials).

(e) With respect to its ongoing participation in an Account, each Client Plan shall receive the following written information from RREEF:

(1) Audited financial statements of the Account prepared by independent public accountants selected by RREEF no later than 90 days after the end of the fiscal year of the Account;

(2) Quarterly and annual reports prepared by RREEF relating to the overall financial position and operating results of the Account and, in the case of a Multiple Client Account, the value of each Client Plan's interest in the Account. Each such report shall include a statement regarding the amount of the Fees paid to RREEF during the period covered by such report;

(3) Periodic appraisals (as agreed upon with the Client Plans) indicating the fair market value of the Account's assets as established by an MAI licensed real estate appraiser independent of RREEF and its affiliates, under the procedures described herein;

(4) In the case of any Multiple Client Account, a list of all other investors in the Account;

(5) Annual operating and capital budgets with respect to the Account, to be distributed to a Client Plan within 60 days prior to the beginning of the fiscal year to which such budgets relate; and

(6) An explanation of any material deviation from the budgets previously provided to such Client Plan for the prior year;

(f) The total fees paid to RREEF shall constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(g) RREEF shall provide a copy of the proposed exemption and a copy of the final exemption to all Client Plans that invest in any Single Client Account or any Multiple Client Account formed, on or after, the date the final exemption is published in the **Federal Register**.

Notice to Interested Persons

Those persons who may be interested in the pendency of this exemption include the independent fiduciaries of each Client Plan that maintains a Single Client Account with RREEF. Thus, RREEF will provide notice of the proposed exemption to each such affected Client Plan, by first class mail, within thirty (30) days following the publication of the proposed exemption in the **Federal Register**. The notice will include a copy of the notice of proposed exemption as published in the **Federal Register** and as a supplemental statement, as required, pursuant to 29 CFR 2570.43(b)(2). This supplemental statement will inform such interested persons of their right to comment on the proposed exemption and/or to request a hearing. All written comments and/or requests for a hearing are due within sixty (60) days of the publication of this notice of proposed exemption in the **Federal Register**.

In addition, RREEF shall provide a copy of the proposed exemption and a copy of the final exemption to all Client Plans that invest in any Single Client Account or any Multiple Client Account formed on, or after, the date the final exemption is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Ekaterina A. Uzlyan of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

Premier Funding Group, Inc. Employees Profit Sharing Plan (the P/S Plan) and the Money Purchase Pension Plan for Employees of Premier Funding Group, Inc. (the M/P Plan, collectively; the Plans), Located in Arlington, Texas

[Application Nos. D-10669 and D-10670]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. part 2570, subpart B

(55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply as of February 1, 1999, to a lease (the Lease) of certain second-floor space (the Leased Premises) in a building by the Plans to LM Holdings, Inc., a party in interest with respect to the Plans; provided that the following conditions are satisfied:

(a) All terms and conditions of the Lease are at least as favorable to the Plans as those which the Plans could obtain in an arm's-length transaction with an unrelated party;

(b) The fair market rental amount for the Lease has been determined by an independent qualified appraiser;

(c) Each Plan's allocable portion of the fair market value of both the Leased Premises and the building where the Leased Premises are located (the Building) represents no more than 20 percent (20%) of the total assets of each Plan throughout the duration of the Lease;

(d) The interests of the Plans under the Lease are represented by an independent, qualified fiduciary (the Independent Fiduciary);

(e) The fees received by the Independent Fiduciary, combined with any other fees derived from any related parties, will not exceed 1% of that person's annual income for each fiscal year that such person continues to serve in the independent fiduciary capacity with respect to the Lease;

(f) The Independent Fiduciary evaluated the Lease and deemed it to be administratively feasible, protective and in the best interest of the Plans;

(g) The Independent Fiduciary monitors the terms and the conditions of the exemption (if granted) and the Lease throughout its duration, and takes whatever action is necessary to protect the Plans' rights;

(h) At the discretion of the Independent Fiduciary, the Lease can be extended for two additional five-year terms, provided that the Independent Fiduciary requires independent appraisals of the Leased Premises to be performed at the time of each extension of the Lease so as to ensure that LM Holdings continues to pay fair market rent, and such rent is not less than either the initial base rent or the amount paid during the most recent annual term; and

(i) Within 90 days of publication in the **Federal Register** of a notice granting this proposed exemption, LM Holdings files with the Internal Revenue Service (IRS) Form 5330 (Return of Initial Excise

Taxes for Pension and Profit Sharing Plans) and pays all excise taxes applicable under section 4975(a) of the Code that are due by reason of the existence of the Lease as a prohibited transaction prior to February 1, 1999.

EFFECTIVE DATE: This exemption, if granted, will be effective as of February 1, 1999.

Summary of Facts and Representations

1. The Plans are a profit sharing plan and a money purchase plan which were established in February, 1994. As of July 15, 1998, the Plans had two participants, Mr. Michael Leighty and Mr. Patrick McCarty (Mr. Leighty and Mr. McCarty, respectively). Mr. Leighty and Mr. McCarty are also the Plans' trustees. As of December 31, 1997, the P/S Plan and the M/P Plan had \$924,350 and \$616,234 in total net assets, respectively. Messrs. Leighty and McCarty are the only participants of the Plans, the only trustees of the Plans and the sole employees and shareholders of LM Holdings, Inc. (LM Holdings) and Premier Funding Group, Inc (Premier Funding).

Premier Funding is the sponsor of the Plans. Premier Funding and LM Holdings are both incorporated in the State of Texas and are located in Arlington, Texas. Both corporations are jointly owned on a 50%-50% basis by Messrs. Leighty and McCarty. Premier Funding and LM Holdings are in the business of acquiring financial instruments, real estate and other assets.

2. The Leased Premises and the Building are located at 2400 Garden Park Court, Arlington, Texas. The Building was owned by Ed Thulin (Mr. Thulin), an unrelated third party, until December 16, 1997. LM Holdings had leased approximately 700 square feet in the Building from Mr. Thulin under the terms and conditions of the subject Lease, as originally agreed to by the parties.

However, on December 16, 1997, the Plans purchased the Building from Mr. Thulin, for \$210,000. Therefore, as of December 16, 1997, the Lease was between the Plans and LM Holdings, which made the Lease a prohibited transaction under the Act.¹⁴ In this regard, the applicant represents that within 90 days of publication in the **Federal Register** of a notice granting this proposed exemption, LM Holdings will file Form 5330 (Return of Initial Excise Taxes for Pension and Profit

Sharing Plans) with the IRS and pay all excise taxes applicable under section 4975(a) of the Code that are due by reason of the existence of the Lease prior to February 1, 1999, the effective date of this exemption.

3. After purchasing the Building, the Plans commissioned an appraisal (the Appraisal) of the Leased Premises by an independent, qualified appraiser (see paragraph 5 below). The Appraisal determined the fair market rental value of the Leased Premises to be approximately \$7 per rentable square foot, or \$782.25 monthly. The Lease was amended on May 5, 1998, whereby the original terms were modified to reflect the fair market rental amount as determined by the Appraisal.¹⁵

Furthermore, to comply with the fair market rental amount determined by the Appraisal, LM Holdings has made an additional rental payment of \$530 to the Plans. The applicant represents that this amount is equal to the difference between the fair market rental value of the Leased Premises and the actual rent that was paid for the Leased Premises by LM Holdings since the beginning of the Lease. This amount was computed by the applicant's attorney and was based on fair market rental amount set forth in the Appraisal.

4. The applicant is now requesting an individual exemption, effective as of February 1, 1999, which is the date that an independent, qualified fiduciary was appointed to represent the Plans for purposes of the Lease (as discussed further below). The parties to the Lease will be the Plans (doing business as PFGI Realty) and LM Holdings. Under the Lease as it now exists between the parties, the Leased Premises include approximately 1,341 square feet of the total rentable 5,196 square feet in the Building.¹⁶ LM Holdings (i.e., the Tenant) will pay \$785 per month during the first year of the Lease. Thereafter, on each annual anniversary of the Lease during the initial term and any subsequent renewal periods (discussed more fully below), the rent will be adjusted by the Independent Fiduciary based on the percent change in the annual Consumer Price Index (CPI) as published in the Wall Street Journal for the previous year. This annual adjustment may not fall below the higher of the base rate of \$785 per month or the amount paid on a monthly

basis during the most recent annual term.

Under the terms of the Lease, LM Holdings will be responsible for electricity, with all other expenses being paid by the owner of the Building (i.e., the Plans).¹⁷ The initial term of the Lease is scheduled to end on May 5, 2003. At the discretion of the Independent Fiduciary, the Lease can be extended for two additional five year terms. The Independent Fiduciary will require independent appraisals to be performed at the time of each extension of the Lease so as to ensure that LM Holdings continues to pay fair market rent. However, the new rents for the Leased Premises set at the time of any extensions of the Lease will not be less than the rent received by the Plans during the prior leasing period.

Furthermore, the Lease requires that LM Holdings, as the tenant, provide public liability and property damage insurance for its business operations on the Leased Premises in the amount of \$500,000. This insurance policy names the Plans as the insured.

5. As stated above, the fair market rent of the Leased Premises was established by the Appraisal dated April 20, 1998. The Appraisal was prepared by Thomas S. Haines, MAI and Wayne Burgdorf, MAI of Hanes, Jorgensen & Burgdorf, Ltd., Diversified Real Estate Services located in Arlington, Texas. The Appraisal relied on eight comparable rentals in the surrounding area to determine the fair market rental value of the Leased Premises. The addendums to the Appraisal (the Addendums), dated May 12, 1998 and May 22, 1998, respectively, state that the fair market rent for the Leased Premises is \$7.00/square foot fixed, which equates to \$782.25 a month, or \$9,387 a year, for a five-year lease.

6. The Lease will be monitored by Gary J. Manny (Mr. Manny), who will serve as the Independent Fiduciary on behalf of the Plans for purposes of the Lease. Mr. Manny was appointed as the Independent Fiduciary on February 1, 1999, and has served in that capacity for the Plans since that date. Mr. Manny represents that he is an attorney who has general knowledge of ERISA, and the regulations thereunder. Mr. Manny also represents that he has acted before in a fiduciary capacity as an executor,

¹⁵ However, under the Lease as amended by the parties pursuant to the Appraisal, the Landlord and the Tenant have agreed to round off this number to \$785 per month.

¹⁶ There are three other tenants in the Building, who separately lease the remaining rentable space. Thus, the Leased Premises represent approximately 25.8% of the Building's rentable space.

¹⁷ The applicant states that the terms of the Lease are identical to the other current leases in the Building. Furthermore, the applicant maintains that the remaining monthly bills for the Building are gas, water and lawn care. These items are not separately metered and are paid by the owner of the Building. The applicant represents that this is consistent with the comparable buildings analyzed in the Appraisal.

¹⁴ Section 406(a)(1)(A) of the Act prohibits, in pertinent part, a plan fiduciary from causing a plan to engage in a transaction which constitutes a leasing of property between the plan and a party in interest.

guardian and trustee for various clients. Thus, Mr. Manny states that he has experience in protecting the rights of the parties involved in such transactions. Mr. Manny states that he understands the duties, responsibilities and liabilities of acting in a fiduciary capacity for the Plans.

7. Mr. Manny represents that he is independent of LM Holdings, Premier Funding, Mr. Leighty and Mr. McCarty (the Related Parties), and has no interest in any of their business activities. In this regard, Mr. Manny states that he has done work in the past for the Related Parties. However, Mr. Manny's fees from the Related Parties represented less than one percent (1%) of his total annual billings. Mr. Manny further represents that for each year that he serves as the Independent Fiduciary for the Plans, his fees for serving in this capacity, combined with any other fees from the Related Parties, will not exceed 1% of his annual billings.

8. Mr. Manny states that he has reviewed the Lease and the Plans' investment portfolios. Mr. Manny concludes that the Lease will be protective of the Plans and consistent with the Plans' investment needs and objectives. In this regard, Mr. Manny notes that the fair market value of the Building, and the Leased Premises, represent less than twenty percent (20%) of each Plan's total assets, and also of the combined assets of the Plans.¹⁸

Mr. Manny states that the Lease will be in the best interest of the Plans and its participants. Mr. Manny believes that the Lease will be an appropriate investment for the Plans with adequate safeguards and protections.

9. Mr. Manny will monitor the terms and conditions of the Lease throughout its initial term and any renewal periods. Mr. Manny represents that he will have access to the books and records of the Plans, and will make sure that rental payments under the Lease are paid on time. Mr. Manny will review the Lease annually to ensure that all annual automatic adjustments to the rent are made based on the percent change in the CPI Index from the previous year. Mr. Manny will ensure that monthly rental payments are adjusted annually, as appropriate. Mr. Manny will also ensure that the adjusted rental payments never fall below the amount paid for the

Leased Premises during the most recent annual period. Mr. Manny will monitor the value of the Building to ensure that each Plan's allocable portion of the Building and the Leased Premises represent no more than 20% of the total assets of each Plan throughout duration of the Lease.

Mr. Manny believes that the Lease is administratively feasible, in the best interest and protective of the Plans. As the Independent Fiduciary, Mr. Manny will represent the interests of the Plans at all times. Mr. Manny will monitor compliance by the LM Holdings, as the tenant, with the terms and conditions of the Lease, and will take whatever action is necessary to safeguard the interests of the Plans and its participants.¹⁹

10. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) All terms and conditions of the Lease are at least as favorable to the Plans as those which the Plans could obtain in an arm's-length transaction with an unrelated party;

(b) The fair market rental value of the Leased Premises has been determined by an independent qualified appraiser;

(c) Each Plan's allocable portion of the fair market value of both the Leased Premises and the Building will represent no more than 20% of the total assets of each Plan throughout the duration of the Lease;

(d) The interests of the Plans under the Lease are represented by the Independent Fiduciary;

(e) The fees received by the Independent Fiduciary, combined with any other fees derived from any related parties, will not exceed 1% of that person's annual income for each fiscal year that such person continues to serve in the independent fiduciary capacity with respect to the Lease;

(f) The Independent Fiduciary evaluated the Lease and deemed it to be administratively feasible, protective and in the best interest of the Plans;

(g) The Independent Fiduciary will monitor the terms and the conditions of the exemption (if granted) and the Lease throughout its duration, and will take whatever action is necessary to protect the Plans' rights;

(h) At the discretion of the Independent Fiduciary, the Lease can be

extended for two additional five-year terms, provided that the Independent Fiduciary requires independent appraisals of the Leased Premises to be performed at the time of each extension of the Lease so as to ensure that LM Holdings continues to pay fair market rent, and such rent will not be less than the current base rate of \$785 per month, or the amount paid on a monthly basis during the most recent annual term; and

(i) Within 90 days of publication in the **Federal Register** of a notice granting this proposed exemption, LM Holdings will file with the IRS Form 5330 (Return of Initial Excise Taxes for Pension and Profit Sharing Plans) and pay all excise taxes applicable under section 4975(a) of the Code that are due by reason of the existence of the Lease as a prohibited transaction prior to February 1, 1999.

Notice to Interested Persons

The applicant represents that, within five (5) business days of the publication of the notice of proposed exemption (the Notice) in the **Federal Register**, all interested persons will receive a copy of the Notice, and a copy of the supplemental statement, as required by 29 CFR 2570.43(b)(2). Comments and hearing requests on the proposed exemption are due thirty-five (35) days after the date of publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

The Unaka Company, Incorporated Employees' Profit Sharing Plan and Trust (the Plan) Located in Greenville, Tennessee

[Application No. D-10722]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

If the exemption is granted the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to:²⁰

(a) The assignment (the Assignment) by the Plan to the Unaka Company,

¹⁸The applicant states that the approximate value of the Building is \$210,495, which represents 11.5% of the P/S Plan and 11.5% of the M/P Plan. This is because the ownership of the building is allocated, as all other assets in the Plans, 60% to the P/S Plan and 40% to the M/P Plan. The applicants represent that all rents for office space in the Building are allocated in the same manner.

¹⁹In this regard, the applicant makes a request regarding a successor independent fiduciary. Specifically, if it becomes necessary in the future to appoint a successor independent fiduciary (the Successor) to replace Mr. Manny, the applicant will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the responsibilities, experience and independence similar to those of Mr. Manny.

²⁰For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Incorporated (Unaka), the sponsoring employer and a party in interest with respect to the Plan, of any and all claims, demands, and/or causes of action which the Plan may have against certain members of the Plan Administrative Committee (the PAC) and other involved parties (collectively, the Responsible Fiduciaries) for breach of fiduciary duty under the Act, during the period from July 1, 1996 to July 31, 1998;

(b) In exchange for the Assignment, described in paragraph (a), above, the interest-free, non-recourse loan (the Loan) by Unaka to the Plan in an amount equal to the difference between \$413 and the fair market value per share for the common stock of Unaka (the Stock) held by the Plan, in connection with the sale of such Stock by the Plan to Unaka, pursuant to the statutory exemption, as set forth in section 408(e) of the Act;²¹

(c) The possible repayment of such Loan to Unaka from the cash proceeds of the recovery, if any, from a judgment or settlement of the litigation against the Responsible Fiduciaries;

(d) The interest-free, non-recourse extension of credit (the Extension of Credit) by Unaka to the Plan of certain expenses arising out of the litigation against the Responsible Fiduciaries, effective as of, May 1, 1999, the date when expenses incurred by the Plan in bringing such litigation were first paid by Unaka; and

(e) The possible receipt by Unaka of reimbursement of such litigation expenses from the cash proceeds of the recovery, if any, from a judgment or settlement of the litigation against the Responsible Fiduciaries; provided that the following conditions are satisfied:

(1) The Plan will pay no interest in connection with the Loan or the Extension of Credit;

(2) None of the assets of the Plan will be pledged to secure either the amount of the Loan or the amount of the Extension of Credit;

(3) Repayment to Unaka of the amount of the Loan and reimbursement to Unaka of the amount of the Extension of Credit shall be restricted solely to the cash proceeds of the recovery, if any, from a judgment or settlement of the litigation against the Responsible Fiduciaries;

(4) To the extent the amount of the cash proceeds, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries is equal to or less than the amount due to Unaka as repayment for the Loan and reimbursement of the Extension of Credit, the Plan shall not be liable to Unaka for any amount;

(5) To the extent the cash proceeds, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries exceeds the total amount of the Loan, plus the amount of the Extension of Credit, such excess amount will be allocated to the accounts of the participants of the Plan; with the exception that no such allocation will be made to the account of Robert Austin, Jr. in the Plan;

(6) The transactions which are the subject of this exemption do not involve any risk of loss either to the Plan or to any of the participants and beneficiaries of the Plan;

(7) The Plan will not incur any expenses as a result of the transactions which are the subject of this exemption;

(8) Notwithstanding the Assignment by the Plan of its rights against the Responsible Fiduciaries, the Plan does not release any claims, demands, and/or causes of action which it may have against Unaka and/or its affiliates;

(9) All of the terms of the transactions are at least as favorable to the Plan as those which the Plan could obtain in similar transactions negotiated at arm's-length with unrelated third parties;

(10) The Plan receives no less than the fair market value for the Assignment, as of the date of the closing on the transfer of the Assignment;

(11) Prior to the Plan's entering the transactions, an independent, qualified fiduciary (the I/F), who is acting on behalf of the Plan and who is independent of Unaka and its affiliates, reviews, negotiates, and approves the terms and conditions of the Loan, the Assignment, and the Extension of Credit and determines that such transactions are prudent, administratively feasible, in the interest of the Plan and its participants and beneficiaries, and protective of the participants and beneficiaries of the Plan;

(12) Throughout the duration of the transactions, the I/F monitors the prosecution of the lawsuit against the Responsible Fiduciaries, including but not limited to monitoring all costs and fees incurred in connection with any litigation related to the proposed transactions, monitors the division of the recovery, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries to ensure that the Plan receives the portion to which

it is entitled and that the Plan's interests are served, and monitors the terms and conditions of the proposed transactions to ensure that such terms and conditions are at all times satisfied;

(13) The I/F, acting on behalf of the Plan, shall have final approval authority over any proposed settlement of any legal proceedings against the Responsible Fiduciaries brought pursuant to the terms of the Assignment; and

(14) In the event the I/F resigns, is removed, or for any reason is unable to serve, including but not limited to the death or disability of such I/F, or if at any time such I/F does not remain independent of Unaka and its affiliates, such I/F will be replaced by a successor: (i) Who is appointed immediately upon the occurrence of such event; (ii) who is independent of Unaka and its affiliates; (iii) who is qualified to serve as the I/F; and (iv) who assumes all the duties and responsibilities of the predecessor I/F.

Summary of Facts and Representations

1. The Plan, established on February 1, 1967, but amended and restated on June 29, 1995, is a defined contribution profit sharing plan which is designed to qualify under section 401(a) of the Code. Contributions to the Plan are made by Unaka and by the participants in the Plan. The Plan is an individual account plan which does not provide for participant-directed investments. All contributions to the Plan are invested by the trustee of the Plan, pursuant to the funding policy and method, as determined by Unaka and by the Plan's investment manager.

Employees of Unaka and/or its subsidiaries are participants in the Plan. As of January 1, 1997, the Plan had approximately 1,142 participants. From January 1, 1997 to February 11, 1999, distributions of account balances were made to 209 participants, and 104 participants were added to the Plan. Accordingly, as of March 1, 1999, there were 1,037 participants in the Plan.

As of June 30, 1998, the Plan had approximately \$16.8 million in assets on an unaudited basis, consisting of cash, mutual fund interests, government and corporate bonds, and shares of stock. It is represented that each participant's account shares a *pro-rata* portion of the overall value of the general assets of the Plan.

In the past, Unaka, as Plan administrator, has delegated to certain individuals, including, but not limited to certain officers and employees of Unaka, the responsibilities of administering the Plan. In this regard, until October 1997, the PAC

²¹ The Department, herein, expresses no opinion as to the applicability of the statutory exemption provided by section 408(e) of the Act to the sale by the Plan of its Unaka Stock to Unaka or as to whether the conditions set forth in such statutory exemption are satisfied in the execution of such transaction. Further, the Department, herein, is offering no relief for transactions other than those proposed.

administered the Plan. It is represented that from June 1996 to October 1997, the PAC was comprised of Gordon H. Newman, Jerald K. Jaynes, Lonnie F. Thompson, and Gary Landes. From May 1995 to June 1996, the PAC was comprised of Gordon H. Newman, Robert Austin, Jr., and Gordon Chalmers. Prior to that time the PAC members were Gordon H. Newman, Terry O'Donovan, Powell Johnson, Dominick Jackson, and Ray Adams.

As discussed more fully below, in an agreement dated July 31, 1998, as amended March 25, 1999, and April 7, 1999, an independent, qualified individual was hired to serve as the trustee (the Trustee) of the Plan, and an institutional investment manager was engaged to manage the assets of the Plan and to serve as the I/F with respect to the transactions which are the subject of this proposed exemption.

2. Established in 1950 in Greeneville, Tennessee, Unaka is a holding corporation for the diverse industries of its wholly-owned subsidiaries. These subsidiaries consist primarily of the MECO Corporation, a manufacturer of barbecue grills and folding metal furniture, SOPAKCO, a warehouse operator and manufacturer of packaged foods, and Crown Point, an international food supply company specializing in the buying and selling of food commodities.

Unaka is a privately held corporation whose stock is not traded on any registered securities exchange. Another holding company, the Rolich Corporation (Rolich), owns approximately 61 percent (61%) of the 54,000 issued and outstanding shares of the Stock of Unaka which has a \$10 par value. The Plan owns an additional 26 percent (26%) of the issued and outstanding shares of Stock of Unaka. Members of the Austin family, as discussed below, and various other individuals own the remaining 13 percent (13%) of the Unaka Stock.

3. In August of 1987, Robert Austin, Sr. purchased, through Rolich, a controlling interest in Unaka. It is represented that at that time, Rolich was owned by the members of the immediate family of Robert Austin, Sr. In connection with Robert Austin, Sr.'s obtaining control of Unaka, the Plan, on December 27 and 28, 1987, acquired 2,500 and 6,500 shares, respectively, of Unaka Stock directly from Unaka at a price of \$220 per share. Subsequently, on October 1, 1989, the Plan purchased an additional 5,000 shares of Unaka

Stock from Unaka at a price of \$250 per share.²²

With the deaths in 1990, of Robert Austin, and his wife, Mary T. Austin, a struggle for control of Rolich and Unaka ensued among their three children who are the heirs to their parents' estates. In this regard, most of the litigation involves the struggle for control of Unaka and Rolich among, Robert Austin, Jr., Lisa Austin, and Christy Austin. Additional litigation is associated with the members of Unaka's former management and with other shareholder derivative and non-derivative suits. It is anticipated that these various legal disputes may continue in the foreseeable future. However, it is represented that as of April 1997, Robert Austin, Jr. obtained majority ownership of Rolich and is currently serving as Chairman of the Board of Directors of Unaka.

4. In October of 1996, the Plan entered into an agreement to sell its Unaka Stock to Nothung, Inc. (Nothung), an entity owned by Robert Austin, Jr., for a minimum price of \$413 per share. It is represented that certain Responsible Fiduciaries who were members of the PAC did not complete the sale of the Plan's Unaka Stock, pursuant to the agreement with Nothung. As a result, the PAC, acting on behalf of the Plan, failed to sell the Plan's Unaka Stock to Nothung in October of 1996. Subsequently, the offer to purchase the Plan's Unaka Stock, pursuant to the agreement with Nothung, lapsed on January 27, 1997.

5. With regard to the \$413 per share price offered, pursuant to the agreement with Nothung, it is represented that Mercer Capital Management, Inc. (Mercer), an independent, qualified appraisal, valued the Plan's Unaka Stock, as of May 31, 1996, on a marketable, minority interest basis, at \$413 per share. Of the three valuation methodologies, Mercer employed the income approach and the asset-based approach, but did not consider the market approach appropriate, because at the time of the appraisal there had been too few arm's length transactions in the Unaka Stock. Further, the Mercer appraisal did not discount the value of the Plan's Unaka Stock for lack of

²² Unaka represents that the acquisition by the Plan of Unaka Stock both in December 1987, and October 1989, satisfied the criteria of section 408(e) of the Act. The Department, herein, expresses no opinion as to the applicability of the statutory exemption provided by section 408(e) of the Act to the acquisition in 1987 and 1989 of the Unaka Stock by the Plan or as to whether the conditions set forth in such statutory exemption were satisfied in the execution of such transactions. Further, the Department, herein, is offering no relief for transactions other than those proposed.

marketability, because: (1) Mercer believed it reasonable to assume that ongoing negotiations with Unaka would result in an option for Plan participants to put the shares to Unaka or to the Plan at the appraised fair market value; (2) Mercer accepted that the original investment by the Plan in Unaka Stock was based on assurances of reasonable treatment by the remaining shareholders; and (3) Mercer accepted representations from the Plan's legal counsel that there had been an intent and practice not to consider marketability discounts in the valuation estimates used in prior years.

6. The Plan currently holds 14,000 shares of Unaka Stock which Unaka has offered to purchase at a price equal to the fair market value of such Stock on the date the transaction is closed. It is represented that the proposed sale by the Plan to Unaka of the Plan's Unaka Stock will satisfy the criteria of section 408(e) of the Act.²³

In anticipation of the sale of the Plan's Unaka Stock to Unaka and in anticipation of the transactions which are the subject of this proposed exemption, it is represented that an appraisal, as of June 30, 1998, of the fair market value of the Unaka Stock was prepared by Bernstein, Phalon & Conklin (BP&C), an independent, qualified appraiser, with offices in Dallas, Texas. In determining the value of the Unaka Stock, BP&C considered all three approaches to value, the income approach, the asset-based approach, and the market approach. The results of these valuation techniques applied to a minority interest of the Plan's Unaka Stock on a closely held basis were as follows:

Income approach	\$283 per share
Asset-based approach	\$334 per share
Market approach	\$292 per share.

After giving slightly greater weight to the income approach, because that valuation method took into consideration the current and projected business operations of Unaka, BP&C determined that the fair market value of the equity of Unaka on a closely held, minority basis was \$301 per share, as of June 30, 1998. Based on an appraised value of \$301 per share, approximately \$4.2 million of the Plan's assets are currently invested in Unaka Stock which constitutes approximately 25 percent (25%) of the total assets held by the Plan.

The applicant has represented that an updated appraisal of the Unaka Stock

²³ See, footnote number 22, above.

will be obtained at the time of the closing of the sale of the Plan's Unaka Stock. In this regard, in the engagement letter, dated September 11, 1998, BP&C acknowledges its responsibility for providing the fair market value of the Plan's Unaka Stock, as of the date of the sale of such shares, and for issuing a fairness opinion regarding such sale, if appropriate.

7. In addition to the sale to Unaka of the Plan's Unaka Stock, it is represented that the Plan intends to sell, assign, transfer, and convey to Unaka any and all of the Plan's claims, demands, and causes of action (including reimbursement of reasonable legal fees, expenses, and costs) which the Plan may have against the Responsible Fiduciaries for breach of fiduciary duties during the period between July 1, 1996 to July 31, 1998. It is represented that this time span was chosen to cover the period during which the Responsible Fiduciaries were in control of the Plan and its assets and in order to cover any and all potential claims or causes of action that may arise out of any acts on the part of the Responsible Fiduciaries. In this regard, July 1, 1996, is the date Robert Austin, Jr. was removed from the PAC, and July 31, 1998, is the last date before the Trustee, who is the successor to the PAC, was appointed.

Included without limitation in the Assignment are all claims as to: (i) The value of the Unaka Stock held by the Plan, including its purchase, sale, transfer, voting, valuation, and appraisal; (ii) any offers, attempts, or agreements to purchase, transfer, assign, vote, pledge, or hypothecate such Stock, including but not limited to the offer/agreement to purchase the Stock made by Nothing in October 1996; and (iii) any third party claims, demands, and causes of action arising therefrom. Notwithstanding the Assignment by the Plan of its rights against the Responsible Fiduciaries, it is represented that the Trustee, on behalf of the Plan, will not release any claims, demands, and/or causes of action which the Plan may have against Unaka and/or its affiliates.

Due to the uncertainty of the outcome of the litigation between the Plan and the Responsible Fiduciaries, it is represented that it is difficult to calculate a precise value of the rights against the Responsible Fiduciaries which the Plan proposes to assign to Unaka. In this regard at the request of the I/F who is also the Plan's investment manager, BP&C were engaged on March 25, 1999, to express an opinion concerning the approximate fair market value of the Assignment. As part of the analysis, BP&C took into consideration:

(i) The likelihood of the Plan prevailing successfully in the lawsuit against the Responsible Fiduciaries; (ii) the likelihood of collecting on any judgment awarded by the court; and (iii) the ability of the Plan to sell the Assignment to a willing buyer. Based on its analysis, BP&C concluded that the fair market value of the Assignment is negligible.

8. In exchange for the Assignment, Unaka proposes to lend to the Plan the difference between the value of \$413 per share for the Unaka Stock (as set forth in the agreement with Nothing and as set forth in the 1966 Mercer appraisal) and the fair market value, as of the date the proposed transactions are closed, of the Plan's Unaka Stock, as determined by the I/F after considering the appraised value of such Stock at closing. Because the offer price for the Plan's Unaka Stock evidenced by the agreement with Nothing was based upon the Mercer appraisal which did not consider a discount for lack of marketability, it is the position of the applicant that the \$413 per share appraised value of the Plan's Unaka Stock includes a "premium." Although at the time of the agreement with Nothing, the applicant maintains that the Plan could have obtained a control premium for the sale of its Unaka Stock, it is represented that the Plan has no current or foreseeable ability to attract such a premium in the future. Furthermore, in the opinion of the applicant the proposed transaction will restore this "premium," because there is no known market for the minority block of Unaka Stock held by the Plan.

9. In addition to the transactions described above, involving the Assignment and the Loan, relief has been requested for an Extension of Credit between Unaka and the Plan of the expenses arising out of the litigation against the Responsible Fiduciaries. In this regard, Unaka proposes to extend credit to the Plan of an amount equal to the cost incurred in bringing suit against such Responsible Fiduciaries. It is represented that due to constraints imposed by the statute of limitations, it will be necessary for the Plan to begin legal proceedings against the Responsible Fiduciaries, prior to the date when a final exemption can be granted for the proposed transactions. In this regard, Unaka has agreed (in anticipation of the subject transactions) to pay on behalf of the Plan, beginning May 1, 1999, all expenses incurred by the Plan in filing and pursuing the litigation against the Responsible Fiduciaries. Accordingly, relief, if granted, for the Extension of Credit, as described in paragraph (d) above, has been made effective, as of May 1, 1999.

In the event a final exemption is issued, it is represented that all amounts paid by Unaka, prior to the Assignment, to cover the expenses incurred by the Plan in filing and pursuing the litigation against the Responsible Fiduciaries shall be added to such additional amounts expended by Unaka after the Assignment in connection with the legal proceedings against the Responsible Fiduciaries. In the event a final exemption is not granted by November 30, 1999, the Plan will have the option of continuing the litigation against the Responsible Fiduciaries, in its own right and at its own expense; but, Unaka shall not have the right to reimbursement for any payments made during the seven (7) months period from May 1, 1999, to November 30, 1999, of the Plan's expenses in connection with the litigation against the Responsible Fiduciaries.

It is represented that both the Loan and the Extension of Credit will be without interest and without recourse against the Plan. In this regard, repayment to Unaka of the amount of the Loan and reimbursement to Unaka of the amount of the Extension of Credit shall be restricted solely to the cash proceeds of the recovery, if any, from a judgment or settlement of the litigation against the Responsible Fiduciaries. It is represented that to the extent the cash proceeds of any judgment or settlement of the litigation against the Responsible Fiduciaries exceeds the total amount of the Loan, plus the amount of the Extension of Credit, such amount will be allocated to the accounts of the participants of such Plan, with the exception that no such allocation will be made to the account of Robert Austin, Jr. in the Plan. It is represented that to the extent the cash proceeds of the recovery, if any, from such litigation is equal to or less than the aggregate amount of the Loan and the Extension of Credit, the Plan will not be responsible for any amount. In this regard, it is represented that Unaka will waive the repayment of any outstanding balance on the Loan and any balance on the Extension of Credit.²⁴

²⁴ It is represented that to the extent Unaka waives repayment of the outstanding balance of the Loan and the Extension of Credit, or to the extent that the Plan receives any excess recovery over the aggregate amount of the Loan and the Extension of Credit, Unaka will amend the Plan to specify the allocation of such amounts in a manner so as to ensure that the Plan will not violate either section 401(a)(4) or section 415 of the Code. Further, Unaka represents that it will submit an amendment to the Internal Revenue Service (the IRS) for a favorable determination letter for the Plan, as amended, by such amendment. Unaka represents that it will make any changes required by the IRS regarding such allocations.

10. As a fiduciary of the Plan and as an employer any of whose employees are covered by the Plan, Unaka is a party in interest with respect to the Plan, pursuant to section 3(14)(A) and 3(14)(C) of the Act. The proposed transactions will violate section 406(a)(1)(B) of the Act, because the execution of the Loan between Unaka and the Plan and the Extension of Credit by Unaka to the Plan each constitutes a lending of money between a plan and party in interest which is prohibited by the Act. In addition, the Assignment between the Plan and Unaka constitutes a transfer to, or use by or for the benefit of a party in interest of the income or assets of the Plan for which relief from section 406(a)(1)(D) of the Act would be necessary.

Further, the applicant has requested relief from violations of section 406(b)(1) and (b)(2) of the Act that may arise from Unaka's status as a sponsor and administrator of the Plan. In this regard, the proposed transactions could involve a fiduciary dealing with the assets of the plan in his own interest and/or acting in his individual capacity on behalf of a party whose interests are adverse to the interests of the plan or its participants and beneficiaries.

11. With respect to the proposed transactions, Unaka notes that a class exemption, Prohibited Transaction Class Exemption 80-26 (PTCE 80-26), provides an exemption for interest-free loans by parties in interest to plans. However, PTCE 80-26 is applicable where loan proceeds are used for payment of ordinary operating expenses of a plan or for a period of no more than three (3) days for a purpose incidental to the ordinary operation of a plan. It is represented that Unaka is uncertain whether the proposed transactions are of the type contemplated by class exemption PTCE 80-26.

However, Unaka points out that individual exemptions have been granted in cases involving an extension of credit from a plan sponsor to a plan and an assignment back from the plan to the plan sponsor of the plan's litigation rights and interests. In the opinion of Unaka, the fact that individual exemptions have been granted in similar circumstances indicates that the proposed transactions are in line with current administrative

¹To the extent that waiving the outstanding balance of the Loan and the Extension of Credit is deemed to be a contribution to the Plan, Unaka represents that such amounts will not be treated as a contribution prior to the date when such amounts are either repaid or waived. However, Unaka represents that it intends to deduct all such amounts deemed to be contributions to the Plan, as of the date they are so deemed.

practices. Accordingly, Unaka believes that the request for an individual exemption is appropriate.

12. Unaka represents that the proposed transactions are administratively feasible in that the nature of the transactions does not require ongoing supervision by the Department. In this regard, the Plan has engaged the Trustee and the I/F, who is also the investment manager of the Plan. In addition, it is represented that all necessary safeguards are incorporated into the documents evidencing the Assignment, the Loan, and the Extension of Credit between the Plan and Unaka.

13. Unaka represents that the proposed transactions will preserve the value of retirement accounts of participants in the Plan and will ensure that such participants do not suffer from the failure by the Responsible Fiduciaries to sell the Unaka Stock, pursuant to the terms of the agreement with Nothung. In this regard, it is represented that denial of the proposed exemption would cause the participants of the Plan to shoulder the decline in the value of the Unaka Stock caused by events wholly outside their control. Further, the Plan would avoid an expensive and time-consuming litigation against the Responsible Fiduciaries the outcome of which is not assured. In addition, it is uncertain whether the Responsible Fiduciaries will have sufficient assets to satisfy a judgment, if one were to be awarded to the Plan.

14. Unaka represents that the proposed transactions are in the interest of the Plan in that such transactions will reinforce the participants' confidence in the security of their retirement funds and allow for diversification of assets. In this regard, the Plan will immediately receive the proceeds from the Loan and can, upon receipt, invest such proceeds in other assets to produce additional earnings for the participants in the Plan. Further, the Plan will benefit in that it will not incur any expenses as a result of the transactions.

15. Unaka represents that the terms of the proposed exemption adequately protect the rights of the participants and beneficiaries of the Plan. Neither the Loan nor the Extension of Credit will bear any interest. The assets of the Plan will not be pledged as collateral to secure the Loan or the Extension of Credit, nor will the assets of the Plan be used to repay the Loan or the Extension of Credit, other than solely from the cash proceeds of the recovery, if any, from a judgment or settlement of the litigation against the Responsible Fiduciaries. To the extent the amount of

the cash proceeds from such recovery, if any, is equal to or less than the amount of the Loan and the amount of the Extension of Credit, it is represented that Unaka will waive the repayment of any outstanding balance on the Loan and any balance on the Extension of Credit. In short, it is represented that as a result of the proposed transactions, neither the Plan nor the participants will experience a risk of loss.

16. As an additional safeguard, pursuant to the terms of an agreement signed, July 31, 1998, as amended March 25, 1999, and April 7, 1999, the Strategic Investment Counsel Corporation (STRINCO) of Dallas, Texas, has agreed to serve as the I/F with respect to the proposed transactions and also to serve as the investment manager with respect to the investment and reinvestment of the assets of the Plan. Pursuant to the same agreement, Colin M. Henderson (Mr. Henderson), the President and chief investment officer of STRINCO, has accepted the appointment to serve, in his individual capacity, as the Trustee of the Plan.

It is represented that STRINCO, as the I/F and the investment manager for the Plan, has agreed to serve throughout the duration of the proposed transactions. The Department notes that the proposed exemption is conditioned upon the I/F, throughout the duration of the transactions, monitoring the prosecution of the lawsuit against the Responsible Fiduciaries, including but not limited to monitoring all costs and fees incurred in connection with any litigation related to the proposed transactions, monitoring the division of the recovery, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries to ensure that the Plan receives the portion to which it is entitled and that its interests are served, and monitoring the terms and conditions of the proposed transactions to ensure that such terms and conditions are at all times satisfied. The exemption contains a further condition that specifies that in the event the I/F resigns, is removed, or for any reason is unable to serve, including but not limited to the death or disability of such I/F, or if at any time such I/F does not remain independent of Unaka and its affiliates, such I/F will be replaced by a successor: (i) Who is appointed immediately upon the occurrence of such event; (ii) who is independent of Unaka and its affiliates; (iii) who is qualified to serve as the I/F; and (iv) who assumes all the duties and responsibilities of the predecessor I/F.

STRINCO has represented that it has extensive experience as a service

provider to employee benefit plans. Further, STRINCO represents that it is independent of all of the parties to the proposed exemption. In this regard, the projected income from Unaka represent a small percentage of the projected revenues of STRINCO. Specifically, it is represented that STRINCO's revenues from fees paid by Unaka will constitute less than 3 percent (3%) of STRINCO's projected total revenues for 1999.

STRINCO has acknowledged its status as an independent fiduciary under the Act, including the responsibilities and duties of a fiduciary involving the assets of the Plan. Specifically, prior to the Plan's entering the transactions, STRINCO is responsible for reviewing, negotiating, and approving the terms and conditions of the Loan, the Assignment, and the Extension of Credit and determining whether such transactions are prudent, administratively feasible, in the interest of the Plan and its participants and beneficiaries, and protective of the participants and beneficiaries of the Plan. It is represented that STRINCO has been involved since its engagement in 1998, in the evaluation, analysis, and design of the proposed transactions. In this regard, STRINCO represents that it has at all times retained complete discretion as to the Plan's participation in the proposed transactions and has been actively involved in the negotiation of the terms of conditions of such transactions. Further, STRINCO represents that throughout the duration of the transactions, it will monitor the prosecution of the lawsuit against the Responsible Fiduciaries, including but not limited to monitoring all costs and fees incurred in connection with any litigation related to the proposed transactions; monitor the division of the recovery, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries to ensure that the Plan receives the portion to which it is entitled and that its interests are served; and monitor the terms and conditions of the proposed transactions to ensure that such terms and conditions are at all times satisfied. In addition, STRINCO, the I/F acting on behalf of the Plan, shall have final approval authority over any proposed settlement of any legal proceedings against the Responsible Fiduciaries brought pursuant to the terms of the Assignment. In this regard, it is represented that such final approval authority is not intended to and does not confer upon STRINCO, as I/F to the Plan, any authority to initiate settlement negotiations nor any right to negotiate any specific terms of settlement.

STRINCO has analyzed each of the three proposed transactions and has made independent investigation of the representations made as to each of the transactions, including significant due diligence into the background surrounding the failure of the Responsible Fiduciaries to sell the Plan's Unaka Stock, pursuant to the agreement with Nothing. It is represented that Mr. Henderson, as President of STRINCO, his counsel, and BP&C have visited the Unaka facilities, interviewed its officers and reviewed documentation involving the Plan, including minutes of the PAC meetings and certain minutes of the meetings of the Board of Directors of Unaka.

With respect to its analysis of the Loan, Assignment, and Extension of Credit, STRINCO states that the proposed transactions do not bind any of the Plan's assets as collateral. Furthermore, the proposed transactions, in the worst case, obtain a premium for the Plan in excess of any loss actually suffered by the Plan or its participants and beneficiaries. In this regard, STRINCO affirms that in the event no recovery is made in the suit against the Responsible Fiduciaries, the amount of Loan will be automatically forgiven, and the Plan will have gained a premium (*i.e.* cash equal to the difference between the price of the Plan's Unaka Stock, pursuant to the agreement with Nothing and the current fair market value of such shares). In the event a substantial amount is recovered in the suit against the Responsible Fiduciaries, the Plan will still gain a premium in recovering everything in excess of the amount of the Loan (less the expenses of litigation). In the opinion of STRINCO, regardless of the outcome of the litigation, the Loan puts the Plan and its participants and beneficiaries in the position they would have been in if the Unaka Stock had been sold to Nothing.

In order to receive the Loan, the Plan is required to enter into the Assignment. In the opinion of STRINCO, the Assignment allows a suit to be brought against the Responsible Fiduciaries without the Plan assuming any risks associated with such suit and without having to spend any of its own funds to do so. In light of Unaka's inability to retain any of the proceeds of such suit, other than recoupment of the outstanding balance of the Loan and any expenses of such litigation, in the opinion of STRINCO the Assignment has minimal, if any, value in the hands of the assignee. Based on this reasoning, STRINCO has concluded the proposed transactions are at least as favorable to the Plan as any transaction between the Plan and a third party.

With respect to the Extension of Credit by Unaka of the litigation expenses, STRINCO points out that, if the Plan were not to participate in the proposed transactions and instead bring suit in its own right against the Responsible Fiduciaries, the Plan would be required to pay the litigation expenses prior to any potential recovery and regardless of such recovery. Accordingly, STRINCO has concluded, based upon its analysis described above, that each of the proposed transactions represents a prudent and conservative course of action which is feasible and fair; in the best interests of the participants and beneficiaries; and protective of the assets of the Plan which are held for the exclusive benefit of the participants and beneficiaries.

17. In summary, the applicant represents that the proposed transactions meet the statutory criteria for an exemption under section 408(a) of the Act and 4975(c)(2) of the Code because:

(1) The Plan will pay no interest in connection with the Loan or the Extension of Credit;

(2) None of the assets of the Plan will be pledged to secure either the amount of the Loan or the amount of the Extension of Credit;

(3) Repayment to Unaka of the amount of the Loan and reimbursement to Unaka of the amount of the Extension of Credit shall be restricted solely to the cash proceeds of the recovery, if any, from a judgment or settlement of the litigation against the Responsible Fiduciaries;

(4) To the extent the amount of the cash proceeds, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries is equal to or less than the amount due to Unaka as repayment for the Loan and reimbursement of the Extension of Credit, the Plan shall not be liable to Unaka for any amount;

(5) To the extent the cash proceeds, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries exceeds the total amount of the Loan and the amount of the Extension of Credit, such amount will be allocated to the accounts of the participants of the Plan; with the exception that no such allocation will be made to the account of Robert Austin, Jr. in the Plan;

(6) The transactions which are the subject of this exemption do not involve any risk of loss either to the Plan or to any of the participants and beneficiaries of the Plan;

(7) The Plan will not incur any expenses as a result of the transactions which are the subject of this exemption;

(8) Notwithstanding the Assignment by the Plan of its rights against the Responsible Fiduciaries, the Plan, will not release any claims, demands, and/or causes of action which it may have against Unaka and/or its affiliates;

(9) All of the terms of the transactions are at least as favorable to the Plan as those which the Plan could obtain in similar transactions negotiated at arm's-length with unrelated third parties;

(10) The Plan receives no less than the fair market value for the Assignment, as of the date of the closing on the transaction;

(11) Prior to the Plan's entering the transactions, STRINCO, who is acting as I/F on behalf of the Plan and who is independent of Unaka and its affiliates, will review, negotiate, and approve the terms and conditions of the Loan, the Assignment, and the Extension of Credit and will determine that such transactions are prudent, administratively feasible, in the interest of the Plan and its participants and beneficiaries, and protective of the participants and beneficiaries;

(12) Throughout the duration of the transactions, STRINCO, as the I/F, will monitor the prosecution of the lawsuit against the Responsible Fiduciaries, including but not limited to monitoring all costs and fees incurred in connection with any litigation related to the proposed transactions; will monitor the division of the recovery, if any, from any judgment or settlement of the litigation against the Responsible Fiduciaries to ensure that the Plan receives the portion to which it is entitled and that its interests are served; and will monitor the terms and conditions of the proposed transactions to ensure that such terms and conditions are at all times satisfied;

(13) STRINCO, the I/F acting on behalf of the Plan, shall have final approval authority over any proposed settlement of any legal proceedings against the Responsible Fiduciaries brought pursuant to the terms of the Assignment; and

(14) In the event STRINCO resigns, is removed, or for any reason is unable to serve, or if at any time STRINCO does not remain independent of Unaka and its affiliates, STRINCO will be replaced by a successor: (i) Who is appointed immediately upon the occurrence of such event; (ii) who is independent of Unaka and its affiliates; (iii) who is qualified to serve as the I/F; and (iv) who assumes all the duties and responsibilities of STRINCO.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested

exemption include any person who presently is a participant in the Plan or any other person who is entitled to receive benefits under the Plan. It is represented that these two classes of interested persons will be notified through different methods.

In this regard, it is represented that notification will be provided to all participants of the Plan who are present in the work environment of Unaka or its affiliates, within fifteen (15) calendar days of the date of publication of the Notice of Proposed Exemption (the Notice) in the **Federal Register** by posting on employee bulletin boards at those locations within the principal places of employment of Unaka and its affiliates which are customarily used for notices regarding labor-management matters for review. Such posting will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 C.F.R. § 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing.

It is represented that notification will be provided to any interested person who is entitled to benefits but who is not present in the work environment of Unaka or its affiliates by mailing first class within fifteen (15) calendar days of the date of publication of the Notice, a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 C.F.R. § 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing.

All written comments and requests for a hearing must be received by the Department no later than thirty (30) days from the date such interested persons receive, through posting or mailing, a copy of the Notice and the Supplemental Statement.

FURTHER INFORMATION CONTACT:

Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

General Motors Hourly Rate Employees Pension Plan, General Motors Retirement Program for Salaried Employees, Saturn Individual Retirement Plan for Represented Team Members, Saturn Personal Choices Retirement Plan for Non-Represented Team Members, Employees' Retirement Plan for GMAC Mortgage Corporation (collectively, the Plans), Located in New York, New York

[Application Nos. D-10473 through D-10476]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Part I—Covered Transactions

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply effective December 11, 1998, to a transaction between AEW Industrial, L.L.C. (the LLC), an entity which currently holds "plan assets" of the Plans, or any subsidiary of the LLC (as defined in Part IV(d) below) which may hold "plan assets" of the Plans in the future, as a result of investments made by the Plans in the LLC or any subsidiary through the First Plaza Group Trust (the Trust), and a party in interest with respect to any of the Plans, provided that the Specific Conditions set forth below in Part II and the General Conditions set forth in Part III are met:

Part II—Specific Conditions

(a) In the case of a transaction by the LLC that involves the acquisition, financing, or disposition of any real property asset, the terms of the transaction are negotiated on behalf of the Plan by AEW Capital Management, L.P. or a successor thereto (AEW), under the authority and general direction of General Motors Investment Management Corporation (GMIMCo), a wholly-owned subsidiary of General Motors Corporation (GM), and GMIMCo makes the decision on behalf of the Plan to enter into the transaction.

Notwithstanding the foregoing, a transaction involving an amount of \$5 million or more, which has been negotiated on behalf of the Plans by AEW and approved by GMIMCo in the manner described above, will not fail to meet the requirements of this Part II(a) solely because GM or its designee

retains the right to veto or approve such transaction;

(b) In the case of any transaction by the LLC that does not involve acquisitions, financings or dispositions of real property assets, the terms of the transaction are negotiated on behalf of the Plans by AEW, under the authority and general direction of GMIMCo, and either AEW or a property manager acting in accordance with written guidelines or business plans (including budgets), adopted with the approval of GMIMCo, makes the decision on behalf of the Plans to enter into the transaction. Notwithstanding the foregoing, a transaction involving an amount of \$5 million or more, which has been negotiated on behalf of the Plans in accordance with the foregoing, will not fail to meet the requirements of this Part II(b) solely because GM or its designee retains the right to veto or approve such transaction;

(c) The transaction is not described in—

(1) Prohibited Transaction Exemption 81-6 (46 FR 7527, January 23, 1981), relating to securities lending arrangements;

(2) Prohibited Transaction Exemption 83-1 (48 FR 895, January 7, 1983), relating to acquisitions by plans of interests in mortgage pools, or

(3) Prohibited Transaction Exemption 88-59 (53 FR 24811; June 30, 1988), relating to certain mortgage financing arrangements;

(d) The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest with respect to any of the Plans;

(e) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of GMIMCo, GM, or AEW the terms of the transaction are at least as favorable to the Plans as the terms generally available in arm's-length transactions between unrelated parties;

(f) The party in interest dealing with the LLC: (1) is a party in interest with respect to a Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act; and (2) does not have discretionary authority or control with respect to the investment of the Plan's assets in the Trust or the LLC, and does not render investment advice, within the meaning of 29 CFR 2510.3-21(c), with respect to the investment of those assets in the Trust or the LLC;

(g) The party in interest dealing with the LLC is neither GMIMCo or AEW nor

a person "related" to GMIMCo or AEW within the meaning of Part IV(c) below;

(h) GMIMCo adopts written policies and procedures that are designed to assure compliance with the conditions of this proposed exemption; and

(i) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act, and who so represents in writing, conducts an exemption audit, as defined in Part IV(f) below, on an annual basis. Following completion of the exemption audit, the auditor issues a written report to each Plan representing its specific findings regarding the level of compliance with the policies and procedure adopted by GMIMCo in accordance with Part II(h) above.

Part III—General Conditions

(a) At all times during the term of this exemption (if granted), GMIMCo shall be—

(1) A direct or indirect wholly owned subsidiary of GM, and

(2) An investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has under its management and control total assets attributable to Plans maintained by GM or its affiliates (as defined in Part IV(a) of this exemption) in excess of \$50 million. In addition, Plans maintained by affiliates of GMIMCo must have, as of the last day of each plan's reporting year, aggregate assets of at least \$250 million;

(b) AEW or any successor, as investment manager for assets held by the LLC, meets the conditions for a "qualified professional asset manager" (QPAM) as set forth in section V(a) of Prohibited Transaction Class Exemption 84-14 (49 FR 9494, March 13, 1984);

(c) AEW and GMIMCo, or their affiliates, shall maintain, for a period of six years from the date of each transaction described above, the records necessary to enable the persons described below in part III(d)(1) to determine whether the conditions of this exemption (if granted) have been met, except that (1) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of AEW or GMIMCo, or their affiliates, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest, other than AEW or GMIMCo, shall be subject to the civil penalty which may be assessed under section 502(i) of the Act or to the taxes imposed by sections 4975 (a) and (b) of the Code, if the records are not available for

examination as required by section (d) below; and

(d)(1) Except as provided in subsection (2) of this section (d), and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in section (c) of this Part III shall be made unconditionally available by GMIMCo or AEW, at the customary location for the maintenance and/or retention of such records, for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service;

(B) The persons described in Part II(i) of this exemption (relating to an independent audit of covered transactions as discussed therein); and

(C) Any fiduciary of the Plans or the Trust;

(2) None of the persons described in subsections (1)(B) and (C) of this section (d) shall be authorized to examine trade secrets of AEW or GMIMCo, or commercial or financial information which is privileged or confidential in nature.

Part IV—Definitions

For purposes of this proposed exemption:

(a) "Affiliate" of GM means a member of either (1) a controlled group of corporations (as defined in section 414(b) of the Code) of which GM is a member, or (2) a group of trades or businesses under common control (as defined in section 414(c) of the Code) of which GM is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in Code section 414(b) or 414(c) or the regulations thereunder.

(b) "Party in interest" means a person described in section 3(14) of the Act and includes a "disqualified person" as defined in section 4975(e)(2) of the Code.

(c) GMIMCo or AEW are "related" to a party in interest with respect to a Plan for purposes of this proposed exemption if the party in interest (or a person controlling or controlled by the party in interest) owns a five percent (5%) or more interest in GMIMCo or AEW, or if GMIMCo or AEW (or a person controlling or controlled by GMIMCo or AEW) owns a five percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) "Interest" means with respect to ownership of an entity:

(A) The combined voting power of all classes of stock entitled to vote, or the total value of the shares of all classes of stock of the entity, if the entity is a corporation;

(B) The capital interest, or the profits interest of the entity, if the entity is a partnership; or

(C) The beneficial interest of the entity, if the entity is a trust or unincorporated enterprise;

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest; and

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

(d) "Subsidiary" means any limited liability company or other entity organized by the LLC, through which it acquires and holds title to its real property investments.

(e) An "exemption audit" of each Plan's interest in the LLC must consist of the following:

(1) A review of the written policies and procedures adopted by GMIMCo pursuant to Part II(h) for consistency with each of the objective requirements of this proposed exemption (as described herein);

(2) A test of a representative sample of the Plan's transactions through investments made by the LLC, as described in Part I, in order to make findings regarding whether GMIMCo is in compliance with both: (i) The written policies and procedures adopted by GMIMCo pursuant to Part II(i) of this proposed exemption; and (ii) the objective requirements of this proposed exemption; and

(3) Issuance of a written report describing the steps performed by the independent auditor during the course of its review and the independent auditor's findings regarding the Plan's interest in the LLC.

(f) For purposes of Part IV(e), the written policies and procedures must describe the following objective requirements of Part II of the proposed exemption and the steps adopted by GMIMCo to assure compliance with each of these requirements:

(1) The requirements of Part III;

(2) The requirements of sections (a) and (b) of Part II regarding the discretionary authority or control of GMIMCo with respect to the Plan assets involved in each transaction, in negotiating the terms of the transaction, and with regard to the decision made on behalf of the Plan, as an investor in the LLC, to enter into the transaction;

(3) The requirements of sections (a) and (b) of Part II with respect to any

procedure for approval or veto of the transaction;

(4) That:

(A) The transaction is not entered into with any person who is excluded from relief under sections (f) or (g) of Part II; and

(B) The transaction is not described in any of the class exemptions listed in section (c) of Part II.

(g) "Plan" means an employee benefit plan established and maintained by GM or an Affiliate.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective as of December 11, 1998.

Summary of Facts and Representations

1. General Motors Corporation (GM) and its Affiliates currently maintain the following employee benefit plans (i.e., the Plans): The General Motors Hourly-Rate Employees Pension Plan (the GM Hourly Plan); (ii) the General Motors Retirement Program for Salaried Employees (the GM Salaried Plan); (iii) the Saturn Individual Retirement Plan for Represented Team Members; (iv) the Saturn Personal Choices Retirement Plan for Non-Represented Team Members (together, the Saturn Plans); and (v) the Employees' Retirement Plan for GMAC Mortgage Corporation (the GMAC Plan). As of December 31, 1998, the Plans had total assets of approximately \$73.2 billion, of which approximately \$4.39 billion were invested in private real estate assets.

2. For a portion of their assets, the Plans make investments through an entity known as the First Plaza Group Trust (i.e., the Trust), which is a group trust established pursuant to IRS Revenue Ruling 81-100. The trustee of the Trust, which acts as a directed trustee, is Chase Manhattan Bank (the Trustee). All beneficial interests in the Trust are held by two other trusts that hold the assets of the Plans. As of March 31, 1997, the Trust had total assets of approximately \$4.1 billion. The General Motors Investment Management Company (i.e., GMIMCo) acts as an investment manager for the assets of the Plans held in the Trust (as discussed further below in paragraphs 9 and 10).

3. On September 13, 1996, CREA Western Investors II, L.L.C. (i.e., CREA II) and the Trust formed Copley West Coast Industrial, L.L.C. (now known as AEW Industrial, L.L.C.), a limited liability company (i.e., the LLC) for the purpose of jointly investing²⁵ in

²⁵ The Department is expressing no opinion in this proposed exemption as to whether the joint investments by the Trust and CREA II to form the LLC, or the ongoing operation of the LLC during such joint investment, violated any of the fiduciary

industrial real properties, under the terms of a Limited Liability Company Agreement (the LLC Agreement). The investment objective of the LLC is to acquire develop, lease, manage and dispose of institutional-grade real properties, including stabilized and opportunistic acquisitions, build-to-suit opportunities, and developments in certain West Coast markets. AEW acts as an investment manager for the assets held by the LLC, including the disposition and sale of LLC properties, subject to the review and approval of GMIMCo (as discussed further below).

4. The LLC was initially structured to qualify as a "real estate operating company" (REOC) pursuant to the Department's regulations at 29 CFR 2510.3-101 (the Plan Asset Regulation).²⁶ Effective December 11, 1998 (the Effective Date), the Trust acquired CREA II's interest in the LLC. The acquisition of CREA II's interest was negotiated by GMIMCo in reliance upon the Prohibited Transaction Class Exemption (PTCE) 96-23, (61 FR 15975, April 10, 1996).²⁷ By reason of the Trust's acquisition of CREA II's interest in the LLC, GM represents that the assets of the LLC became "plan assets" (within the meaning of the Plan Asset Regulation) as of the Effective Date, and the LLC and is no longer a REOC. Thus, all transactions engaged in by the LLC with any persons that are parties in interest with respect to any of the Plans invested therein became subject to the prohibited transaction restrictions of the Act. As a result, these transactions and future party in interest transactions require relief under this proposed exemption, pursuant to the terms and conditions described herein, as of the Effective Date.

5. CREA II is an affiliate of AEW Investment Group, Inc., a wholly-owned subsidiary of AEW Capital Management, L.P. (AEW Capital). AEW Capital is an indirect, wholly-owned subsidiary of New England Investment Companies, L.P. (NEIC), and is the successor to the business operations of Aldrich, Eastman & Waltch, L.P. and Copley Real Estate

responsibility provisions under Part 4 of Title I of the Act.

²⁶ The Department expresses no opinion herein as to whether the LLC met the definition of a REOC under the Plan Asset Regulation at any time.

²⁷ PTCE 96-23 (a/k/a the INHAM Class Exemption) permits various transactions involving employee benefit plans whose assets are managed by an in-house asset manager, or "INHAM", provided that the conditions of the exemption are met. An INHAM is a registered investment adviser which is either (a) a direct or indirect wholly-owned subsidiary of an employer or parent of an employer, or (b) a membership nonprofit corporation a majority of whose members are officers or directors of such an employer or parent organization.

Advisors. AEW Capital manages in excess of \$9 billion in real estate assets. In addition, NEIC is a publicly-traded holding company with approximately \$90 million in assets under management through its subsidiaries and affiliates. Pursuant to a 1996 merger between Metropolitan Life Insurance Company (Metropolitan) and the New England Life Insurance Company, NEIC is now owned approximately 50% by Metropolitan.

6. Pursuant to an agreement among AEW Capital, the Trust, and the LLC (the Investment Agreement), AEW Capital is required, during an exclusivity period specified therein, to utilize its reasonable best efforts to identify, for the benefit of the LLC, investments which meet the LLC's investment objectives. For each potential investment which is presented to the LLC for consideration, AEW Capital prepares a preliminary written proposal in accordance with the terms of the Investment Agreement. GMIMCo, on behalf of the Trust, then evaluates the potential investment for the LLC and determines whether the LLC should pursue the investment. If the Trust determines that the investment should be pursued for the benefit of the LLC, AEW Capital initiates a due diligence investigation of the investment. Due diligence and acquisition expenses can be incurred on behalf of the LLC only with the written consent of the Trust. If, after completion of due diligence, AEW Capital decides to present the potential investment to the LLC for acquisition, it prepares a report which includes a budget for all acquisition and development costs.

7. If GMIMCo, on behalf of the Trust, determines to proceed with the investment, AEW Capital has the primary responsibility for negotiating, finalizing and closing the investment, subject to the approved terms and conditions for the investment, including any related financings. However, AEW Capital does not have the authority to bind the LLC to any material definitive terms with respect to any investment, including price, without the prior review and written consent of GMIMCo on behalf of the Trust.

8. The Trust generally is not involved in the day-to-day management, development, or operation of LLC assets. Pursuant to the Advisory Agreement between AEW Capital and the LLC, AEW Capital has been retained by the LLC to provide certain services in connection with the ongoing management of the LLC, and to advise the LLC with respect to, and manage the disposition and sale of, LLC properties. GMIMCo, acting on behalf of the Trust,

exercises sole discretion with respect to any final decisions regarding the disposition of LLC assets. Under the Advisory Agreement, AEW Capital is further obligated to provide certain services in connection with the development, operation, management, and leasing of LLC properties. AEW Capital is not responsible for directly providing management and development services but, rather, is responsible for engaging other parties to perform such services pursuant to development and property management agreements approved by the LLC investors.

9. GMIMCo is a separately-incorporated, wholly-owned subsidiary of GM and is a registered investment adviser under the Investment Advisers Act of 1940, as amended. GMIMCo is the named fiduciary, within the meaning of section 402(a)(2) of the Act, for purposes of investment of "Plan assets" for the GM Hourly Plan, the GM Salaried Plan, and the Saturn Plans. The named fiduciary of these four Plans for all other purposes is the Investment Funds Committee of the Board of Directors of GM (the GM I.F. Committee). With respect to the other Plans, GMIMCo currently operates as an investment manager with respect to the Plan assets to be invested in the LLC through the Trust under delegated authority of the named fiduciary of each Plan. The GMAC Mortgage Pension Committee (which is a committee of executives of the plan sponsor, not a board committee) is the named fiduciary of the GMAC Plan.

10. GMIMCo is involved in all aspects of the management of the assets of the Plans. In this regard, GMIMCo is organized into several distinct functions, as follows: North American Equities (U.S. and Canada); North American Fixed Income (U.S. and Canada); International Investments; Real Estate and Alternative Investments; Investment Strategy and Asset Allocation; Motors Insurance Corporation; Investment Research; Business Risk Management; Information Systems; Financial Accounting and Controls; Human Resources; and Legal. As of December 31, 1996, the Real Estate and Alternative Investments group (REAI) has approved aggregate current investments with a total value of approximately \$4.1 billion and directly manages investments with a total value of approximately \$1.3 billion, all of which are attributable to the Plans. REAI also exercises varying degrees of supervision over assets being managed by third party investment managers or invested in partnerships or other pooled funds. In addition, REAI selects,

monitors, reviews and evaluates third party investment managers.

11. On and after the Effective Date, the Advisory Agreement provides for the retention by the Trust, and the exercise by GMIMCo on behalf of the Trust, of certain powers from which AEW is completely excluded. These retained powers (the Retained Powers), include the power:

(a) To determine whether the LLC or any subsidiary entity shall pursue any investment, acquisition or development;

(b) To cause any sale, transfer, assignment, conveyance, exchange or other disposition of all or any substantial part of any assets of the LLC or of any subsidiary entity;

(c) To cause the LLC or any subsidiary entity to borrow money, refinance, recast, extend, compromise or otherwise deal with any loans (including securing such loans) of the LLC or any subsidiary entity;

(d) To approve the annual business plans for the LLC; and

(e) To exercise all the powers that a member may exercise under the terms of the LLC operating agreement.

12. Although GMIMCo qualifies as an in-house asset manager (i.e., an INHAM) for the Plans within the meaning of PTCE 96-23 (the INHAM Class Exemption), that exemption might not apply to transactions engaged in by the LLC. The applicant states that the discussion of the comments relating to the INHAM Class Exemption contained in section A1 of the preamble to PTCE 96-23,²⁸ suggests that the exemption does not apply to a transaction where an INHAM retains a QPAM (i.e., a qualified professional asset manager)²⁹ to locate and negotiate the terms of a possible transaction. These comments state that the INHAM Class Exemption does not apply in such instances even though the INHAM performs its own due diligence review of each investment opportunity presented, and evaluates the appropriateness of the investment for the plan's particular investment needs. Thus, GMIMCo represents that there is an immediate need for this proposed exemption to permit transactions by the LLC.

13. GM represents that GMIMCo has not committed at this time a specified amount of Plan assets to be invested in

²⁸ See PTCE 96-23, 61 FR at 15976.

²⁹ In this regard, see PTCE 84-14, 49 FR 9497 (March 13, 1984). PTCE 84-14, a/k/a the QPAM Class Exemption, permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are managed by persons, defined for purposes of the exemption as QPAMs, which are independent of the parties in interest (with certain limited exceptions) and which meet specified financial standards.

the LLC. Rather, GM states that each approved investment by the Plans, through the Trust, constitutes a separate "commitment" of funds to the LLC and the fees to AEW Capital will be paid on the basis of each commitment, rather than on the total capital actually invested at any particular time. The applicant states further that all fees payable to AEW Capital will be reasonable and in compliance with section 408(b)(2) of the Act and the regulations thereunder.³⁰

14. Investment opportunities in real property assets presented by AEW Capital to the Trust for consideration as possible acquisitions for the LLC are submitted to REAI (the responsible group within GMIMCo) for review and approval. REAI will perform a preliminary review of the investment opportunity for suitability, which includes verification that the proposed investment satisfies the broad investment guidelines relating to the Plans' investments in the Trust and specific investment objectives of the REAI portfolio.

15. Once AEW Capital has completed its initial due diligence review for the suitability of the investment and prepared its report with respect to a proposed acquisition of a property by the LLC, the REAI portfolio manager with responsibility for the LLC's investment portfolio (the Manager), assisted by an investment analyst, will conduct a quantitative and qualitative analysis of the investment opportunity. This analysis will form the basis for a recommendation of the investment to upper level officials within GMIMCo. The Manager and the Managing Director of REAI routinely discuss proposed investments, and any decision to recommend approval or to reject an investment is made jointly. Any rejection of an investment opportunity is recorded, and the reasons for such rejection are kept in a file containing the written materials relating to the investment. If the Manager and the Managing Director of REAI decide to recommend an investment to upper level GMIMCo officials, a written report is prepared summarizing the investment and briefly setting forth the reasons for such recommendation and the financial expectations for the investment.

³⁰The Department is not providing any opinion herein as to whether the fee arrangements involving AEW Capital and the LLC meet the requirements for relief under section 408(b)(2) of the Act.

The Department notes that section 408(b)(2) of the Act does not exempt the payment of fees by a plan fiduciary which would constitute a violation of section 406(b) of the Act, even if such fees would otherwise constitute reasonable compensation for the services performed by the fiduciary (see 29 CFR 2550.408b-2(e)).

16. After a proposed investment has been reviewed, analyzed and favorably approved by the Manager and the Managing Director of REAI, the additional levels of approval required in order for the investment to be finally authorized depend directly upon the amount of the investment. If the investment is not in excess of a threshold level, currently \$30 million, it need only be approved by the REAI Investment Approval Committee. However, if the investment is greater than that amount, it must be approved by GMIMCo's president upon the recommendation of the REAI Investment Approval Committee. The REAI Investment Approval Committee consists of the Managing Director of REAI (who is Committee chairman) and the four REAI portfolio managers. Approval by the REAI Investment Approval Committee requires the affirmative vote of a majority of a quorum of the Committee members, including the affirmative vote of the Committee chairman. Final approval is based on the written report described above together with oral discussions regarding the proposed investment. Approval may take a variety of forms from a simple approval to an approval conditioned upon the resolution of certain issues. In all cases, a written record is maintained with respect to the action taken at each level of approval. Notwithstanding the procedure for the approval of any investment for the LLC by GMIMCo, GM or its designee may retain the right to veto or approve such transaction if the amount involved exceeds \$5 million.

17. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The exemption, if granted, will enable the Plans, through investments made in the LLC by the Trust, to transact business with a greater number of potential parties in interest with respect to such Plans; (b) The Plans will save significant costs relating to due diligence reviews and procedures that otherwise would be necessary for the LLC to avoid party-in-interest transactions; and (c) GMIMCo will be afforded maximum flexibility in overseeing the activities of the LLC, and will exercise sole authority on behalf of the LLC with respect to the Retained Powers to ensure that the Plans' interests are protected.

FOR FURTHER INFORMATION CONTACT:
Ekaterina A. Uzlyan of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

Gaetano Lombardo Individual Retirement Account (the IRA), Located in St. Louis, Missouri

[Application No. D-10749]

Proposed Exemption

The Department is considering granting an exemption 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). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the IRA of 26,306 shares of stock (the Stock) of Courtesy Manufacturing Company (Courtesy) to Courtesy, a disqualified person with respect to the IRA, provided that the following conditions are satisfied: (1) The sale of Stock by the IRA is a one-time transaction for cash; (2) no commissions or other expenses are paid by the IRA in connection with the sale; and (3) the IRA receives the greater of: (a) the fair market value of the Stock as determined by a qualified independent appraiser as of October 31, 1998, or (b) the fair market value of the Stock as of the time of the sale.³¹

Summary of Facts and Representations

1. The IRA and Dr. Gaetano (Guy) Lombardo (Lombardo) currently own 100% of the outstanding common stock of Courtesy. Courtesy is an Illinois corporation, located at 1300 Pratt Boulevard in Elk Grove, Illinois, of which Lombardo is the sole director. The IRA had total assets of \$838,039 as of January 31, 1999. The IRA's custodian is Stifel, Nicolaus & Company, Inc. of St. Louis, Missouri.

With respect to the current ownership of the outstanding shares of Courtesy, the IRA owns 26,306 Class A shares (i.e., the Stock) and Lombardo owns 2,194 Class A shares. Prior to December 29, 1998, the only other shareholders of Courtesy were Citicorp Venture Capital, Ltd. (Citicorp), which owned 12,450 shares of Class B common stock, and Goldman Sachs Credit Partners, LP (Goldman), which owned 7,550 shares of Class B common stock. The Class B shares owned by Citicorp and Goldman were redeemed by Courtesy on December 29, 1998. Citicorp received \$900,000 for its shares, and Goldman received \$200,000 for its shares.

³¹Pursuant to 29 CFR 2510.3-2(d), the IRA is not within the jurisdiction of Title I of the Act. However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

2. Lombardo and his then wife, Nancy (Nancy) were residents of Bloomfield Hills, Michigan in the 1980's. Lombardo was the sole shareholder of two Michigan consulting corporations, the Nelmar Corporation (Nelmar) and the Edens Corporation (Edens). Lombardo and Nancy were the only employees of Nelmar and Edens. Nelmar and Edens established the Nelmar-Edens Employees' Pension Plan (the Plan), a defined benefit pension plan for the employees of the two corporations in 1985. Nelmar and Edens merged in 1986, with Nelmar the surviving corporation. In February, 1988, the Plan acquired 30,000 shares of Class A common stock of Courtesy for \$750,000 (i.e., \$25 per share). The applicant represents that Courtesy was not a disqualified person with respect to the Plan.³²

3. In December of 1988, the Plan transferred 1,500 of its Class A shares to Bruce Fisher (Fisher), an officer and employee of Courtesy. The price Fisher paid for the shares was the same price per share (i.e., \$25 per share) that the Plan paid for the shares in February, 1988. Fisher subsequently tendered his shares in November, 1996, to Courtesy, for an agreed upon price of \$44,723 (\$29.82 per share). These shares have been redeemed by Courtesy and are currently held as treasury shares.

4. The Plan became overfunded and was terminated in 1989. Upon termination of the Plan, 2,194 shares of Courtesy reverted to Nelmar because of the overfunding. When distributions to the participants were made pursuant to the termination of the Plan, 7,022 shares of Courtesy were transferred to Nancy, which were rolled over into an individual retirement account established by her (Nancy's IRA), and 19,284 shares of Courtesy were transferred to Lombardo, where were rolled over into the IRA.

5. Nelmar was liquidated in 1991, following Lombardo's move from Bloomfield Hills, Michigan to Concord, Massachusetts in 1989. The 2,194 shares of Courtesy which had been owned by Nelmar were transferred by the corporation upon liquidation to Lombardo. This transfer was independent of the transfer of Courtesy Stock to either the IRA or Nancy's IRA. Lombardo and Nancy subsequently divorced, and the shares of Courtesy in Nancy's IRA were transferred to the IRA pursuant to a Qualified Domestic Relations Order.

³²The Department is taking no position in this proposed exemption as to whether the Plan's acquisition and holding of Courtesy stock resulted in any violations of Part 4 of Title I of the Act.

6. Lombardo wants to make an election for Courtesy to be taxed as a "Subchapter S" Corporation under section 1362(a) of the Code. However, the IRA cannot be a shareholder of an "S" corporation. Accordingly, the applicant has requested an exemption to permit the IRA to sell all of the Stock (26,306 shares) to Courtesy for the fair market value of the Stock, as determined by an independent, qualified appraiser. This transaction would also permit the IRA to diversify its investment portfolio by reinvesting the proceeds of the sale of the Stock in a wider array of securities. The Stock currently represents approximately 94% of the fair market value of the assets in the IRA.³³

7. The applicant has obtained an appraisal of the Stock as of October 31, 1998 from Michael A. Dorman (Mr. Dorman) of the firm of Blackman Kallick Bartenstein, LLP (BKB), independent certified public accountants and business consultants located in Chicago, Illinois. Mr. Dorman states that he is a qualified appraiser for the Stock with over 9 years of experience in the valuation of closely-held corporations and other business entities. Mr. Dorman also states that he is independent of Lombardo and Courtesy. While BKB does provide accounting services to Lombardo and Courtesy, BKB derives less than 1% of its annual revenue from the provision of such services. Mr. Dorman represents that as October 31, 1998, the Stock had a fair market value

³³The Department notes that the Internal Revenue Service has taken the position that a lack of diversification of investments may raise questions in regard to the exclusive benefit rule under section 401(a) of the Code. See, e.g., Rev. Rul. 73-532, 1973-2 C.B. 128. The Department further notes that section 408(a) of the Code, which describes the tax qualification provisions for IRAs, mandates that the trust be created for the exclusive benefit of an individual or his beneficiaries. However, the Department is expressing no opinion in this proposed exemption regarding whether violations of the Code have taken place with respect to the acquisition and holding of the Stock by the IRA.

In this regard, the acquisition and holding of the Stock by the IRA raises questions under section 4975(c)(1)(D) and (E) depending on the degree of Lombardo's interest in the transaction. That section prohibits the use by a disqualified person of the income or assets of an IRA or dealing by a fiduciary (i.e., Lombardo) with the income or assets of an IRA for his own interest or for his own account. An IRA participant who is the sole director and a shareholder of a company may have interests in the acquisition and holding of stock issued by such company which may affect his best judgment as a fiduciary of his IRA. In such circumstances, the holding of the stock may violate section 4975(c)(1)(D) and (E) of the Code. See Advisory Opinion 90-20A (June 15, 1990). Accordingly, to the extent there were violations of section 4975(c)(1)(D) and (E) of the Code with respect to the acquisition and holding of the Stock by the IRA, the Department is extending no relief for those transactions herein.

per share of \$30. Thus, the total value for all the shares of Stock held by the IRA would be \$789,180. Mr. Dorman will update his appraisal as of the date of the proposed sale.

8. The applicant has requested the exemption proposed herein to permit Courtesy to purchase all of the Stock held in the IRA. Courtesy will pay the greater of (i) the fair market value of the Stock as of October 31, 1998, as established by Mr. Dorman's appraisal, or (ii) the fair market value of the Stock, based on an updated independent appraisal as of the date of the sale. The IRA will pay no fees, commissions or other expenses in connection with the transaction.

9. In summary, the applicant represent that the proposed transaction satisfies the criteria contained in section 4975(c)(2) of the Code because: (a) The proposed sale will be a one-time transaction for cash; (b) no commissions or other expenses will be paid by the IRA in connection with the sale; (c) the IRA will be receiving not less than the fair market value of the Stock, as determined by a qualified, independent appraiser; and (d) Guy Lombardo is the only participant in his IRA, and he has determined that the proposed transaction is appropriate for and in the best interest of his IRA and desires that the transaction be consummated with respect to his IRA.

NOTICE TO INTERESTED PERSONS: Because Lombardo is the only participant in the IRA, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Comments and requests for a hearing are due 30 days after publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and

beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 27th day of May, 1999.

Ivan Strasfeld,

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

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BILLING CODE 4510-29-P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Extend and Revise a Current Information Collection

AGENCY: National Science Found.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request renewal of this collection. In accordance with the requirement of

section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104-13), we are providing opportunity for public comments on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by August 2, 1999, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR ADDITIONAL INFORMATION OR COMMENTS: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 306-1125 x2017; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Title of Collection: Survey of Graduate Students and Postdoctorates in Science and Engineering.

OMB Approval Number: 3145-0062.

Expiration Date of Approval: November 30, 1999.

Type of Request: Intent to seek approval to extend with revision an information collection for three years.

Proposed Project

Graduate students in science, engineering, and health fields in U.S. colleges and universities, by source and mechanism of support and by demographic characteristics. An electronic/mail survey, the Survey of Graduate Students and Postdoctorates in Science and Engineering originated in 1966 and has been conducted annually since 1972. The survey is the academic graduate enrollment component of the NSF statistical program that seeks to "provide a central clearinghouse for the collection, interpretation, and analysis of data on the availability of, and the current and projected need for, scientific and technical resources in the United States, and to provide a source of information for policy formulation by other agencies of the Federal government" as mandated in the National Science Foundation Act of 1950.

The proposed project will continue the current survey cycle for three to five years. The annual Fall surveys for 1999

through 2003 will survey the universe of approximately 725 reporting units at approximately 600 institutions offering accredited graduate programs in science, engineering, or health. The survey has provided continuity of statistics on graduate school enrollment and support for graduate students in all science & engineering (S&E) and health fields, with separate data requested on demographic characteristics (race/ethnicity and gender by full-time and part-time enrollment status). Statistics from the survey are published in NSF's annual publication series Graduate Students and Postdoctorates in Science and Engineering, in NSF publications Science and Engineering Indicators, Women, Minorities, and Persons with Disabilities in Science and Engineering, and are available electronically on the World Wide Web.

NSF proposes to revise the questionnaire in 1999 to include the Department of Energy as a source of funding of graduate students and to ask for the number of first-time full-time graduate students by race/ethnicity. These changes are being proposed for purposes of planning, policy formulation, and program evaluation and to provide consistency with other NSF surveys (e.g., on R&D expenditures). Two redundant items will be deleted from the questionnaire: The number of part-time students and the number of women part-time students. In addition, the names of the race/ethnicity categories will be changed to comply with the new OMB guidelines. The new categories will be: Black or African American; American Indian or Alaska Native; Asian; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; and White. These changes are expected to result in minimal change in burden. Overall burden is expected to be reduced from 1999 to 2003 due to expansion of the Web-based data collection.

The survey will be sent primarily to the administrators at the Institutional Research Offices. To minimize burden, NSF instituted a Web-based survey in 1998 through which institutions can enter data directly or upload preformatted files. The Web-based survey includes a complete program for editing and trend checking and allows institutions to receive their previous year's data for comparison. Respondents will be encouraged to participate in this Web-based survey should they so wish. Traditional paper questionnaires will also be available, with editing and trend checking performed as part of the survey processing.