

the average brokerage commission per share paid by each Portfolio to Salomon Smith Barney and its affiliates, as compared to the average brokerage commission per share paid by the Trust to brokers other than Salomon Smith Barney and its affiliates, both expressed as cents per share.

(m) Salomon Smith Barney shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (n) of this Section 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 Salomon Smith Barney and/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 Salomon Smith Barney shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to 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 (n) below.

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

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

(B) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(D) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in subparagraphs (B)–(D) of this paragraph (n) shall be authorized to examine the trade secrets of Salomon Smith Barney or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this proposed exemption:

(a) The term "Salomon Smith Barney" means Salomon Smith Barney Inc. and any affiliate of Salomon Smith Barney, as defined in paragraph (b) of this Section III.

(b) An "affiliate" of Salomon Smith Barney includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Salomon Smith Barney. (For purposes of this subsection, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) An "Independent Plan Fiduciary" is a Plan fiduciary which is independent of Salomon Smith Barney and its affiliates and is either—

(1) A Plan administrator, sponsor, trustee or named fiduciary, as the recordholder of Trust shares under a Section 404(c) Plan;

(2) A participant in a Keogh Plan;

(3) An individual covered under a self-directed IRA which invests in Trust shares;

(4) A trustee, investment manager or named fiduciary responsible for investment decisions in the case of a Title I Plan that does not permit individual direction as contemplated by Section 404(c) of the Act; or

(5) A participant in a Plan, such as a Section 404(c) Plan, who is permitted under the terms of such Plan to direct, and who elects to direct the investment of assets of his or her account in such Plan.

Section IV. Effective Dates

If granted, this proposed exemption will be effective as of June 21, 1994 with respect to the transactions described in Section I.A. and B.(1). With respect to Section I.B.(2) and Section II(f)(1)–(4) of the General Conditions, this proposed exemption will be effective November 9, 1998.

The availability of this proposed exemption is subject to the express condition that the material facts and representations contained in the application for exemption are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the applications change, the exemption will cease to apply as of the date of such change. In the event of any such change, an application for a new exemption must be made to the Department.

For a more complete statement of the facts and representations supporting the Department's decision to grant PTEs 92–

77 and PTE 94–50, refer to the proposed exemptions and the grant notices which are cited above.

Signed at Washington, D.C., this 4th day of November, 1998.

Ivan L. Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98–51; Exemption Application No. L–9583, et al.]

Grant of Individual Exemptions; U.S. West, Inc.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, 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 proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

U S WEST, Inc.; Located in Englewood, Colorado

[Prohibited Transaction Exemption 98-51; Application No. L-9583]

Exemption

Section I—Transactions Involving Contributions In-kind

Effective March 31, 1994, the restrictions of sections 406(a)(1)(E), 407(a)(2), 406(b)(1), and 406(b)(2) of the Act shall not apply to voluntary contributions in-kind by U S WEST, Inc., any successor to U S WEST, Inc., and/or any affiliates of U S WEST, Inc. (collectively, U S WEST) of certain shares of publicly traded common stock of U S WEST (the Stock) and/or any replacement publicly traded shares of such Stock to certain trusts (the Trusts or Trust) for the purpose of pre-funding welfare benefits under one or more employee welfare benefit plans (the Plan or Plans) maintained by U S WEST, provided that:

(a) The Plan provisions explicitly authorize U S WEST to pre-fund benefits through in-kind contributions of Stock, and all contributions of Stock have been and will be made in conformity with such Plan provisions;

(b) Neither the Plans nor the Trusts have paid nor will pay, whether in cash or in other property or in a diminution of any funding obligation of U S WEST, any consideration for Stock contributed in-kind by U S WEST;

(c) U S WEST has no obligation to pre-fund welfare benefits provided to participants under any of the Plans, either pursuant to the plan documents, the terms of any collective bargaining agreement, or the provisions of the Act;

(d) None of the Plans have ceded, nor will cede, any right to receive cash contributions from U S WEST;

(e) None of the Plans or Trusts have paid, nor will pay, any commissions in

connection with the contribution in-kind of Stock by U S WEST; and

(f) Each of the conditions, as set forth below in Section II, have been satisfied and at all times will be satisfied.

Section II—Conditions

The exemption is conditioned upon the adherence by U S WEST to the material facts and representations described in the Notice of Proposed Exemption (the Notice) as modified by this exemption and upon satisfaction of the following requirements:

(a) All Stock contributed in-kind by U S WEST to any of the Trusts or acquired by such Trusts, as a result of the recapitalization of U S WEST, constituted qualifying employer securities (QES), as defined in section 407(d)(5) of the Act; and all Stock contributed in-kind in the future and any replacement publicly traded shares of such Stock will constitute QES;

(b) Stock contributed in-kind by U S WEST or acquired as a result of the recapitalization of U S WEST has been held in Trusts, which are qualified under section 501(c)(9) of the Code, and which are established for the purpose of funding life, sickness, accident, and other welfare benefits for the participants and beneficiaries of the Plans, and all Stock contributed in-kind in the future and any replacement publicly traded shares of such Stock will be held in such Trusts;

(c) All Stock contributed in-kind by U S WEST to any Trust or acquired by any Trust as a result of the recapitalization of U S WEST has been held in a separate account (the Account or Accounts) under such Trust, and all Stock contributed in-kind in the future and any replacement publicly traded shares of such Stock will be held in an Account under such Trust. Such Accounts under a Trust have been and will be managed by an independent fiduciary (the I/F), who is an independent, qualified investment manager, or any successor independent, qualified investment manager, and who has represented and will represent the interests of the Plans which are funded by such Trust for all purposes with respect to the Stock for the duration of the Trust's holding of any of such Stock;

(d) The I/F of the Accounts in the Trusts which fund any welfare plan benefits, has accepted Stock from U S WEST, through in-kind contributions and recapitalization of U S WEST, and will accept Stock, through future in-kind contributions and through any replacement publicly traded shares of such Stock, only after such I/F determines at the time of the transactions that such transactions are

feasible, in the interest of, and protective of participants and beneficiaries of the Plans funded by such Trusts;

(e) The I/F has had sole responsibility and, at all times, will have sole responsibility for the ongoing management of the Accounts under the Trusts which hold the Stock and has taken and will take whatever action is necessary to protect the rights of the Plans funded by such Trusts, including but not limited to all decisions regarding the acceptance of contributions in-kind by U S WEST, the sale or retention of such Stock, the exercise of voting rights of such Stock, and any other acquisition or dispositions of such Stock;

(f) Any contributions in-kind of Stock made by U S WEST to any Plan through any Trust and any acquisitions of Stock in connection with the recapitalization of U S WEST did not cause immediately after each such transaction, and in the future any contributions in-kind of Stock and any replacement publicly traded shares of such Stock will not cause immediately after each such transaction the aggregate fair market value of such Stock, plus the fair market value of all qualifying employer real property (QERP), as defined by section 407(d)(4) of the Act, and the fair market value of all other QES held by such Plan to exceed 25 percent (25%) of the fair market value of the assets of such Plan as determined on the date of each such transaction;

(g) The percentage limitations, as set forth above in paragraph (f) of this Section II, have been and will be applied without regard to amounts of securities issued by U S WEST that may be held by an unrelated common or collective trust fund maintained by an independent manager in which any of the Plans through the Trusts may have invested or may invest, provided that the fair market value of the securities issued by U S WEST and held in such unrelated common or collective trust fund does not exceed 5 percent (5%) of the fair market value of each such common or collective trust fund; and provided further that the conditions of Prohibited Transaction Class Exemption 91-38 (PTCE 91-38)¹ are satisfied, including the requirement that the interests of the Plans in such unrelated common or collective trust fund does not exceed 10 percent (10%) of the total

¹ The Notice of Proposed Exemption for exemption application number D-8414 was published at 56 FR 4856 on February 6, 1991. PTCE 91-38 was granted at 56 FR 31966 on July 12, 1991.

of all assets in such common or collective trust fund;

(h) Nothing in the conditions, as set forth above in paragraph (f) of this Section II, shall preclude, the holding by any Plan of Stock, any other QES and QERP, in amounts in excess of 25 percent (25%) of the assets of such Plan, if the aggregate fair market value of such Stock, other QES and QERP exceeds 25 percent (25%) of the value of the assets of such Plan solely by reason of:

(1) A greater rate of appreciation to the value of such Stock, other QES and QERP relative to the rate of appreciation to the value of the assets in such Plan, other than the Stock, other QES and QERP; or

(2) A greater decline in the value of the other assets of the Plan relative to that of such Stock, other QES and QERP;

(i) None of the assets of any of the Trusts have reverted, nor at any time will any of the assets of such Trusts revert to the use or benefit of U S WEST.

EFFECTIVE DATE: The exemption is effective as of March 31, 1994.

Written Comments

In the Notice, the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within ninety (90) days of the date of the publication of the Notice in the **Federal Register** on March 31, 1998. All comments and requests for hearing were due by June 29, 1998.

During the comment period, the Department received two (2) requests for a hearing. The Department has taken into consideration the concerns expressed by the individuals who requested a hearing. After a review of these concerns, the Department does not believe that any issues have been raised which would require the convening of a hearing.

The Department received letters from thirty-five (35) interested persons commenting on the subject transaction. At the close of the comment period, the Department forwarded copies of these letters to the applicant and requested that the applicant address in writing the various concerns raised by the commentators. Most of the comments fell into broad categories that the applicant responded to generally. Where a single commentator raised a specific issue, such issue was responded to individually. A description of the comments and the applicant's responses thereto are summarized below.

The applicant noted that several commentators objected to the granting of the requested exemption based on the belief that the assets of the Plans, the assets of U S WEST Pension Plan, or the

assets of retirees would be used to purchase QES. In this regard, the applicant reiterated that the exemption would permit the voluntary contribution of QES by the applicant or its affiliates. Thus, it is represented that the cost of the QES contributed to the Trusts has been and will be borne solely by U S WEST. No assets of the Plans, of the U S WEST Pension Plan, or of the retirees has been or will be used to pay for the QES, nor have the Trusts ceded nor will the Trusts cede any right to receive cash contributions in exchange for the contribution by U S WEST of the QES.

Three (3) commentators expressed identical beliefs that the applicant should be required to contribute to the Trusts the cash which the applicant's affiliate, U S WEST Communications (USWC) receives from its telephone service customers (the Rate Payers), and which is attributable to the expense borne by the Rate Payers as a result of the cost of the Plans being passed along to the Rate Payers in the state rate making procedures. The three commentators that raised the rate making issue were from Arizona, which the applicant maintains does not permit accrued expenses for post-retirement welfare benefits to be taken into account for purposes of setting the rates charged by USWC in that state.

Notwithstanding the circumstances in Arizona, and in the interest of ensuring a complete response to the issues raised, the applicant considered the comments in light of each of the fourteen (14) states served by USWC. In this regard, it is represented that until recently accrued expenses for future post-retirement welfare benefits could not be included in the calculation of cost of service for rate making purposes. Instead, such expenses could be included in cost of service calculations only to the extent they were paid out in the form of benefits. Following the adoption by the Financial Accounting Standards Board of Financial Accounting Standard 106 (FAS 106) in 1990, most state regulatory jurisdictions in which USWC does business have begun permitting utilities to use some type of accrual method similar to that provided in FAS 106 for recognizing post-retirement welfare benefit expenses in the cost of service. These accrued expenses are not automatically included in rates but may be included at the request of USWC.

As part of the procedure for determining the extent to which accrued post-retirement welfare benefit expenses should be included in rates, many jurisdictions consider how these expenses are funded through trusts or

other means, and certain states require U S WEST to maintain a specified minimum level of funding for benefits in one or more external accounts (*i.e.* trust accounts). More specifically, some of the states served by USWC may require a certain level of funding of benefits be designated as funded by that state's utility customers. In this regard, the applicant represents that no part of U S WEST's two prior contributions of QES was attributable to funding these designations. In the future, even if the applicant chooses to make an additional contribution attributable to a particular state's Rate Payers, rather than choose other alternatives, New U S WEST is able to ensure that no part of such contribution will consist of QES, and accordingly will do so.

The three commentators who raised the rate structuring issues, discussed in the paragraphs above, also suggested that the Stock should be discounted to protect the Plans against the potential loss of value over time. In the opinion of the applicant the intent of the commentators in making this suggestion is unclear, inasmuch as Plans are not paying for the Stock contributed by U S WEST, and the financial reporting standards of the Act require plan assets to be reported at fair market value.

Several commentators objected to permitting the Plans to invest more than the statutory limit (10%) in QES. Some of these commentators expressed their concern that the holding by the Plans of QES in excess of the statutory limit would reduce the security of Plan benefits (*e.g.* by exposing the Plans to volatility in Stock prices). In response, the applicant points out that welfare benefits under the Plans are not intended to be fully pre-funded, and that the voluntary contributions of Stock do not replace any required cash contributions of U S WEST. The applicant notes that no business purpose would be served if U S WEST were to contribute Stock that is expected to decline in value, because the cost of any benefits that are not pre-funded remain a liability of U S WEST. Accordingly, in the opinion of the applicant the exemption is in the interest of the participants and beneficiaries of the Plans in that U S WEST will be encouraged to make voluntary contributions to the Plans that would not otherwise be made.

Finally, several commentators expressed concern that the proposed exemption would affect their benefits under the Plans or their benefits under the U S WEST Pension Plan. In response, the applicant represents that the exemption will have no impact on these benefits. Further, one

commentator noted that the applicant has made certain promises relating to the continuation of benefits to persons who retired prior to 1991. With respect to such promises, the applicant represents that it intends neither to enlarge nor to reduce the scope of its obligations by any representations made in connection with the requested exemption.

In addition to the comments described above, in letters dated June 29, August 10, 1998, September 17, and September 23, 1998, the Department also received comments and additional information from the applicant. In these submissions, the applicant requested certain modifications to the exemption as proposed, provided documentation for such modifications, and informed the Department of certain clarifications and changes in the Summary of Facts and Representations (SFR) in the Notice. The applicant's comments fall into four (4) categories: (1) clarification of the purpose of the contribution; (2) the application of limits on the acquisition and holding of QES; (3) information on the separation of U S WEST; and (4) the impact of such separation on the requested exemption.

With respect to category 1, above, regarding the purpose of the contribution, the applicant has requested confirmation of its interpretation of the language in Section I of the Notice. In this regard, Section I states that the contribution by U S WEST of Stock to the Trusts was "for the purpose of pre-funding post-retirement welfare benefits" under the Plans. In its comment, the applicant expressed its understanding that the exemption would not require Stock or any other specific asset contributed to a Trust to be used *solely* for the provision of post-retirement welfare benefits. In this regard, the applicant notes that where a Plan provides benefits to retirees, as well as to active employees, and such Plan holds an interest in a Trust, the terms of such Trust would permit the use of plan assets held in the Trust to pay benefits on behalf of either group, to the extent that such assets are not segregated for tax and accounting purposes for one or the other group. The Department concurs in the understanding, as expressed by the applicant, and has deleted the words, "post-retirement," from the language in Section I of the exemption.

With respect to category 2, above, regarding issues associated with the application of limits on the acquisition and holding of QES, the applicant has requested a modification of the language of Section III (f) of the Notice. In this regard, Section III (f) states that:

any contributions in-kind of Stock made by U S WEST to any Trust, any acquisitions of Stock in connection with the recapitalization of U S WEST, did not cause immediately after each such transaction, and in the future any contributions in-kind of Stock, any replacement publicly traded shares of such Stock or any Stock purchases in connection with rebalancing of a Trust's holding of Stock will not cause immediately after each such transaction the aggregate fair market value of such Stock, plus the fair market value of all qualifying employer real property (QERP), as defined by section 407(d)(4) of the Act, and the fair market value of all other QES held by such Trust to exceed 25 percent (25%) of the fair market value of the assets of such Trust as determined on the date of each such transaction.

In the opinion of the applicant the 25 percent limitation (the 25% Limitation) should be calculated at the Plan level, rather than at the Trust level. In this regard, the applicant believes that applying the 25% Limitation at the Plan level would ensure consistency with the method of accounting required under the reporting rules of the Act, and that the primary impact of applying the 25% Limitation at the Trust level would be that fewer voluntary contributions would be made to the trusts, specifically, to the U S WEST Occupational Welfare Benefit Trust (formerly the U S WEST Benefit Assurance Trust) (the Assurance Trust). Further, the applicant points out that if the final exemption were revised to provide for calculation of the 25% Limitation at the Plan level, rather than at the Trust level, the assets of the Assurance Trust that could be invested in QES would not significantly exceed 25 percent (25%) of the asset of such trust.

In support of its position, the applicant represents that the value of each Plan's interest in each Trust can be measured. In addition, the applicant represents that each Plan holds a proportionate interest in each Trust asset (that is, a Plan's interest in each Trust asset, is the same as such Plan's interest in the Trust as a whole). Because each Plan can account for its interest in the Trust and holds an undivided interest in each of the underlying assets of the Trust in the same proportion as its interest in the Trust as a whole, it is represented that each Plan's interest in a particular asset, including the Stock, can be readily determined. Because a single Plan's benefits may be funded under more than one Trust, the applicant believes that applying the 25% Limitation at the Plan level would provide a more useful and accurate measurement of each Plan's interest in the Stock.

Further, it is represented that where a single Trust funds the benefits of more than one Plan, the assets attributable to each Plan are identifiable. The applicant represents that this is achieved either by commingling plan assets for investment purposes and attributing a *pro rata* share of each asset in the commingled Account to each Plan participating in the Trust, or by establishing one or more separate investment management Accounts solely on behalf of a plan participating in the Trust, or by combining both approaches. In this regard, it is represented that a Trust that funds benefits under more than one Plan functions as a "master trust." Moreover, when assets of a Plan are utilized to pay benefits, the liquidation of the assets attributable to the benefit paying Plan funded under a Trust will not affect the assets of any other Plan funded under such Trust. Once U S WEST has determined that benefits are to be paid for a Plan from the assets in an Account that holds QES, then the Independent Fiduciary of such Account continues to be responsible for the allocation as between QES or cash equivalents in funding the benefit payment.

The Department has decided that it is in the interests of the participants and beneficiaries whose Plan benefits are funded in whole or in part by the assets in the Accounts under the Trusts, if the 25% Limitation is imposed on the Plan level. This decision is based on the representations of the applicant, as discussed in the paragraph above, and on the fact that all Stock contributed in-kind by U S WEST in the past or in the future to any Accounts under such Trusts have been and will be managed by an I/F who has had and, at all times, will have sole responsibility for the ongoing management of the Accounts under the Trusts which hold the Stock and has taken and will take whatever action is necessary to protect the rights of the Plans funded by such Trusts, including but not limited to all decisions regarding the acquisition, retention, or disposition of such Stock. Accordingly, the Department concurs with the applicant's request to modify the language, as set forth in Section III(f) of the Notice. However, the Department notes that Section III(f), has been renumbered in the final exemption, as Section II(f) which reads as follows:

any contributions in-kind of Stock made by U S WEST to any Plan through any Trust and any acquisitions of Stock in connection with the recapitalization of U S WEST did not cause immediately after each such transaction, and in the future any contributions in-kind of Stock and any replacement publicly traded shares of such

Stock will not cause immediately after each such transaction the aggregate fair market value of such Stock, plus the fair market value of all qualifying employer real property (QERP), as defined by section 407(d)(4) of the Act, and the fair market value of all other QES held by such Plan to exceed 25 percent (25%) of the fair market value of the assets of such Plan as determined on the date of each such transaction.

In addition, the Department notes that reference was made in the language of Section III(h), as set forth in the Notice, to the application, under certain conditions, of the 25% Limitation to the Trust level. In order to maintain consistency throughout the exemption the Department has renumbered Section III(h), as Section II(h) and has substituted the word, "Plan," wherever the word, "Trust," appears in the language of Section II(h). Accordingly, the language of Section II(h) reads as follows:

nothing in the conditions, as set forth above in paragraph (f) of this Section II, shall preclude, the holding by any Plan of Stock, any other QES and QERP, in amounts in excess of 25 percent (25%) of the assets of such Plan, if the aggregate fair market value of such Stock, other QES and QERP exceeds 25 percent (25%) of the value of the assets of such Plan solely by reason of:

(1) a greater rate of appreciation to the value of such Stock, other QES and QERP relative to the rate of appreciation to the value of the assets in such Plan, other than the Stock, other QES and QERP; or

(2) a greater decline in the value of the other assets of the Plan relative to that of such Stock, other QES and QERP.

With respect to category 3, above, regarding information relating to the separation of U S WEST, the applicant informed the Department that the Board of Directors of U S WEST, on April 20, 1998, submitted for shareholder approval a proposal under which U S WEST would be separated into two (2) independent companies. In this regard, pursuant to the terms of the separation, those parts of the business representing U S WEST Communications Group (the Communications Group) and U S WEST's directory services (DEX) would be known as U S WEST, Inc. (New U S WEST), and those parts of the business representing U S WEST Media Group (the Media Group) would be known as MediaOne Group, Inc. (MediaOne). It is represented that the terms of the separation were approved for fairness by two (2) independent investment banking firms, and that the opinions of these firms were provided to all shareholders of U S WEST. On June 4, 1998, shareholders of U S WEST approved the proposal to separate U S WEST, effective June 12, 1998. It is represented that after the separation of U S WEST,

there is no ownership or management relationship between New U S WEST and MediaOne (other than the fact that shareholders may choose to hold shares issued by both companies).

Prior to the separation of U S WEST, the different lines of business engaged in by U S WEST through its subsidiaries were reflected in two (2) classes of stock, "C" shares and "M" shares (the "C" Shares and the "M" Shares). The "C" Shares represented the Communications Group's business involving integrated communications, entertainment, information and transactions services. The "M" Shares reflected the Media Group's business involving cable, wireless, directory, interactive and international services.

To effect the separation of U S WEST, it is represented that the businesses of the Communications Group and DEX were contributed to New U S WEST, and stock of New U S WEST was distributed to the holders of "C" Shares. It is represented that the "M" Shares continue to reflect the business of the Media Group which after the separation of U S WEST is engaged in by MediaOne. No additional shares were distributed to the holders of "M" shares, other than \$850 million shares of New U S WEST stock that such holders received as compensation for the transfer of DEX from the Media Group to New U S WEST.

The Department acknowledges the separation of U S WEST into New U S WEST and MediaOne, as described by the applicant, and notes that this information has been included in the record of the exemption. For a more detailed description of the circumstances preceding the separation of U S WEST and/or a description of the steps taken to effect such separation, interested persons are encouraged to obtain a copy of the exemption application file (L-9583) which is available in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

With respect to category 4, above, it is represented that the separation of U S WEST into two distinct companies did not have an impact on the holding of the Stock contributed in-kind by U S WEST to the Assurance Trust, on March 1994, and again on March 1995. In this regard, the applicant represents that such Stock was not affected by the separation of U S WEST on June 12, 1998, because such Stock had already been sold out of the Assurance Trust by December 31, 1997. Further, it is represented that the cash proceeds from sales of "C" Shares or the "M" Shares were not used to purchase shares of

Stock in connection with "rebalancing" the portfolio of "C" Shares and "M" Shares by the Assurance Trust.

Accordingly, the applicant represents that the transactions, as described in Section II of the Notice and in the SFR, have not occurred and will not occur, such that relief will no longer be necessary, either on a retroactive or prospective basis. Accordingly, the applicant does not object to the removal in its entirety of Section II of the Notice from the final exemption.

The Department concurs with the applicant, has deleted Section II from the exemption, and has renumbered the former Section III, as Section II in the final exemption. In addition, the Department has deleted any reference to transactions involving "rebalancing" of a Trust's holding of Stock from the terms and conditions of the final exemption.

The separation of U S WEST into two distinct companies did cause changes in the employee welfare benefit plans sponsored by each company. In this regard, because MediaOne and New U S WEST are not affiliated, it is no longer possible to cover employees of each company under the same welfare benefit plan. Accordingly, it is represented that the respective boards of directors of each company have determined that New U S WEST will adopt the Plans previously maintained by U S WEST (the New U S WEST Plans), and that MediaOne will establish "mirror" welfare benefit plans (the MediaOne Plans) on behalf of the former employees of U S WEST who transferred to MediaOne. It is anticipated the welfare benefit plans maintained by New U S WEST and MediaOne, respectively, will provide the same benefits provided by the Plans maintained by U S WEST. In this regard, it is represented that the operation and administration of the welfare benefit plans and trusts maintained by New U S WEST and MediaOne will be the same in all material respects to the operation and administration of Plans and the Trusts established by U S WEST. It is further represented that the welfare benefits provided to employees of New U S WEST and MediaOne will have the same level of funding protection that such employees had prior to the separation of U S WEST. Each company will reserve the same right to amend or terminate, respectively, the New U S WEST Plans and the MediaOne Plans, as was reserved by U S WEST with respect to the Plans it sponsored. As described in the Notice, in order to pre-fund a portion of the welfare benefits provided under the Plans, U S WEST established

under section 501(c)(9) of the Code, three Trusts: (1) the Assurance Trust, (2) the U S WEST Management Benefit Assurance Trust (the Management Trust), and (3) the U S WEST Life Insurance and Welfare Trust (the Life Insurance Trust). In its comment, the applicant informed the Department of the effect of the separation of U S WEST on these three Trust and on a fourth trust, the U S WEST VEBA Trust (the VEBA Trust), maintained by U S WEST, pursuant to section 501(c)(9) of the Code, to provide short-term funding of health care benefits for any of the Plans.

In this regard, it is represented that, effective with the separation of U S WEST, New U S WEST adopted the Assurance Trust, the Management Trust, and the Life Insurance Trust to provide funding for the New U S WEST Plans, while MediaOne has adopted the VEBA Trust. Further, New U S WEST has transferred a proportionate share of the assets and liabilities of the Management Trust and the Life Insurance Trust to the VEBA Trust for the purpose of funding the MediaOne Plans. In addition, the applicant has represented that no assets of the Assurance Trust were transferred to the VEBA Trust, because the assets of the Assurance Trust are held solely on behalf employees covered under collective bargaining agreements, and none of these employees are employed by MediaOne.

Notwithstanding the changes caused by the separation of U S WEST, as described in the paragraphs above, New U S WEST and MediaOne have requested that the final exemption continue to be available prospectively to both companies; provided certain conditions are satisfied. It is represented that the conditions of the exemption will ensure that the rights of participants and beneficiaries of the New U S WEST Plan and the MediaOne Plan will be protected. In this regard, New U S WEST and MediaOne each confirm that the Department may rely on representations made in the exemption application and incorporated in the Notice, subject to those modifications necessarily resulting from the separation of U S WEST, as described herein. Specifically, New U S WEST and MediaOne have omitted representations (b) and (c) in paragraph 12 of the SFR in the Notice, because such conditions relate solely to the "rebalancing" transactions for which exemptive relief is no longer requested or required.

New U S WEST and MediaOne believe that it would be in the interest of participants of the welfare benefit plans sponsored respectively by each company to continue to receive

contributions of QES. In support of this request, it is represented that the reasons that additional voluntary contributions of QES are in the best interest of participants are completely unchanged. In this regard, it is represented that the operation and administration of the welfare benefit plans and trusts that will be maintained respectively by New U S WEST and MediaOne "mirror" the terms of the Plans in existence prior to the separation of U S WEST. Further, it is represented that the level of protection afforded to participants and beneficiaries in the New U S WEST Plans and the MediaOne Plans will be unaffected, in that voluntary contributions of QES will permit a higher level of contributions and will provide greater security that assets will be available to fund future benefits.

Finally, the applicant argues that the separation of U S WEST into two (2) lines of business should not necessitate the filing of another application for exemption, as such a filing would only duplicate the information that has already been provided to the Department. Similarly, it is represented that a separate exemption application would not serve to provide notice to additional interested persons, because all persons who would be interested in such application have already been notified by the publication of Notice in the **Federal Register**.

The Department concurs that the exemption will cover future contributions in-kind of QES by New U S WEST, and accordingly, has altered Section I of the exemption by adding the italicized words to the language of Section I, as follows,

Effective March 31, 1994, the restrictions of sections 406(a)(1)(E), 407(a)(2), 406(b)(1), and 406(b)(2) of the Act shall not apply to voluntary contributions in-kind by U S WEST, Inc., any successor to U S WEST, Inc., and/or any affiliates of U S WEST, Inc. (collectively, U S WEST) of certain shares of publicly traded common stock of U S WEST (the Stock) and/or any replacement publicly traded shares of such Stock to certain trusts (the Trusts or Trust) for the purpose of pre-funding post-retirement welfare benefits under one or more employee welfare benefit plans (the Plan or Plans) maintained by U S WEST.

However, with regard to the request that the exemption continue to be available prospectively to MediaOne, the Department does not believe that the Notice, as published in the **Federal Register**, contemplated future contributions in-kind of QES by MediaOne to the MediaOne Plans. In this regard, the Department notes that the MediaOne Plans are new "mirror"

plans which were not in existence at the time of the publication of the Notice in the **Federal Register**. Further, the Department is not convinced that the notice to interested persons that was provided with regard to the exemption requested by U S WEST afforded sufficient opportunity for comment from persons who would be interested persons with regard to future transactions by MediaOne. As a result, the Department does not believe that the exemption can be interpreted to be available prospectively to MediaOne. MediaOne may submit another application for exemption relief should MediaOne wish to make voluntary in-kind contributions of QES in the future to MediaOne Plans.

Accordingly, after full consideration and review of the entire record, including the written comments, the Department has determined to grant the exemption, as modified and amended herein. The comments submitted by the commentators to the Department and the applicant's response thereto has been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on March 31, 1998, 61 FR 15443.

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

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

**[Prohibited Transaction Exemption 98-52;
Exemption Application No. D-9952]**

Exemption

The Department is 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.)
Section I—Covered Transactions

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason

of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(1) The provision of certain leasing services (the Leasing Services) by RREEF's leasing affiliates (the Leasing Affiliates, as defined in Section IV) to certain accounts established by RREEF (the Accounts, as defined in Section IV); and

(2) The payment of leasing commissions in connection with the provision of Leasing Services by the Leasing Affiliates to the Accounts; provided that the conditions set forth in Section II are met.

Section II—Conditions

(1) The arrangement under which the Leasing Services are performed with respect to any Account is subject to the prior authorization of either (i) an independent plan fiduciary for each employee benefit plan or other plan for which RREEF serves as trustee or investment manager (a Client Plan) that invests in a Single Client Account, or (ii) independent plan fiduciaries with respect to Client Plans or other institutional investors holding at least 60 percent of the units of beneficial interest in a Multiple Client Account, following disclosure of information in the manner described in paragraph (2) below. In the case of a Client Plan whose assets are proposed to be invested in an Account subsequent to the provision of Leasing Services to the Account, the Client Plan's investment in the Account is subject to the prior written authorization of an authorizing plan fiduciary following disclosure of the information described in paragraph (2).

(2) Not less than 45 days prior to the first date it proposes to provide Leasing Services for any Account, RREEF, as investment manager, shall furnish the authorizing plan fiduciary with any reasonably available information which RREEF believes to be necessary to determine whether such approval should be given, as well as such information which is reasonably requested by the authorizing plan fiduciary. Such information will include: (a) a description of the Leasing Services to be performed by the Leasing Affiliate; (b) an explanation of the potential conflicts of interest involved in selecting the Leasing Affiliate; (c) an explanation of the selection process (including the role of the Independent Fiduciaries (as defined in Section IV)); (d) identification of properties for which Leasing Services will be required; (e) an estimate of the leasing fees to be paid to the Leasing Affiliate if it is selected to provide such services; and (f) a description of the terms upon which a

Client Plan may withdraw from an Account.

(3) In the event an authorizing plan fiduciary of any Client Plan whose assets are invested in an Account submits a notice in writing to RREEF, as investment manager, at least 15 days prior to the provision of Leasing Services, objecting to the provision of the Leasing Services, and RREEF proposes to proceed with the provision of Leasing Services, the Client Plan on whose behalf the objection was tendered will be given the opportunity to terminate its investment in the Account, without penalty. With the exception of a Client Plan which has invested in a closed-end Account under which the rights of withdrawal from the Account may be limited, as provided in the Client Plan's written agreement to invest in the Account, if a written objection to the Leasing Services is submitted to RREEF any time after 15 days prior to implementation of the Leasing Services (or after implementation), the Client Plan must be able to withdraw without penalty, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing and the non-withdrawing Client Plans. However, the Leasing Affiliate need not discontinue providing the Leasing Services, once implemented, by reason of a Client Plan electing to withdraw after 15 days prior to the scheduled implementation date of the Leasing Services. Any Client Plan which invests in a Single Client Account may terminate the Leasing Services arrangement and withdraw from the Account at any time (upon reasonable written notice).

(4)(a) RREEF shall furnish the Independent Fiduciary (as defined in section IV) acting on behalf of the Client Plans participating in the Account with an annual report (the RREEF Annual Report) containing the information described in this paragraph, not less frequently than once a year and not later than 45 days following the end of the period to which the report relates. The RREEF Annual Report shall disclose the total of all fees incurred by the Account during the preceding year under contracts with RREEF and its affiliates and shall include a description of all leasing activities with respect to each property under the responsibility of the Independent Fiduciary for which a Leasing Affiliate provides services, including marketing/advertising activities, leases under negotiation, lease offers rejected (and why), and such other information as shall be reasonably requested by the Independent Fiduciary. The RREEF Annual Report shall also delineate the leasing commissions that

are anticipated to be paid to RREEF and its affiliates in the coming year for services provided by these entities in connection with the properties held by the Account. The RREEF Annual Report will contain a description of a method for the termination of the leasing arrangement (see Section II(5)) by the Independent Fiduciary and/or by investing Client Plans in each Account.

(b) The Independent Fiduciary shall furnish RREEF and the authorizing plan fiduciaries with an annual report (the I/F Annual Report), within 90 days following the end of the period to which the report relates, summarizing its activities for the year, indicating its opinion as to the continued validity of the leasing guidelines with respect to any property for the next year, and recommending any amendments to, or termination of, the leasing agreement with the Leasing Affiliate. The I/F Annual Report will contain a description of a method for the termination of the leasing arrangement with the Leasing Affiliate and for the confirmation and/or removal of the Independent Fiduciary by the Client Plans investing in the Accounts.

(c) RREEF implements procedures to ensure each authorizing plan fiduciary of a Client Plan investing either in a Multiple Client Account, or a Single Client Account, has an opportunity to vote on the reconfirmation of the Independent Fiduciary on an annual basis. These procedures require that the Independent Fiduciary: (i) provide each authorizing independent client plan fiduciary with a ballot² by certified mail (or another method of delivery pursuant to which confirmation of receipt is provided), with the ballot instructions that direct the authorizing independent client plan fiduciary to return the ballot to RREEF; (ii) ensure that the ballot clearly indicates that the authorizing plan fiduciary may vote for or against continuation of the Independent Fiduciary; (iii) ensure that the ballot must be accompanied by a statement that failure to return the ballot within 45 days following the independent plan fiduciaries' receipt of the ballots will be counted as a "for" vote (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation); and (iv) 30 days after the Independent Fiduciary mails the ballot to the authorizing plan fiduciary, RREEF must make at least one follow-up contact with the authorizing plan fiduciary that has not previously

² RREEF will direct the Independent Fiduciary as to the specific form of a ballot. The applicant represents that for a Single Client Account, this will not be a "ballot", but a "direction" form.

returned the ballot prior to treating the unreturned ballot as a "for" vote. If RREEF does not receive a response from the authorizing plan fiduciary within 15 days after initiating contact with the authorizing plan fiduciary, RREEF may treat the unreturned ballot as a vote for reconfirmation. The reconfirmation will become effective on the earlier of the date affirmative ballots are obtained from the holders of a majority of the units of beneficial interests in the Accounts, or 45 days following the authorizing plan fiduciaries' receipt of the ballots (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation.)

(d) The Independent Fiduciary receives confirmation, and certifies to RREEF that the notice and the ballots sent to the authorizing plan fiduciary pursuant to subparagraphs (b) and (c) regarding the continued retention of the Independent Fiduciary and RREEF have been received by the authorizing plan fiduciary. The method used to confirm notice to the authorizing plan fiduciaries must be sufficient to ensure that the authorizing Client Plan fiduciaries actually receive notice. In all cases, return receipt for certified mail, printed confirmation of facsimile transmissions and manifest or computer data entries of independent courier services will be considered acceptable methods of confirming receipt.

(5)(a) The leasing agreement for any property may also be terminated or modified at any time at the written direction of the Independent Fiduciary, and may be terminated by a vote in favor of such termination by the holders of a majority of the units of beneficial interests in the Account (or such greater percentage, not to exceed 60 percent, as shall be set out in the agreements establishing the Account). Further, any Client Plan which invests in a Single Client Account may terminate the Leasing Services arrangement and withdraw from the Account at any time (upon reasonable notice).

(b) In the event of a vote to terminate the Leasing Services arrangement pursuant to paragraph (4)(c) or (5)(a), RREEF shall cease submitting to the Independent Fiduciary any new proposals to engage in covered transactions and RREEF will not renew or extend any covered transactions. Moreover, within 180 days after the vote of the Account holders, RREEF shall cease engaging in any existing covered transactions.

(6)(a) Each Leasing Services agreement shall be in writing and shall be reviewed at least annually and approved by an Independent Fiduciary.

However, prior to proposing a transaction to the Independent Fiduciary, RREEF will first determine that such transaction is in the best interest of the Account.

(b) The Independent Fiduciary shall negotiate each Leasing Services agreement. The Independent Fiduciary shall also consider the cost to the Account of such fiduciary's involvement in connection with its consideration of whether to approve a particular Leasing Services agreement.

(c) Each leasing agreement and the performance of the Leasing Affiliate under such agreement shall be reviewed at least annually by the Independent Fiduciary, who shall instruct RREEF of any action which should be taken by RREEF on behalf of the Account with respect to the continuation, termination or other exercise of rights available to the Account under the terms of the leasing agreement. RREEF will carry out such instruction from the Independent Fiduciary to the extent it is legal and permitted by the terms of the leasing agreement.

(d) In the case of any emergency circumstances, RREEF or the Leasing Affiliates may provide Leasing Services to an Account for a period not exceeding 90 days without entering into a Leasing Services agreement, but no compensation may be paid by an Account for such services without prior approval of the Independent Fiduciary.

(7) If RREEF holds Account properties, and any RREEF affiliate or principal holds for its own account any properties in the same real estate market during a period when there is leasing competition between those properties, RREEF will hire, during such period, a third party leasing agent for Account properties.

(8)(a) RREEF shall furnish the Independent Fiduciary with any reasonably available information which RREEF reasonably believes to be necessary or which the Independent Fiduciary shall reasonably request to determine whether such approval of the transactions described above should be given, or to accomplish the Independent Fiduciary's periodic reviews of RREEF's performance under such agreements.

(b) With respect to RREEF, such information will include: a description of the Leasing Services for the Account and the Client Plans investing therein; the qualifications of RREEF to do the job; a statement, supported by appropriate factual representations, of the reasons for RREEF's belief that RREEF is qualified to provide the services; a copy of the proposed Leasing Services agreement and the terms on which RREEF would provide the

services; the reasons why RREEF believes the retention of RREEF would be in the best interest of the Account; information demonstrating why the fees and other terms of the arrangement are reasonable and comparable to the fees customarily charged by similar firms for similar services in comparable locales; the identities of non-affiliated service providers and the terms under which these service providers might perform the services; and whether any RREEF affiliate is a property manager to any properties that are in competition for tenants with the property for which RREEF is under consideration.

(9) Any Independent Fiduciary may be removed at any time by a vote of holders of a majority of the units of beneficial interests in an Account. In the event of the removal of an Independent Fiduciary, existing leasing agreements overseen by that Independent Fiduciary will not be affected; however, RREEF will designate a replacement Independent Fiduciary within sixty (60) days.

(10) 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. In addition, 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 exercises such discretion with respect to Client Plan assets in excess of \$100 million.

(11) No Client Plan covering employees of RREEF will be invested in an Account.

(12) Not more than 20 percent of the assets of any Client Plan on whose behalf RREEF proposes to provide Leasing Services can be invested in RREEF Accounts.

(13) At the time any leasing agreement is entered into, the terms of the agreement must be at least as favorable to the Account as the terms of an arm's-length transaction between unrelated parties. In addition, the compensation paid to the Leasing Affiliate for Leasing Services by any Account must not exceed the amount paid in an arm's-length transaction between unrelated parties for comparable properties in similar locales. In any event, such

compensation will not exceed reasonable compensation within the meaning of section 408(b)(2) of the Act and regulation 29 CFR 2550.408b-2. (The Independent Fiduciary must certify that an economic advantage to the Accounts exists before consummation of any leasing agreement).

(14)(a) Within one-year of the grant of this exemption, and after the beginning of each subsequent five-year period, each Independent Fiduciary will prepare with the assistance of RREEF a survey of leasing fees for the properties that have similar geographic location and property types to those held by the Accounts for which the Independent Fiduciary is responsible. The survey will include data regarding the fees that have been charged to the Accounts by several firms that are unaffiliated with RREEF for Leasing Services during the one-year period prior to the beginning of the new five-year period. Also, the survey will include data as to the fees paid by RREEF for such services performed for the properties not held by the Accounts during the same period and other market data regarding the cost of Leasing Services by geographic location and property types.

(b) Based upon its survey and its professional resources and expertise, the Independent Fiduciary will determine a typical range of annual fees for Leasing Services for the Accounts. The average of the range, as determined from such survey, will serve as the basis of comparison for determining for the next five-year period whether continuation of the Leasing Services policy has provided cost savings or other benefits to the Accounts.

(c) RREEF will demonstrate to the Independent Fiduciary at the end of the applicable five-year period that leasing fees charged to each Account by RREEF or its affiliates, plus the cost of the services of the Independent Fiduciary under the exemption that are allocated to the Accounts, are less than the fees that would have been charged using the benchmark rate established at the beginning of the five-year period. In making its determinations, the Independent Fiduciary shall take into account, to the extent it deems necessary, property management fees paid by the Accounts to RREEF and its affiliates.³

³ With respect to Multiple Client Accounts, property management services by RREEF are currently provided in accordance with PTE 82-51 (47 FR 14238/14241, April 2, 1982). PTE 82-51 permits collective investment funds (the Funds) managed by RREEF or any of its affiliates, in which Client Plans participate, to engage in certain transactions with parties in interest with respect to

(d) The Independent Fiduciary will review the data supplied by RREEF and, to the extent considered necessary by the Independent Fiduciary, data collected from the Independent Fiduciary's own surveys, and will document its findings and analysis of such cost savings in a report to be delivered to each of the Client Plans participating in the Accounts within 90 days after the end of the five-year period and each subsequent five-year period and prior to the implementation of the annual confirmation procedure described in paragraph (6) of Section II with respect to such period. In the event the Independent Fiduciary finds that cost savings have not been achieved for the Accounts, it will not approve any additional services arrangements until RREEF and its affiliates have demonstrated to the satisfaction of the Independent Fiduciary that policies intended to assure cost savings to the Accounts have been implemented by RREEF and its affiliates. The survey, the Independent Fiduciary's report reviewing the survey, and the final report of the Independent Fiduciary analyzing whether cost savings had been achieved during the five-year period to which the survey relates, will be maintained by RREEF in accordance with the recordkeeping requirements of Section III.

(15) The fees paid to RREEF and/or its affiliates for Leasing Services provided in connection with a property held for an Account shall not exceed: (a) 7 percent of the lease amount for new leases; (b) 2 percent of the lease amount for renewal leases; and (c) for leases in which outside brokers are involved, 2.75 percent of the lease amount.

(16) Before entering into any leasing arrangement pursuant to the terms of this exemption, copies of the proposed exemption and the final exemption will be delivered to each Client Plan for which RREEF or its affiliate propose to perform Leasing Services as described herein.

Section III—Recordkeeping

(1) RREEF and any Leasing Affiliate will maintain, for a period of six years, the relevant records necessary to enable the persons described in paragraph (2) of this Section III to determine whether the conditions of this exemption have been met. Included in these records will be the written records of the Independent Fiduciary which had been

the Client Plans that are investors in the Funds, provided that certain conditions are met. Therefore, the requested exemption is necessary only for the provision of Leasing Services by RREEF's affiliates to the Multiple Client Accounts in connection with the properties held by the Accounts.

periodically furnished by the Independent Fiduciary to RREEF, and the records described in paragraph (14) of Section II. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond RREEF's, the Leasing Affiliate's, or the Independent Fiduciary's control, the records are lost or destroyed prior to the end of the six-year period.⁴

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

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

(2) Any fiduciary of a Client Plan who has authority to acquire or dispose of the interests of the Client Plan in the Accounts or any duly authorized employee or representative of such fiduciary;

(3) Any contributing employer to any Client Plan that has an interest in the Accounts or any duly authorized employee or representative of such employer;

(4) Any participant or beneficiary of any Client Plan participating in the Accounts, or any duly authorized employee or representative of such participant or beneficiary; and (5) The Independent Fiduciaries.

(b) None of the persons described above in subparagraphs (2)–(5) of this paragraph shall be authorized to examine the trade secrets of RREEF or any Leasing Affiliate or commercial or financial information which is privileged or confidential.

Section IV—Definitions

(1) The Accounts—The Accounts are any future pooled accounts (i.e., Multiple Client Accounts) or any existing or future single-customer accounts (i.e., Single Client Accounts), including joint ventures, general or limited partnerships or other real estate investment vehicles established by RREEF for the investment of employee benefit Client Plan assets in real-estate related investments to the extent that (i) such Accounts hold "plan assets" within the meaning of the regulations at 29 CFR section 2510.3-101 and (ii) management of their assets is subject to the discretionary authority of RREEF.

⁴ RREEF represents that its contract with each Independent Fiduciary will require that the Independent Fiduciary's written records be maintained in accordance with this section.

(2) RREEF—For purposes of this exemption, the term RREEF means RREEF America L.L.C., and certain of their officers who may serve as trustees of group trusts managed by RREEF America L.L.C., or who may serve in similar fiduciary capacities with respect to other commingled investment vehicles managed by them, and/or any other affiliates of RREEF as defined in paragraph (4) of this section IV which act as investment fiduciaries with respect to any Account.

(3) Leasing Affiliate—RREEF Management Company or other affiliates of RREEF (as defined in paragraph (4) of this Section IV) retained to provide Leasing Services with respect to an Account.

(4) An "affiliate" of a person means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person.

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

(6) Independent Fiduciary—A person who:

(a) Is not an affiliate of RREEF as defined in Section IV(4);

(b) Is not an officer, director, employee of, or partner in, RREEF (or affiliates thereof as defined in Section IV(4));

(c) Is not a corporation or partnership in which RREEF has an ownership interest or is a partner;

(d) Does not have an ownership interest in RREEF or any of its affiliates;

(e) Is not a fiduciary with respect to any Client Plan's investment in the Account;

(f) Has represented in writing that it is qualified to perform the services contemplated by the exemption, which qualifications shall include, among other things: (i) Demonstrated experience, generally over a period of not less than five years, in the business of commercial real estate, brokerage, management, or appraisal generally and in reviewing or negotiating leasing agreements and commissions specifically; (ii) familiarity with the relevant real estate, specifically as it relates to comparable property types with respect to the specific properties for which the Leasing Affiliate proposes to perform Leasing Services (for example, in the case of office properties, the Independent Fiduciary's experience shall relate specifically to office properties in the same market); (iii) experience in complying with the fiduciary standards of the Act in

connection with the representation of the Client Plans; and

(g) Has acknowledged in writing acceptance of fiduciary obligations and has agreed not to participate in any decision with respect to any transaction in which the Independent Fiduciary has an interest that might affect its best judgement as a fiduciary. For purposes of the foregoing, each Independent Fiduciary shall represent in writing that it has no relationship with RREEF or its affiliates, or with any Account, that would affect its best judgement as a fiduciary.

For purposes of this definition of Independent Fiduciary, no organization or individual may serve as an Independent Fiduciary for any fiscal year if the gross income received by such organization or individual (or partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder) from RREEF or any affiliates of RREEF (including amounts received for services as Independent Fiduciary under any prohibited transaction exemption granted by the Department) for that fiscal year exceeds 5 percent of its or his annual gross income from all sources for such fiscal year.

In addition, no organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director or 10 percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from RREEF or any affiliates of RREEF, or any Account maintained by RREEF or any affiliates of RREEF, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of 6 months after such organization or individual ceases to be an Independent Fiduciary or negotiates any such transaction during the period that such organization or individual serves as Independent Fiduciary.

This exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions to be consummated pursuant to the exemption.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on August 31, 1998 at 63 FR 46245 (the Notice).

Written Comments

The Department received two written comments (the Comments) with respect to the Notice and no requests for a public hearing. The Comments were filed by RREEF and generally request clarifications and modifications to the Notice. Set forth below in section I is a discussion of those aspects of the Comments which relate to the language of the final exemption (the Exemption). In addition, section II below discusses those aspects of the Comments which relate to the Summary of Facts and Representations (the Summary) contained in Notice.

I. Discussion of the Comments Regarding the Exemption

1. Section II(10) of the Notice relates to the appropriate percentage of beneficial interests in an Account which must be held by Client Plans with a certain minimum asset size. Specifically, Section II(10) of the Notice states, in relevant part, that 75% or more of the units of beneficial ownership in "an Account" must be held by Client Plans or other investors having total assets of at least \$100 million. In addition, Section II(10) of the Notice states that 50% or more of the Client Plans investing in "an Account" must have assets of at least \$100 million.

The Comments state that the foregoing 75% and 50% tests are relevant only in the case of, and are meant to apply to, Multiple Client Accounts (see paragraph 22 of the Summary contained in the Notice). For purposes of this Exemption, RREEF has represented that Single Client Accounts will be established only for Client Plans with at least \$100 million in assets. Accordingly, RREEF requests that the foregoing references to "an Account" in the first and second sentences of Section II(10) of the Exemption be changed to "Multiple Client Account."

The Department acknowledges RREEF's request, as stated in the Comments, and has modified the language of Section II(10) of the Exemption accordingly.

2. The Comments also state that the third sentence in Section II(10) of the Notice provides that "for purposes of the 50% test", 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 is made at the direction of an unaffiliated fiduciary who exercises discretion with respect to

total Client Plan assets in excess of \$100 million.

The Comments state that the phrase “. . . . For purposes of the 50% test”, as it appears in the third sentence of Section II(10) of the Notice, should be deleted. The Comments note that this reference to only the “50% test” is not completely accurate in the context of RREEF’s Multiple Client Accounts, as contemplated under this Exemption. In this regard, the Comments state that if a fiduciary unaffiliated with RREEF directs the investment of multiple affiliated plans (usually through a single “master trust”) into a Multiple Client Account, it is appropriate to treat the affiliated plans as a Single Client Plan for both the “75% test” and the “50% test” referred to in Section II(10). In addition, the Comments state that it is RREEF’s understanding that multiple plans of a single employer, invested as a unit at the direction of a fiduciary independent of RREEF, would be treated as a single Client Plan for purposes of establishing a Single Client Account under the Exemption.

The Department acknowledges RREEF’s request and has modified the Exemption by deleting the phrase “. . . . For purposes of the 50% test” in the third sentence of Section II(10) of the Exemption.

II. Discussion of the Comments Regarding the Summary

1. The Comments state that the Exemption will not be relevant to RREEF USA Fund-I because this Multiple Client Account is in liquidation. Moreover, as stated in the Notice, the Comments reaffirm that RREEF has no intention of using the Exemption for any other current Multiple Client Accounts. Therefore, the Comments note that the references to USA Fund-I in the Notice, which are located in Paragraphs 3 and 20 of the Summary, should be disregarded.

The Department acknowledges the applicant’s clarification regarding the applicability of the Exemption to existing Multiple Client Accounts, including USA Fund-I. Thus, in response to this Comment, the Department has modified the definition of the term “Accounts,” as it appears in Section IV(1) of the Notice, to clarify that this term does not apply to any existing Multiple Client Accounts. Section IV(1) of the Exemption states, in pertinent part, that the Accounts are any future pooled accounts (i.e., Multiple Client Accounts) or any existing or future single-customer accounts (i.e., Single Client Accounts).

2. With respect to Paragraph 9 of the Summary, the Comments state that the

discussion regarding the potential for leasing competition among properties held by an Account and another property held by a RREEF affiliate for its own account in the same real estate market, is not meant to refer in any way to the potential for competition between two properties held by two different Accounts. In the latter case, RREEF and the Independent Fiduciary, subject to the veto rights of the Client Plan(s), will determine whether it would be appropriate for a Leasing Affiliate to provide Leasing Services to one or both of the properties held by such Accounts.

3. With regard to Paragraph 10 of the Summary, the Comments state that the reference to the use of the same Independent Fiduciary for all Accounts that have properties in the same real estate market is not entirely accurate. In this regard, the Comments note that RREEF proposes to use the same Independent Fiduciary for all Accounts that have properties of the same type in the same real estate market. Thus, for example, different Independent Fiduciaries may be retained in the same real estate market for retail and commercial properties.

The Department concurs with all of the Comments relating to the Summary.

Accordingly, after giving full consideration to the entire record, including the Comments, the Department has decided to grant the exemption subject to the modifications and clarifications described above. The Comments have been included as part of the public record of the exemption application.

Interested persons should note that the complete exemption file is available for public inspection in the Public Disclosure Room of the Pension and Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210.

FOR FURTHER INFORMATION CONTACT:

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

**Pacific Income Advisers, Inc. (PIA);
Located in Santa Monica, CA**

**[Prohibited Transaction Exemption 98-53;
Exemption Application No. D-10324]**

Exemption

Section I—Exemption Involving Plans Where PIA Is Both a Fiduciary or Other Party in Interest With Respect to the Plan and Investment Adviser of Certain Trusts in Which the Plans Invest

The restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section

4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code shall not apply to: (1) the acquisition, sale or redemption of trust units (the Units) in the Pacific Income Advisers Fixed-Income Group Investment Trust (Fixed Income Trust), the Pacific Income Advisers Short-Term Group Investment Trust (Short-Term Trust), the Pacific Income Advisers Equity Group Investment Trust (Equity Trust), and the Pacific Income Advisers Global Group Investment Trust (Global Trust; each a Trust and collectively, the Trusts), by employee benefit plans, and Individual Retirement Accounts (IRA’s; collectively, the Plan(s)); and (2) the payment of fees by a Trust to Pacific Income Advisers (PIA) where PIA is a fiduciary or other party in interest with respect to a Plan investing in a Trust and the investment adviser to each of the Trusts, provided the conditions of Section II are met.

Section II—Conditions

(1) (a) The investment of a Plan’s assets in the each of the Trusts and the fees to be paid by a Trust to PIA are authorized in writing by a Plan fiduciary who is independent of PIA (Independent Fiduciary).⁵ Such authorization shall be consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act. In addition, such authorization shall be either: (1) Set forth in the investment management agreement between the Plan and PIA; (2) indicated in writing prior to each purchase or sale; or (3) indicated in writing prior to the commencement of a specified purchase or sale program in the Units of the Trusts.

(b) PIA does not provide investment advice to a Plan’s Independent Fiduciary within the meaning of 29 CFR 2510.3-21(c)(1)(ii) with respect to a Plan’s acquisition of Units of a Trust.

(2) Prior to making an initial investment in the Units, each Plan’s Independent Fiduciary shall receive the following written disclosures from PIA:

(a) The proposed exemption and grant notice describing the exemptive relief provided herein;

(b) The applicable Trust’s Offering Memorandum, outlining the investment

⁵ A fiduciary will not be deemed independent of PIA if: (1) such fiduciary is directly or indirectly controlled by PIA or an affiliate thereof; (2) such fiduciary or any officer, director, partner, highly compensated employee, or the relative of such fiduciary is an officer, director, partner, or highly compensated employee, of PIA or an affiliate of PIA; and (3) such fiduciary directly or indirectly receives any compensation or other consideration for that fiduciary’s own personal account in connection with any transaction described in this exemption.

objective(s) of the Trust and the policies employed to achieve these objectives and a description of all fees associated with investment in the Trust; and

(c) The applicable Trust's Agreement and Declaration of Trust, disclosing the structure and manner of operation of the Trust.

(d) A statement describing the relationship between PIA and the Trusts.

(3) The Independent Fiduciary shall acknowledge in writing that the Plan is an "accredited investor" as defined in Rule 501 of Regulation D of the Securities Act of 1933 (1933 Act). In addition, the Independent Fiduciary shall acknowledge in writing that it has not relied upon the advice of PIA with respect to the acquisition, sale or redemption of the Units.

(4) No Plan shall pay a sales commission or redemption fee, in connection with the acquisition, sale or redemption of the Units of the Trusts.

(5) (a) No participating Plan may invest more than 25% of its total assets in the Global Trust.

(b) No Plan, other than a multiple employer welfare arrangement (MEWA), a multiple employer trust (MET), or voluntary employee benefit association (VEBA), may acquire or hold Units representing more than 20% of the assets of a Trust.⁶ A MEWA, MET, or VEBA may acquire and hold Units representing up to 35% of the assets of either the Short-Term Trust or Fixed Income Trust only. As to investment in any other Trust, a MEWA, MET, or VEBA may not acquire or hold Units representing more than 20% of the assets of such Trust.

(c) For purposes of determining the percentage of the assets of a Trust being held by a single Plan, PIA shall first make the calculation 90 days after the first Unit of a Trust is sold to such Plan.

(6)(a) At the time the transactions are entered into, the terms of the transactions shall be at least as favorable to the Plans as those obtainable in arm's length transactions between unrelated parties.

(b) PIA, including any officer or director of PIA, does not purchase or

sell shares of the Trusts from or to any Plan Client.

(c) The price paid or received by a Plan Client for Units of a Trust is the net asset value per Unit at the time of the transaction and it is the same price which would have been paid or received for the Units of a Trust by any other investor at that time. For purposes of this paragraph, the term "net asset value" means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by an objective method as set forth in each Trust's relevant Trust documents and Trust Offering Memorandum, and other assets belonging to the Trust, less the liabilities charged to such Trust, by the total number of Units of the Trust.

(7) The combined total of all fees paid by a participating Plan shall constitute no more than reasonable compensation within the meaning of section 408(b)(2) of the Act.

(8) The Plan does not pay any Plan-level investment management fees, investment advisory fees or similar fees to PIA with respect to any of the assets of such Plan which are invested in Units of a Trust. This condition does not preclude the payment of investment advisory or similar fees by the Trusts to PIA under the terms of investment management agreements between PIA and each of the Trusts.

(9) All authorizations and approvals made by the Independent Fiduciary regarding investment in a Trust and the fees paid to PIA are subject to an annual reauthorization wherein any such prior authorization shall be terminable at will by the Plan, without penalty to the Plan, upon written notice of termination. A form expressly providing an election to terminate the authorization (the Termination Form) with instructions on the use of the form must be supplied to the Independent Fiduciary no less than annually; provided that the Termination Form need not be supplied sooner pursuant to paragraph (10) below. The Termination Form must include the following information:

(a) The authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by PIA of written notice from the Independent Fiduciary; and

(b) Failure of the Independent Fiduciary to return the Termination Form will result in continued authorization of PIA to continue to engage in the transactions described in Sections I.

(10) PIA will provide, at least 30 days in advance of the implementation of an additional service to a Trust by PIA or a fee increase for investment

management, investment advisory or similar services, a written notice to the Independent Fiduciary of the Plan Client explaining the nature and amount of the additional service for which a fee is charged or the increase in fees.

(11) Each Plan shall receive the following:

(a) A monthly report disclosing the performance and the value of the Plan's investment in each of the Trusts. Such monthly report shall disclose the extent to which assets of a Plan have been shifted between the Trusts by PIA and any fee differential resulting from such shifting between the Trusts;

(b) An audited financial statement of each of the Trusts in which a Plan is invested, prepared annually by a independent, certified public accountant, including a list of investments of each Trust and their valuations, provided to the Plan not later than 45 days after the end of the period to which the report relates; and

(c) An annual statement of a Plan's percentage interest in each Trust and the value of the Plan's Units, provided to the Plan not later than 45 days after the end of the period to which the report relates. Such report shall also include the total fees paid to PIA by each Trust. Further, such report shall also include the brokerage fees paid by each Trust to unrelated broker-dealers, as well as the total of all fees and expenses paid by PIA to third parties.

(12) Brokerage transactions for the Trusts are performed by entities unrelated to PIA for no more than reasonable compensation within the meaning of section 408(b)(2) of the Act.

(13) PIA shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (14) of this section to determine whether the conditions of this exemption have been satisfied, except that (a) prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of PIA, the records are lost or destroyed prior to the end of the six year period, and (b) no party in interest other than PIA shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to 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 (14) below.

(14) (a) Except as provided in section (b) of this paragraph and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (13) of this section shall be unconditionally available at their

⁶A MEWA is defined in section 3 (40)(A) of the Act and provides benefits described in section 3(1) of the Act for employees of two or more employers. Although the term "MET" is not used or defined in Title I of the Act, a MET may be covered by Title I of the Act, to the extent that it provides benefits described in section 3(1) of the Act and it is established or maintained by an employer, an employee organization, or both. A VEBA is defined in section 501(c)(9) of the Code and is subject to Title I to the extent that it provides benefits described in section 3(1) of the Act and it is established or maintained by an employer, an employee organization, or both.

customary location during normal business hours for examination by:

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

(2) Any Independent Fiduciary of a Plan investing in a Trust, or any duly authorized representative of such fiduciary;

(3) Any contributing employer to any Plan investing in a Trust, or any duly authorized employee representative of such employer;

(4) Any participant or beneficiary of any participating Plan investing in a Trust, or any duly authorized representative of such participant or beneficiary; and

(5) Any other person or entity investing in a Trust.

(b) None of the persons described above in subparagraphs (2)–(5) of this paragraph (14) shall be authorized to examine the trade secrets of PIA or commercial or financial information which is privileged.

EFFECTIVE DATE: This exemption is effective August 29, 1997.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on July 20, 1998 at 63 FR 38855.

Written Comments

The applicant submitted a letter and certain other information commenting on the notice of proposed exemption (the Notice) and the Summary of Facts and Representations contained therein (the Summary). The major points raised by such comments are summarized below.

First, the applicant states that references made in the Notice to the "Pacific Income Advisers International Group Investment Trust" should be changed to refer to the "Pacific Income Advisers Global Group Investment Trust". Thus, the applicant requests that the first reference to this Trust in the operative language of the exemption should be changed to reflect the proper name, and that references made thereafter in the exemption to the "International Trust" should be changed to refer to the "Global Trust".

The Department acknowledges the applicant's request and has so modified the language of the exemption.

Second, with respect to Paragraphs 4, 5 and 7 of the Summary, the applicant's comments seek to clarify the relationships between PIA and its clients, including the Plans. In this regard, the applicant states that it is unlikely that a Plan would discontinue a separate account investment advisory

relationship with PIA and subsequently invest all of its assets under PIA's management in Units of one or more of the Trusts. The applicant states that it would be more likely that a Plan would instruct PIA to sell some of the assets separately managed by PIA and invest the proceeds in such Units.

Third, with respect to the discussion in Paragraph 10 of the Summary regarding the fees charged to Plans for investments in each of the Trusts, the applicant's comments state that the investment advisory fees payable to PIA by each Trust are subject to change. Such change must be approved in accordance with the terms and conditions set forth in the Notice and this exemption. Thus, for example, Section II(10) of this exemption requires that PIA provide, at least 30 days in advance of the implementation of any fee increase for investment management, investment advisory or similar services, a written notice to the Independent Fiduciary of the Plan explaining the increase in fees. Section II(9)(a) and (b) also requires that the Independent Fiduciary be provided with a Termination Form which allows the Plan to authorize such a fee increase under the procedures described therein.

The Department acknowledges these and other clarifications to the information contained in the Summary, as stated in the applicant's comment letter and accompanying materials.

Accordingly, the Department has determined to grant the exemption as modified.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, D.C., this 4th day of November, 1998.

Ivan Strasfeld,

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

[FR Doc. 98-29963 Filed 11-6-98; 8:45 am]

BILLING CODE 4510-29-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Services—Washington, DC.

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before December 24, 1998. Once the appraisal of the records is completed, NARA will