Explanation of Table

Column 1: This column shows each State's unemployment rate for the twelve months ending September 1995.

Column 2: This column shows the amount of excess funds which are subject to recapture. PY 1995 funds in an amount equal to the excess funds identified will be recaptured from such States and distributed as discussed below.

Column 3: This column shows total excess funds distributed among all ''eligible States'' by applying the regular Title III formula. ''Eligible States'' are those with unexpended PY 1994 funds at or below the level of 20 percent of their PY 1994 formula allotments as described above.

Column 4: Eligible States with unemployment rates higher than the national average, which was 5.6 percent for the 12-month period, are ''eligible high unemployment States.'' These eligible high unemployment States received amounts equal to their share of the excess funds (the amounts shown in column 3) according to the regular Title III formula. This is Step 1 of the reallotment process. These amounts are shown in column 4 and total $8,823, 675.

Column 5: The sum of the remaining shares of available funds ($3,669,500) for eligible States with unemployment rates less than or equal to the national average is distributed among all eligible States, again using the regular Title III allotment formula. This is Step 2 of the reallotment process. These amounts are shown in column 5.

Column 6: Net changes in PY 1995 formula allotment are presented. This column represents the decreases in Title III funds shown in column 2, and the increases in Title III funds shown in columns 4 and 5. NOOs in the amounts shown in column 6 are being issued to the States listed.

Equitable Procedures

Pursuant to section 303(d) of the Act, Governors of States required to make funds available for reallotment shall prescribe equitable procedures for making funds available from the State and substate grantees. 29 U.S.C. 1653(d).

Distribution of Funds

Funds are being reallotted by the Secretary in accordance with section 303(a), (b), and (c) of the Act, using the factors described in section 302(b) of the Act. 29 U.S.C. 1652(b) and 1653(a), (b), and (c). Distribution within States of funds allotted to States shall be in accordance with section 302(c) and (d) of the Act (29 U.S.C. 1652(c) and (d)), and the JTPA regulation at 20 CFR 631.12(d).

Signed at Washington, DC, this 26th day of January, 1996.

Timothy M. Barnicle,

Assistant Secretary of Labor.

[FR Doc. 96–1914 Filed 1–30–96; 8:45 am]

BILLING CODE 4510–30–M

Pension and Welfare Benefits Administration

[Application No. D–0948, et al.]

Proposed Exemptions; Associated Hospital Service of Maine d/b/a Blue Cross and Blue Shield of Maine) and Blue Alliance Mutual Insurance Company, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

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

Notice to Interested Persons

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

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

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

Associated Hospital Service of Maine, (d/b/a Blue Cross and Blue Shield of Maine) and Blue Alliance Mutual Insurance Company, Located in Portland, Maine

[Application No. D–09848]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) and (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 [1] shall not apply, effective August 18, 1993, to the past sales of certain securities (the Securities) by the Associated Hospital Service of Maine Retirement Plan (the Plan) to the Associated Hospital Service of Maine (d/b/a Blue Cross and Blue Shield of Maine) (BCBSME) and Blue Alliance Mutual Insurance Company (Blue Alliance) (collectively, the Applicants), parties in interest with respect to the Plan; provided that the following conditions were met: (a) The sales of the Securities were one-time transactions for cash; (b) the purchase price paid by BCBSME and Blue Alliance was no less than the fair market value of the Securities on the date of the sales; (c) the fair market value of the Securities were determined by reference to an objective third party pricing service, as of the date of the sales; (d) the terms of the transactions were no less favorable to the Plan than those obtainable in similar transactions negotiated at arm's length with unrelated third parties; and (e) the Plan paid no costs, fees, or commissions associated with the transactions, nor other expenses associated with the application for exemption.

EFFECTIVE DATE: If this proposed exemption is granted, it will be effective on August 18, 1993, the date of the sales of the Securities to BCBSME and Blue Alliance.

Summary of Facts and Representations

1. The Plan, established in 1953, is an individually designed, tax-qualified non-contributory defined benefit pension plan. As of July 8, 1994, the Plan had 1,009 participants including current retirees, terminated vested employees, and their beneficiaries. It is represented that the Plan has been fully funded since 1991 and no contribution was required for 1994. As of December 31, 1993, the fair market value of the assets of the Plan was $26,692,805.

The Plan provides for pension, disability retirement, and death benefits. Plan benefits are funded through the Associated Hospital Service of Maine Retirement Trust (the Trust). The Board of Directors of BCBSME appoints the Board of Trustees for the Trust (the Trustees). In this regard, in 1993 when the transaction occurred, two of the five (5) Trustees were former employees of BCBSME, two (2) individuals were officers of BCBSME, and one of the Trustees was also a member of the Board of Directors of BCBSME. It is represented that the Trustees have exclusive authority and discretion to manage and control the Plan's assets in accordance with the provisions of the Trust, including the power to appoint one or more investment managers.

The Plan covers employees of BCBSME, salaried employees of Machigonne, Inc. (Machigonne), and employees of HRS Maine, Inc., a corporation in which Machigonne holds a 45 percent (45%) ownership interest.

2. BCBSME is organized under the laws of the State of Maine as a non-profit hospital, medical, and health care service corporation. BCBSME underwrites prepaid hospital, medical, and health care service plans by providing hospital, medical and health care coverage and Medicare supplemental coverage. BCBSME is the sponsor of the Plan and a party in interest with respect to the Plan, as an employer any of whose employees are covered by the plan, pursuant to section 3(14)(C) of the Act.

3. Blue Alliance, an affiliate of BCBSME, is organized under the laws of the State of Maine as a mutual insurance company. Blue Alliance underwrites major medical and dental insurance coverage that is intended to complement the health care coverage offered to subscribers of BCBSME by covering services that are not covered under the BCBSME contracts. With some exceptions, Blue Alliance and BCBSME insurance products are offered only jointly to subscribers. As a mutual insurance company owned by its policyholders, Blue Alliance is not directly or indirectly owned in whole or in part by BCBSME. However, BCBSME controls the management and policies of Blue Alliance. In this regard, the most recent by-laws of Blue Alliance provide that all of the directors of Blue Alliance must be directors or employees of BCBSME. At the time the transactions were entered on August 18, 1993, it is represented that at least seven (7) out of twelve (12) of the directors of Blue Alliance were directors or employees of BCBSME.

Blue Alliance is not an employer of employees covered by the Plan, as all of its business functions are performed by employees of BCBSME. However, Blue alliance and BCBSME own, respectively, 15 percent (15%) and 85 percent (85%) of the stock of Machigonne which is an employer of employees covered by the Plan. Accordingly, Blue Alliance is party in interest with respect to the Plan, as an 10 percent (10%) or more owner of a participating employer in the Plan, pursuant to section 3(14)(H) of the Act.

4. The sales of the Securities for which exemptive relief is requested was part of a larger, integrated transaction that resulted in a complete restructuring of the Plan's investment program. Prior to the sales of the Securities, the investment responsibilities for the Plan were divided between an external investment advisor and the Trustees. The professional investment firm of David L. Babson & Company, Inc. was retained to invest approximately 55 to 60 percent (55% to 60%) of the assets of the Plan in domestic equity securities. The balance of the Plan's assets were invested by the Trustees in fixed income securities consisting of United States Treasury and agency notes and bonds and investment-grade corporate notes and bonds.

At the Trustees' meeting of November 18, 1991, the Trustees decided to engage an independent professional pension consulting firm. Following interviews with several firms, on April 23, 1992, the Trustees selected New England Pension Consultants (NEPC), located in Cambridge, Massachusetts. NEPC assists corporations, endowments, foundations, public funds, and Taft-Hartley accounts in pension plan investment policy development, asset allocation analysis, investment manager searches, and monitoring and performance analysis of plan asset investments. NEPC's responsibilities with respect to the Plan included a complete review and analysis of the Plan's investment structure, investment policy, asset allocation, investment performance, choice of investment managers, and manager guidelines. After conducting an in-depth study of the Plan's investment performance over the previous five (5) years, NEPC proposed that the Trustees no longer manage any of the Plan's assets. Further, NEPC suggested that the asset classes in the Plan's portfolio be expanded to include international equity, global fixed income, and real estate asset classes, as well as the existing domestic equity and fixed income classes. The Trustees adopted NEPC's proposal, with minor modifications, at their February 18, 1993, meeting.

At the same meeting, NEPC also advised the Trustees to appoint five (5) new investment managers by December 31, 1994, with the first two such managers to be in place by the end of 1993. Further, NEPC expressed a preference for having each new manager liquidate the securities, if necessary, after the assets of the Plan had been transferred to them for investment purposes, rather than have the Trustees do so. It is represented that this recommendation was made because

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

NEPC believed that in many cases a direct transfer served to minimize transaction costs. Further, NEPC believed that particularly in circumstances where plan assets are being transferred for investment from a former investment manager to a new manager, sale of such plan assets by the new manager (whose performance will be monitored on an ongoing basis) tends to maximize the return on the existing investments to such plan. It is represented that the Trustees approved NEPC's recommendations, and engaged NEPC to conduct a search for investment management candidates.

In this regard, except for the selection of a real estate investment manager which will be undertaken at the appropriate time, the restructuring of the Plan's investment program was completed by approximately May 4, 1994. Four new investment managers, Invesco Capital Management, Inc. (Invesco), Pacific Investment Management Company (PIMCO), Templeton Investment Counsel, Inc. (Templeton), and Scudder, Stevens & Clark (Scudder), were selected in 1993 and 1994 by the Trustees from a number of candidates.

With respect to the transfer of assets to Invesco, approximately 20 percent (20%) of the total assets of the Plan were transferred for purposes of active management to Invesco by June 30, 1993. It is represented that the Trustees were not required to liquidate any plan assets, because Invesco was able to accept in-kind the securities held by the Plan.

With respect to the transfer for purposes of active management of assets of the Plan to Templeton and Scudder, because these managers specialize in foreign investments, neither would accept in-kind transfers of assets from the Plan. Accordingly, the Trustees liquidated portions of the Plan's portfolio through sales to unrelated parties and instead transferred the cash proceeds to the new managers.

With respect to the transfer for purposes of active management to PIMCO of assets of the Plan, PIMCO replaced the Trustees as manager of the Plan's fixed income assets on July 22, 1993. PIMCO is a subsidiary of Pacific Financial Asset Management Corporation (PFAMCO) and manages the Managed Bond and Income Portfolio of the PFAMCO Funds, a non-load, open-end management investment company. However, as the securities owned by the Plan did not match the investment characteristics of the bonds then held in the Managed Bond and Income Portfolio, for administrative convenience, PIMCO requested that the Plan assets be transferred in cash. As of August 31, 1993, approximately 35 percent (35% of the total assets of the Plan were transferred to the Managed Bond and Income Portfolio, an investment-grade, commingled bond fund for institutional investors managed by PIMCO in cash.

5. It is represented that prior to the transfer of cash to PIMCO, the Trustees inquired of NEPC whether the securities that the Plan was required to sell in order to effectuate the transfer of assets for investment to PIMCO could be ''bundled'' and sold as a package. In this regard, NEPC advised the Trustees that either: (1) The portfolio could be liquidated in a program trade where all the securities would be sold as a group to a broker who would typically receive a premium paid by the seller to assume the market risk of subsequently liquidating such securities; or (2) the Trustees could avoid paying a premium to the broker by liquidating the securities in a series of individual transactions as market opportunities presented themselves. It is represented that after advising the Trustees of their options, NEPC did not render any advice with respect to, had no knowledge with regard to, and no further involvement with the execution of the sales of the Securities by the Plan, including the transactions with parties in interest.

The Trustees, in order to effect the transfer for purposes of active management of the assets of the Plan to PIMCO, on four (4) separate dates liquidated sixty-nine (69) different securities held by the Plan worth approximately $8.8 million. In this regard, on August 11 and August 15, 1993, the Plan sold fourteen (14) corporate bonds for approximately $1.5 million. On August 20, 1993, seventeen (17) government-backed mortgage securities and three (3) Treasury notes were sold for approximately $1.8 million. It is represented that the sales of these thirty-four (34) securities were made by the Plan on the open market to unrelated parties on the days specified.

The transactions for which retroactive relief is requested occurred on August 18, 1993, and involved one-time cash sales by the Plan of the Securities to each of the Applicants. The Securities consisted of publicly-traded United States Treasury and agency securities for which there was a readily ascertainable market price. It is represented that the Plan sold a total of twenty-six (26) securities (fourteen Treasury notes and twelve agency obligations) to BCBSME for a price of $4,470,773 and a total of nine (9) securities (five Treasury notes and four agency obligations) to Blue Alliance for a price of $1,031,516. The Securities constituted approximately 20 percent (20%) of the total Plan assets which as of July 31, 1993, were worth approximately $26,487,645. It is represented that the sales of the Securities were executed at fair market value.

6. With respect to the fair market value of the Securities, it is represented that, as of approximately 11:50 A.M. Eastern Daylight Time on August 18, 1993, the day of the sales, the Securities were worth approximately $5.4 million. In this regard, M.G.S.I. Securities, Inc., an independent brokerage firm located in Houston, Texas, supplied the fair market value contemporaneous with the actual sale of the Securities by facsimile transmission of printouts generated by The Bloomberg, a computerized, real-time independent financial reporting service. It is represented that the Trustees executed the transactions at the bid price for each of the Securities involved. Further, the application contains a schedule that compares the prices paid by the Applicants for the Securities and the prices for the Securities quoted on August 19, 1993, in the Wall Street Journal (WSJ), which reflect the market prices of the Securities, as of August 18, 1993, the day of the sales. It is represented that there was a total favorable variance to the Plan of $2,437.55 between the prices paid by the Applicants and the prices quoted in the WSJ for the Securities.

7. Subsequent to the sales of the Securities to the Applicants, PIMCO received in cash, on August 26, and August 30, 1993, $7.5 million and $1.5 million, respectively, for reinvestment in the Managed Bond and Income Portfolio. It is represented that the second transfer for management purposes included approximately $84,000 of the Plan's cash reserves in addition to the balance of cash realized from sales of the Securities to the Applicants and from sales of other securities to unrelated parties.

8. It is represented that none of the Trustees was aware that the sales of the Securities to the Applicants violated the prohibited transaction provisions of the Act until May 1994, when Ernst & Young conducted the annual independent audit of the Plan. In this regard, it is represented that the transactions were fully disclosed in the Plan's audited financial statements for the Plan Year ending December 31, 1993. It is represented that the Trustees acted entirely in good faith in believing that the transactions were not prohibited and acted to protect the Plan from abuse and unnecessary risk by

obtaining current price quotations on the date of the sales from objective third party sources to ensure that the Plan received the fair market value for the Securities. Immediately upon becoming aware that the sales to the Applicants were prohibited, the Trustees consulted legal counsel, and subsequently, filed an application for retroactive exemption, based on the applicable provisions of the Act, the Department's regulations, and ERISA Technical Release 85–1.

The Applicants submit that undoing the transactions is not possible without, at best, creating an undue risk of loss to the Plan through a series of transactions required to liquidate Plan investments with PIMCO, repurchase the Securities from the Applicants, resell those Securities to unrelated parties, and reinvest the proceeds with PIMCO. In addition, were these steps taken the Plan would be subject to brokerage fees and other transactions costs.

9. The Applicants maintain that the transactions were in the interest of the Plan in that the Trustees sought to liquidate the Securities as expeditiously as possible. In addition, although certain of the Securities were sold at a loss, the sales took place at fair market value, and such loss would not have been avoided by sales to unrelated parties. Moreover, it is represented that in the aggregate the Plan realized a substantial gain. In this regard, the Plan obtained a slightly better price for the Securities sold to the Applicants by not having to pay a premium to a broker for the liquidation of the fixed income assets and by avoiding brokerage fees (or dealer margins) and ''odd lot'' discounts. It is represented that the total sales price of the Securities aggregated $5.4 million, and the Plan gained approximately $317,000 on the sales to the Applicants.

10. It is represented that the transactions were feasible in that the sales of the Securities to the Applicants were one-time transactions in which the Plan received only cash. In addition, it is represented that the Plan was not required to pay any commissions, costs, premiums or expenses in connection with the sales. Further, the costs of filing the exemption application and of notifying interested persons will be borne by BCBSME.

11. It is represented that at the time the transactions were entered there were sufficient safeguards in place to protect the interests of the Plan and its participants and beneficiaries. In this regard, it is represented that the sales were an integral part of a comprehensive restructuring of the Plan's investment program and asset management that the Trustees had undertaken and were carrying out, pursuant to the expert advice of NEPC, an independent pension consultant. Further, the Applicants maintain that all terms and conditions of the sales were at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party. In this regard, the Securities are publicly traded on an established market, and the Plan received a sales price equal to at least the fair market value of the Securities on the date of the sales. In addition, the sales price for such Securities was determined by an independent brokerage firm, using a well-established pricing service and based on current market quotations on the date of the sales.

12. In summary, the Applicants represent that the proposed transactions meet the statutory criteria of section 408(a) of the Act because:

(a) The sales of the Securities to the Applicants were one-time transactions for cash;

(b) The purchase price paid by BCBSME and Blue Alliance was no less than the fair market value of the Securities on the date of the sales;

(c) The fair market value of the Securities were determined by reference to an objective third party pricing service, as of the date of the sales;

(d) The terms of the transactions were no less favorable to the Plan than those obtainable in similar transactions negotiated at arm's length with unrelated third parties; and

(e) The Plan paid no costs, fees, or commissions associated with the transactions, nor other expenses associated with the application for exemption.

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

Spreckels Industries, Inc. Employee Stock Ownership Plan (the ESOP); Spreckels Industries, Inc. Incentive Savings Plan for Union Hourly Employees (the Hourly Plan); and Spreckels Industries, Inc. Employees' Incentive Savings Plan (the Incentive Plan; collectively, the Plans) Located in Pleasanton, California,

[Application Nos. D–09999 through D–10001

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 407(a), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (E) of the Code,[2] shall not apply to the proposed acquisition, holding or exercise by the Plans of certain warrants (the Warrants) for the purchase of Class A new common stock (the New Common Stock) of Spreckels Industries, Inc. (the Employer), a party in interest with respect to the Plans; provided that the following conditions are satisfied:

(a) An independent fiduciary (the I/F) will manage the Warrants and monitor the value of the Warrants at all times and will be empowered to assign, transfer, sell, and exercise the Warrants in order to serve the best interest of the Plans and their participants and beneficiaries;

(b) The fair market value of the Warrants will at no time exceed twenty-five percent (25%) of the value of the total assets of the Hourly Plan or the Incentive Plan;

(c) The Warrants that the Plans will acquire resulted from a bankruptcy proceeding, in which all holders of the Class A old common stock (the Old Common Stock) in Spreckels Industries, Inc. (Old Spreckels) were treated in a like manner, including the Plans;

(d) The Plans will not incur any expenses or fees in connection with the proposed transactions;

(e) Any assignment, sale, or other transfer of the Warrants will not involve a party in interest with respect to the Plans, as defined in section 3(14) of the Act, unless such transfer is to the Employer, pursuant to an exercise of the Warrants; and

(f) The I/F will determine the fair market value of the Warrants upon acquisition by the Plans, and an independent qualified appraiser will determine the fair market value of the Warrants on a periodic basis (but not less frequently than annually).

Summary of Facts and Representations

1. The Employer, a Delaware corporation with offices in Pleasanton California, is a holding company that operates through ten (10) wholly-owned subsidiaries. Through these subsidiaries, the Employer engages in three principal businesses: (a) The production and marketing of sugar products in the United States; (b) the production and marketing of electrical

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

and manual hoists, actuators, rotating joints, jacks, and other materials-handling equipment; and (c) the production and sale of a wide range of speciality industrial products, including circuit breakers, hydraulic scissors-lifts, and machine parts.

2. The Plans are defined contribution plans created for its employees by Old Spreckels. Pursuant to the reorganization in bankruptcy of Old Spreckels, as more fully discussed below, the Employer became the sponsor of the ESOP, the Hourly Plan, and the Incentive Plan.

The ESOP was designed to compensate employees for services rendered by giving them an equity interest in Old Spreckels. In this regard, all of the ESOP's stock in Old Spreckels was acquired in a leveraged transaction in January of 1988. It is represented that such stock in Old Spreckels was allocated to the accounts of the participants in the ESOP, over a five (5) year period ending in 1992.[3] As of April 14, 1995, the ESOP had 947 participants and beneficiaries. The assets of the ESOP totalled $1,344,599, as of December 31, 1994.

A committee of five (5) individuals serves as named co-fiduciary with the Employer, with respect to the administration, operation, control, and management of the ESOP. The trustee for the ESOP is the Business Trust Department of First Interstate Bank in San Francisco, California. It is represented that the trustee's fees and other administrative expenses of the ESOP are paid by the Employer.

The Hourly Plan is intended to qualify as a profit-sharing plan under section 401(a) of the Code and contains a salary deferral agreement that is intended to qualify under section 401(k) of the Code. As of April 14, 1995, the Hourly Plan had 1084 participants and beneficiaries. The assets of the Hourly Plan totalled $1,251,916, as of December 31, 1994.

The Hourly Plan was established by Old Spreckels, as of July 1, 1991, to assist eligible employees in accumulating funds for retirement by providing a regular means of savings. Eligible employees include union hourly employees of the Employer or any participating subsidiary. Enrollment in the Hourly Plan is voluntary, and employees are eligible to become participants after the completion of thirty (30) days of employment. It is represented that the Hourly Plan is an eligible individual account plan, as defined under section 407(d)(3) of the Act. Employee contributions are directed by participants in the Hourly Plan into two investment fund options. The first option is a common stock and short-term investment fund that invests primarily in the common stock of the Employer. The second option is a guaranteed income fund that invests in contracts issued primarily by insurance companies. Participants may also elect to make after-tax and tax-deferred contributions to the Hourly Plan. The Employer's matching contributions to the Hourly Plan are based on the attainment of financial targets by the Employer and each of its operating subsidiaries.

The Incentive Plan was established by Old Spreckels to assist eligible employees in accumulating funds for retirement by providing a regular means of savings. Eligible employees include any salaried or non-union hourly employee who is employed on a regular full-time basis by the Employer or a participating subsidiary. Such employee is eligible to become a participant on the first day of the month following the completion of a month of continuous service. It is represented that the Incentive Plan is an eligible individual account plan, as defined under section 407(d)(3) of the Act. Participants in the Incentive Plan may direct their contributions (and earnings thereon) into various investment funds offered by the Incentive Plan, including a common stock and short-term investment fund that invests primarily in the common stock of the Employer. The Employer may elect to make matching contributions to the Incentive Plan, based on total eligible tax-deferred and after-tax employee contributions. As of April 14, 1995, the Incentive Plan had 1006 participants and beneficiaries. The assets of the Incentive Plan totalled $35,207,827, as of December 31, 1994.

All of the assets of the Hourly Plan and the Incentive Plan are held in trust by the same trustee. Effective January 1, 1995: (a) The trustee of the Hourly Plan and the Incentive Plan changed from Bank of America to Harris Bank & Trust; (b) the recordkeeper of the Hourly Plan and the Incentive Plan changed from Buck Consultants to William M. Mercer, Inc.; and (c) the Hourly Plan and the Incentive Plan became responsible for paying the trustee's fees, instead of the Employer.

3. On October 14, 1992, Old Spreckels filed a voluntary petition for bankruptcy with the United States Bankruptcy Court for the Northern District of California (Case No. 92–47497–J), pursuant to Chapter 11 of the Bankruptcy Code. It is represented that the bankruptcy filing was made as a result of the inability of Old Spreckels to meet scheduled payments of principal and interest on long-term debt in the amount of approximately $140 million dollars. At the time the bankruptcy petition was filed, Old Spreckels was a holding company with ten (10) wholly-owned operating subsidiaries. It is represented that none of the operating subsidiaries of Old Spreckels were part of the Chapter 11 filing.

On June 22, 1993, the Bankruptcy Court held a hearing on the Third Amended Plan of Reorganization (the Reorganization Plan) of Old Spreckels. The Reorganization Plan was confirmed by the Bankruptcy Court on August 4, 1993. Subsequently, on September 2, 1993, Old Spreckels emerged from Chapter 11 of the federal bankruptcy law, reorganized as the Employer.

4. Prior to its reorganization, the authorized capital stock of Old Spreckels consisted of 15 million shares of Class A voting Old Common Stock, 15 million shares of Class B non-voting Old Common Stock, and one million shares of preferred stock. Pursuant to the Reorganization Plan of Old Spreckels, all of the shares of outstanding Old Common Stock were cancelled and exchanged for shares of the New Common Stock of the Employer, and approximately $75 million dollars worth of the long term debt of Old Spreckels was converted into equity of the Employer. The effect of such conversion was to significantly reduce the debt of the Employer in comparison to Old Spreckels. It is represented that the exchange ratio of 9.9088387 shares of Old Common Stock for one share of New Common Stock was the same for all equity holders.

Old Spreckels was required prior to the hearing on August 4, 1993, which confirmed the Reorganization Plan to file with the Bankruptcy Court a new certificate of incorporation and new by-laws for the Employer. The certificate of incorporation of the Employer authorized the issuance of 15 million shares of New Common Stock, but did not authorize the issuance of preferred or other non-voting stock. As provided in the Reorganization Plan, 6 million shares of New Common Stock were issued along with Warrants to purchase New Common Stock. On September 3, 1993, it is represented that the par value of the New Common Stock was $.01 per share. On January 6, 1994, the New Common Stock was listed on the National Association of Security Dealers Automated Quotations System (NASDAQ). It is represented that on

[3] The Department expresses no opinion herein, as to whether the described transactions relating to the ESOP satisfy the conditions set forth under section 408(b)(3) of the Act.

September 14, 1995, the closing price of the New Common Stock on the NASDAQ National Market was $9.00 per share.

5. Prior to confirmation on August 4, 1993, of the reorganization of Old Spreckels, it is represented that the ESOP, the Hourly Plan, and the Incentive Plan held, respectively, 2,054,250 shares, 39,586 shares, and 419,064 shares of Class A Old Common Stock, which constituted approximately 41%, .8%, and 8.3% of the Old Common Stock then issued. As of June 30, 1993, the fair market value of the old Common Stock held by the ESOP, the Hourly Plan, and the Incentive Plan, respectively, was approximately $1,705,028, $32,856, and $347,823. As of June 30, 1993, the Old Common Stock represented approximately 100%, 4.8% and 1%, respectively, of the total assets of the ESOP, the Hourly Plan, and the Incentive Plan.

It is represented that post-confirmation, the Plans, like all other similarly situated shareholders of Old Common Stock, received their *pro rata* share of the New Common Stock in exchange for Old Common Stock. The ESOP, the Hourly Plan, and the Incentive Plan, respectively, were issued 207,315 shares, 3,995 shares, and 42,292 shares of New Common Stock, which constituted approximately 3.5%, .1%, and .7% of the then issued shares of New Common Stock. As of October 31, 1993, the New Common Stock constituted 100 percent (100%) of the assets of the ESOP. As of November 30, 1993, the New Common Stock held by the Hourly Plan and the Incentive Plan represented approximately 4.1% and 1% of the total assets of those two plans, respectively. It is represented that the Old Common Stock and the New Common Stock are ''qualifying employer securities,'' as defined in section 407(d)(5) of the Act.[4]

On April 14, 1995, the ESOP, the Hourly, and the Incentive Plan, respectively, held 186,680 shares, 18,735 shares, and 11,252 shares which constituted approximately 3.11%, .31% and .187% of the then issued shares of New Common Stock. Subsequently, as of September 20, 1995, the percentage of shares of New Common Stock in the ESOP, the Hourly Plan, and the Incentive Plan when compared to the approximately 5,599,900 shares of New Common Stock then issued and outstanding was, respectively, 2.5% (151,352 shares), .74% (44,412 shares) and 3.9% (233,252 shares).

6. Pursuant to the reorganization, the Plans, like all other similarly situated shareholders of Old Common Stock, in addition to receiving New Common Stock were also entitled to receive a *pro rata* share of Warrants to purchase additional shares of New Common Stock. The Warrants are not registered with the Securities and Exchange Commission, and are not freely transferrable or marketable. Holders of the Warrants are not generally entitled to vote, to receive dividends, or to be deemed holders of New Common Stock. It is represented that the Warrants will expire on September 2, 2001, and are subject to all applicable federal and state securities laws. The Plans will receive the Warrants following the grant of this exemption.

Once acquired the Warrants must be held, by the Plans and all other similarly situated shareholders of Old Common Stock, until such time as the Warrants may be exercised, transferred, or assigned pursuant to their terms. The Warrants to be received by the Plans are divided into three classes as follows: (a) The First Old Equity Warrants—Series B (the First Old Equity Warrants); (b) the Second Old Equity Warrants; and (c) the Third Old Equity Warrants. Generally, each of the First Old Equity Warrants and each of the Second Old Equity Warrants are exercisable for one share of New Common Stock by the holder at the price discussed in the paragraph below, at any time or from time to time, during the term of such Warrants, in whole or in part (but, if in part, in multiples of 1,000 shares). Each of the Third Old Equity Warrants are exercisable, at the price discussed in the paragraph below, for one share of New Common Stock, but not until the closing price of the New Common Stock shall have equaled or exceeded $17.50 for twenty (20) consecutive days, and thereafter, regardless of whether or not the closing price of such stock shall be above or below $17.50, may be exercisable by the holder in whole or in part (but, if in part, in multiples of 1,000 shares).

The terms of the Warrants provide for the adjustment of the exercise price and the number of shares of New Common Stock purchasable under the Warrants upon the occurrence of certain events, such as a change in the corporate structure of the Employer and changes in the form and/or value of New Common Stock. Subject to adjustment under certain circumstances, the exercise price for the First Old Equity Warrants, the Second Old Equity Warrants, and the Third Old Equity Warrants is, respectively $11.67, $15.00, and $1.00.

7. The applicant represents that it believes that the Warrants are securities under federal securities law but are not ''qualifying employer securities,'' as defined in section 407(d)(5) of the Act. Accordingly, the ESOP, the Hourly Plan, and the Incentive Plan seek exemptive relief to acquire and hold, in the aggregate, 132,189 First Old Equity Warrants, 462,664 Second Old Equity Warrants, and 132,189 Third Old Equity Warrants. The Employer represents that the Plans will be amended in all necessary respects to provide for, among other things, the acquisition, retention, exercise, transfer, assignment, and distribution of the Warrants. It is represented that the Warrants will not be issued to the Plans, unless this proposed exemption is granted.

8. The applicant points out that the transactions do not arise from the ordinary course of business, but arise as a result of an extraordinary event (i.e. the issuance of the Warrants to stockholders of Old Common Stock under the terms of the Reorganization Plan of Old Spreckels approved by the Bankruptcy Court). It is represented that the Bankruptcy Court has approved the Reorganization Plans as the best means of providing creditors and equity holders, including the Plans, with a fair opportunity to recover from the reorganization of Old Spreckels and to profit from the success of the Employer. It is represented that the Warrants which the Plans will acquire resulted from the bankruptcy proceeding, in which all holders of the Class A Old Common Stock were treated in like manner, including the Plans. It is further represented that during the bankruptcy proceeding, the ESOP was represented by the law firm of Wendel, Rosen, Black, Dean, and Levitan, an independent fiduciary appointed by the Bankruptcy Court. In this regard, the applicant maintains that the interests of the Hourly Plan and the Incentive Plan were substantially similar to those of the ESOP and that thus such plans were well protected during the bankruptcy proceeding.[5]

The applicant maintains that the transactions are in the interest of the

[4] The Department, herein, expresses no opinion as to whether the Old Common Stock or the New Common Stock constitute ''qualifying employer securities,'' as defined in section 407(d)(5) of the Act, or whether the acquisition and holding by the Plans of such securities satisfied the conditions, as set forth under section 408(e) of the Act. Further, the Department, herein, is offering no relief for transactions other than those proposed.

[5] The relief provided in this exemption is limited to the acquisition, holding or exercise by the Plans of the Warrants. The Department, herein, expresses no opinion as to whether any of the relevant provisions of part 4, subpart B, of Title I of the Act have been violated regarding the representation of the Plans' interest in the bankruptcy proceeding or the ultimate outcome of such proceeding, and no exemption from such provisions is proposed herein.

Plans. In this regard, it is represented that the acquisition of the Warrants offers an opportunity for economic gain to the Plans, in that the Plans could exercise the Warrants and purchase New Common Stock at a favorable price, if the price of such stock rises above the exercise price. Further, the Plans would experience a loss if they, unlike all other similarly situated shareholders of Old Common Stock, were not permitted to receive the full value under the terms of the Reorganization Plan. The applicant maintains that the Plans should not be made to suffer a detriment relative to such other shareholders of Old Common Stock.

The applicant maintains that the Plans and their participants and beneficiaries were protected during the bankruptcy proceedings, in that the process afforded the Plans the same opportunity pursuant to the terms of the Reorganization Plan to acquire the New Common Stock and the Warrants. In this regard, it is represented that the terms of the Reorganization Plan apply in the same manner to all shareholders of the Class A Old Common Stock, including the Plans.

It is represented that the Plans will not incur any expenses or fees in connection with the proposed transactions. Further, the costs of filing the exemption application and of notifying interested persons will be borne by the Employer.

9. If this proposed exemption is approved, the Employer will issue in the aggregate approximately 594,343 Warrants to the ESOP. Specifically, the ESOP will receive 108,062 First Old Equity Warrants, 378,219 Second Old Equity Warrants, and 108,062 Third Old Equity Warrants. With regard to the allocation of the Warrants, it is represented that each participant will receive a *pro rata* share of the Warrants issued to the ESOP based on the number of shares of Old Common Stock in such participant's account just prior to the conversion to New Common Stock. It is represented that this allocation of the Warrants to the ESOP participants will be made in whole numbers of Warrants, and any fractional interest will be rounded to the nearest whole number. If a participant in the ESOP terminates employment and requests a distribution when unexercised and unsold Warrants still remain allocated to this account, the Warrants will be distributed to the participant in-kind, in the same manner and at the same time as any New Common Stock in such account is distributed to such participant.

Provided this proposed exemption is granted, the Employer will also issue approximately 11,452 Warrants to the Hourly Plan. Specifically, the Hourly Plan will receive 2,082 First Old Equity Warrants, 7,288 Second Old Equity Warrants, and 2,082 Third Old Equity Warrants. With respect to the Hourly Plan, the Warrants will be allocated to and held in a fund which currently holds the New Common Stock and investments with up to 360 days' maturity. Once the Warrants are allocated to the fund, the value of the Warrants in such fund, as determined by the I/F, will be reflected in the units received by each participant of the Hourly Plan invested in such fund.

If the Department grants this proposed exemption, the Employer will issue approximately 121,247 Warrants to the Incentive Plan. Specifically, the Incentive Plan will receive 22,045 First Old Equity Warrants, 77,157 Second Old Equity Warrants, and 22,045 Third Old Equity Warrants. With respect to the Incentive Plan, the Warrants will be allocated to an investment fund which holds New Common Stock and investments with up to 360 days' maturity. Each participant in the Incentive Plan invested in such fund will receive units based on his investments in the fund and on the addition of the value of the Warrants, as determined by the I/F, to such fund. It is represented that the Incentive Plan will manage the Warrants in exactly the same manner as the Hourly Plan.

10. Pursuant to the terms of an agreement signed January 17, 1995, L. Scott Maclise (Mr. Maclise), a registered investment advisor with Linsco/Private Ledger Financial Services (LPL), in San Rafael, California, has accepted the appointment to serve as the I/F on behalf of the Plans for purposes of this exemption, and except in the event of his discharge or resignation, as described below, will serve throughout the duration of the transactions which are the subject of this exemption. In this regard, Mr. Maclise states that he understands his duties as I/F under the Act and shall assume all duties, responsibilities, and obligations imposed upon him as I/F of the Plans in connection with the proposed transactions, pursuant to the provisions of the Act and the Code.

Mr. Maclise represents that he is qualified to serve as I/F with respect to the Plans. In this regard, Mr. Maclise states that he is experienced in representing clients as a fiduciary in stock transactions. Mr. Maclise is a graduate of California State University in San Francisco. Before joining LPL in 1992, Mr. Maclise had sixteen (16) years of investment experience with other firms, including Dean Witter, Merrill Lynch, and Shearson Lehman Brothers.

Mr. Maclise represents that he is independent of the Employer and its officers, directors, shareholders, agents, and representatives. In this regard, Mr. Maclise represents that he is not affiliated with the Employer and that his income from the Employer represents less that 1 percent (1%) of his income annually. It is further represented that Mr. Maclise shall have the power to negotiate and act independently of the Employer, and its officers, directors, shareholders, agents, and representatives with respect to the proposed transactions.

In fulfilling his responsibility as I/F to the Plans, Mr. Maclise represents that he will take whatever acts are necessary to review, analyze, negotiate, monitor, and approve or disapprove the proposed transactions, and will be responsible for the Plans' acquisition and holding of the Warrants. Bearing in mind his fiduciary duties under the Act, Mr. Maclise represents that he shall determine whether the proposed transactions: (a) Are prudent and for the exclusive purpose of providing benefits to participants; (b) are fair to the Plans from a financial point of view; and (c) are in accordance with terms and conditions, as set forth in this proposed exemption.

With respect to the acquisition of the Warrants by the Plans, Mr. Maclise represents that he will conduct due diligence to evaluate whether the Plans should enter into the proposed transactions. In this regard, Mr. Maclise will decide on behalf of the Plans (a) whether or not the Plans should acquire and hold the Warrants; and (b) when, if at all, the Warrants should be exercised to acquire New Common Stock, or sold and the proceeds used to acquire such stock.

With respect to the holding of the Warrants by the Plans, Mr. Maclise has determined that the Plans' holding of the Warrants will not impair diversification, prudence, or liquidity as mandated by the Act. In this regard, Mr. Maclise represents that he retains full power to manage and monitor the value of the Warrants at all times and is empowered to assign, transfer, sell, and exercise the Warrants in order to serve the best interests of the participants and beneficiaries of the Plans.

Mr. Maclise may resign his appointment as I/F at any time upon six (6) months prior written notice, unless the Employer and Mr. Maclise mutually agree to a shorter period of time. In addition, it is represented that the Employer can remove Mr. Maclise as I/F "for cause," upon thirty (30) days' prior written notice, unless the Employer and Mr. Maclise mutually

agree to a shorter period of time. It is represented that ''for cause'' means a breach of the agreement between the Employer and Mr. Maclise, or the I/F's negligence, gross negligence, willful misconduct or lack of good faith in the execution of his duties, or in the event Mr. Maclise's fee for the services is being renegotiated, the inability of the Employer and Mr. Maclise to agree upon the fee under such agreement.

11. It is represented that the I/F will determine the fair market value of the Warrants upon acquisition by the Plan. It is further represented that, as appropriate, the Warrants will be appraised by an independent appraiser. Such appraisals will be done on a periodic basis (but not less frequently than annually).

12. In summary, the applicant represents that the proposed transactions meet the statutory critiera of section 408(a) of the Act because:

(a) The I/F will manage the Warrants and monitor the value of the Warrants at all times and will be empowered to assign, transfer, sell, and exercise the Warrants in order to serve the best interest of the Plans and their participants and beneficiaries;

(b) The fair market value of the Warrants will at no time exceed twenty-five percent (25%) of the value of the total assets of the Hourly Plan or the Incentive Plan;

(c) The Warrants that the Plans will acquire resulted from a bankruptcy proceeding, in which all holders of the Class A Old Common Stock in Old Spreckels were treated in a like manner, including the Plans;

(d) The Plans will not incur any expenses or fees in connection with the proposed transactions;

(e) Any assignment, sale, or other transfer of the Warrants will not be to a party in interest with respect to the Plans, as defined in section 3(14) of the Act, unless such transfer is to the Employer, pursuant to an exercise of the Warrants; and

(f) The I/F will determine the fair market value of the Warrants upon acquisition by the Plans, and an independent qualified appraiser will determine the fair market value of the Warrants on a periodic basis (but not less frequently than annually).

Notice to Interested Persons

Included among those persons who may be interested in the pendency of the proposed exemption are all fiduciaries, all active participants, and all inactive participants of the Plans. It is represented that these various classes of interested persons will be provided with a copy of the Notice of Proposed Exemption (the Notice), plus a copy of the supplemental statement (Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2) within fifteen (15) calendar days of publication of the Notice in the Federal Register. Notification will be provided to all fiduciaries and all inactive participants of the Plans either by mailing first class or overnight express delivery of a copy of the Notice, plus a copy of the Supplemental Statement. Notification will be provided to active participants by posting a copy of the Notice, plus a copy of the Supplemental Statement at those locations within the principal places of employment of the Employer which are customarily used for notices regarding labor-management matters for review.

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

H.E.B. Investment and Retirement Plan (the Plan), Located in San Antonio, Texas

[Application No. D–10035]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale by the Plan to H.E. Butt Grocery Company (the Company), a party in interest with respect to the Plan, of an interest in a certain parcel of improved real property (the Property) known as the South Congress Shopping Center in Austin, Texas, provided that the following conditions are met:

(a) The sale is a one-time transaction for cash;

(b) The Plan will receive an amount equal to the greater of either: (1) $2,975,666, or (2) the fair market value of the Property at the time of the transaction, as determined by a qualified, independent appraiser;

(c) The Plan will not pay any commissions or other expenses with respect to the sale; and

(d) The Plan's trustees determine that the sale of the Property to the Company is appropriate for the Plan and in the best interests of the Plan and its participants and beneficiaries at the time of transaction.

Summary of Facts and Representations

1. The Company is a Texas corporation engaged primarily in the retail grocery business in Texas. The Company has sponsored the Plan since 1956. The Plan has also been adopted by the following entities which are affiliated with the Company: HEBCO Partners, Ltd., Parkway Distributors, Inc., Parkway Transport, Inc., C.C. Butt Grocery Company and High-Tech Commercial Services, Inc. Parkway Distributors, Inc. and Parkway Transport, Inc., are engaged in the business of intrastate and interstate trucking.

2. The Plan is a defined contribution plan incorporating a qualified cash or deferred arrangement and had approximately 20,773 participants as of December 31, 1994. As of that date, the Plan had total assets with a fair market value of approximately $386,537,043, of which approximately 8.7% reflect direct real estate investments.

The trustees of the Plan are John C. Broulliard, James F. Clingman, Jr., Richard M. Ellwood, Bea Weicker Irvin, Louis M. Laguardia, Allen B. Market, Robert A. Neslund, Wesley D. Nelson, Todd A. Piland, Charles W. Sapp, and Edward C. Gotthordt (collectively, the Trustees). The Trustees are all either current or former officers and/or employees of the Company or its affiliates.

3. The Plan and the Company currently own interests in a tract of realty known as the South Congress Shopping Center (the Shopping Center Property), located at 2400 South Congress Avenue in the City of Austin, County of Travis, State of Texas.[6]

The Shopping Center Property consists of approximately 6.21 acres of land (the Land) and a single-story masonry, multi-tenant building with approximately 98,918 square feet (the Building). The Land is described as a

[6] The Department is providing no opinion in this proposed exemption as to whether the joint ownership by the Plan and the Company of interests in the Shopping Center Property resulted in any Plan fiduciary violating his fiduciary responsibilities under Part 4 of Title 1 of the Act. However, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. In addition, section 406(b) of the Act, in pertinent part, prohibits a fiduciary of a plan from dealing with the assets of a plan in his own interest or for his own account or from acting in any transaction on behalf of a party whose interests are adverse to the interests of the plan.

nearly rectangular corner site with 420 feet of frontage on South Congress Avenue, 620 feet along Oltorf Avenue, and 53 feet along Euclid Avenue. The Company owns the eastern 29,638 square feet of the Land, and the portions of the Building related thereto, and an additional 55x135 foot strip of the Land (i.e., 7425 square feet) at the southwest corner of the Shopping Center Property. The Plan owns the remaining portions of the Building, the Land related thereto, and a three-quarter (3/4) undivided interest in the Land used for the parking lot. (The portions of the Land and the Building owned by the Plan are referred to herein as ''the Property''.) The Company owns the remaining one-quarter (1/4) interest in the Land used for the parking lot.

The Plan acquired the Property in 1960 from the Company as an employer contribution to the Plan.[7] The Property has generated a cash-on-cash return, based on its current appraised value, of 9.1 percent, 9.5 percent, and 12.4 percent for the years 1992, 1993, and 1994, respectively. The applicant represents that the Property's total net income to the Plan has produced a reasonable rate of return as an investment for the Plan since 1960, but that there is no assurance that the current income stream from the existing leases (as noted below) will continue.

The Property is currently subdivided into separate leasehold parcels. These leasehold parcels are subject to existing leases (the Existing Leases) to the following tenants:

(i) Tandy Corporation (lease expiring December 7, 1997 with no renewal options);

(ii) Texas State Optical, Inc. (lease expiring August 31, 1996 with no renewal options);

(iii) Gregory J. Tomczyk (Mother Nature's Health Foods) (lease on a month-to-month tenancy);

(iv) Walgreen Company (lease expiring June 30, 1996 with no renewal options);

(v) Western Auto Supply Company (lease expiring January 31, 1996 with no renewal options); and

(vi) H.E. Butt Grocery Company (lease expiring June 14, 2001 with four renewal options of five years each).

The applicant states that the Plan's lease to the Company of a portion of the Property, as noted in item (vi) above, constitutes ''qualifying employer real property'' (QERP) within the meaning of section 407(d)(4) of the Act. In this regard, the applicant represents that the leasing of such parcel of the Property to the Company is and has been statutorily exempt under section 408(e) of the Act.[8]

The applicant requests an exemption for the proposed sale of the Property by the Plan to the Company. The applicant states that because the Property encompasses leasehold parcels which are *not* leased to the Company, the proposed sale of the Property to the Company would not meet the statutory requirements for an exempt sale of QERP under section 403(e) of the Act.

4. With respect to the reasons for the proposed transaction, the applicant states that the Property is in excess of 30 years old, is antiquated in appearance, and needs both interior and exterior refurbishing to compete with more modern shopping center facilities. In addition, in order to be competitive in the retail grocery market, the Company desires to expand its existing grocery store beyond the current portion of the Property which it leases from the Plan.[9] In order to effect such expansion, the applicant represents that it will be necessary to demolish other portions of the Building on the Property that are currently leased to third parties and to effect significant construction. The Company believes that it would be in a better position to effect such demolition and construction activities without the participation of the Plan and that, in fact, entering into such activities with the Plan would be inappropriate.

5. The Trustees have determined that it would be in the best interests of the Plan and its participants and beneficiaries to sell the Property to the Company for a number of reasons.

First, retail shopping centers have a certain ''life cycle'' (i.e., a period of time over which they are commercially viable without significant renovation and updating). The trustees believe that the Property has reached the end of its ''life cycle'' and needs a substantial amount of capital to renew itself and go forward on a commercially competitive basis in the future. Second, the Trustees have determined that it is not in the Plan's best interest to undertake the type of demolition and construction activities, as well as the additional interior and exterior cosmetic refurbishing, which will be necessary for the Property in order to maintain its commercial viability for the future. Third, after reviewing a current appraisal of the Property, the Trustees have concluded that it would be in the best interests of the Plan to liquidate such investment and reinvest the cash in assets which would not require the oversight, updating, construction and expenditure that will be necessary for the Property in the future.

In sum, the Trustees believe that the sale of the Property to the Company at the present time would enable the Plan to convert an existing illiquid real estate investment, which will require significant expenditures to preserve and maintain, into more liquid and potentially more profitable investments.

6. The applicant represents that the sale of the Property to the Company will be a one-time transaction for cash at a price which is no less than the fair market value of the Property as determined by an independent, qualified appraiser.

7. The Property has been appraised by Russell T. Thurman (Mr. Thurman) of Sayers & Associates, Inc., an independent, qualified real estate appraiser in Austin, Texas, as of July 31, 1995 (the Appraisal).

Mr. Thurman states that the Appraisal relied primarily on the income approach (the Income Approach) to value the Property, taking into consideration the present value of the income stream on the Existing Leases. The Income Approach was based on actual contract rents for occupied space (approximately 88% of the leasable space) and current economic market rents for vacant space (approximately 12% of the leasable space) on the Property as of July 31, 1995. In addition, the Appraisal considered the market approach (the Market Approach) to value the Property, with an analysis of recent sales of similar properties in the area. Finally, the Appraisal considered the cost approach (the Cost Approach) to value the Property, with an estimation of the reproduction cost for the improvements, minus accrued depreciation, added to the value of the Land obtained from a sales comparison approach.

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[7] The applicant represents that the acquisition preceded the effective date of the Act, but that it met the requirements of the Code which governed such transactions at that time. However, the Department expresses no opinion in this proposed exemption as to whether the Plan's acquisition of the Property satisfied the requirements of the Code.

[8] The applicant states that the parcel of the Property leased to the Company is one of several such parcels of real property leased by the Plan to the Company. The applicant maintains that such leasehold parcels are located throughout the State of Texas and that these parcels are suitable or adaptable without excessive cost for more than one use, as required by section 407(d)(4) of the Act. In addition, the applicant states that these leases did not involve the payment of any commissions and were entered into for adequate consideration, as required by section 408(e) of the Act.

In this regard, the Department is expressing no opinion as to whether the Property constitutes QERP, within the meaning of section 407(d)(4) of the Act, or whether the Plan's leasing transactions with the Company meet the conditions of section 408(e) of the Act and the regulations thereunder (see 29 CFR 2550.408e).

[9] The Company owns and occupies the eastern 29,638 square feet of the existing grocery store and leases the western 19,100 square feet of the grocery store from the Plan.

Based on this analysis, the Appraisal concluded that the fair market value of the Property, as of July 31, 1995, was $2,825,000, based on the Income Approach. However, the data provided by the Appraisal indicated that the current market value of the Property, as of such date, was approximately $3,178,000, based on the Market Approach, and $2,924,000, based on the Cost Approach. The Appraisal also concluded that the fair market value of the Shopping Center Property as of such date, including the portions of the Land and the Building owned by the Company, was $4,541,000, based on the Market Approach, and $4,287,000, based on the Cost Approach.

After reviewing the results of the Appraisal, the Company agreed to pay the Plan at least $2,975,666 for the Property, an amount determined based on the average of values provided by the Income Approach, the Market Approach, and the Cost Approach.[10]

The applicant states that the Appraisal will be updated by Mr. Thurman at the time of the proposed transaction to establish the current fair market value of the Plan's leased fee interest in the Property. For purposes of establishing the fair market value of the Property under the Income Approach, Mr. Thurman will determine the value of the Company's leasehold interest based on the greater of either (i) the actual contract rent under the Existing Lease,[11] or (ii) the fair market rental value of the leased space currently occupied by the Company.

Finally, the applicant represents that the Plan will not pay any commissions or other expenses in connection with the proposed sale.

8. In summary, the applicant represents that the proposed transaction will satisfy the statutory requirements of section 408(a) of the Act because: (a) The sale of the Property will be a one-time transaction for cash; (b) the Plan will receive a sale price for the Property which is equal to the greater of either (i) $2,975,666, or (ii) the fair market value of the Plan's leased fee interest in the Property at the time of the transaction, as determined by an independent, qualified appraiser; (c) the transaction will enable the Plan to divest itself of an illiquid real estate asset and invest the proceeds of the sale in more profitable, liquid investments; (d) the Plan will not pay any commissions or other expenses in connection with the transaction; and (3) the Trustees have determined that the sale of the Property to the Company would be appropriate for and in the best interest of the Plan and its participants and beneficiaries.

Notice of Interested Persons

The applicant states that notice of the proposed exemption shall be made to all interested persons by first class mail, except that persons who are participants in the Plan and who are actively employed by the Company, or an affiliate thereof, may be provided such notice by posting upon bulletin boards customarily used for the provision of information required to be provided to employees or by publication in one or more general employee communications.

Notice to interested persons shall be made within thirty (3) days following the publication of the proposed exemption in the Federal Register. This notice shall include a copy of the notice of proposed exemption as published in the Federal Register and a supplemental statement (see 29 CFR 2570.43(b)(2)) which informs interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within sixty (60) days following the publication of the proposed exemption in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. WIlliams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

Aircon Energy, Inc. 401(k) Profit Sharing Plan (the Plan), Located in Sacramento, California

[Application No. D–10073]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed sale by the Plan of certain office equipment (the Workstations) to Aircon Energy, Inc. (Aircon), a party in interest with respect to the Plan, provided that the following conditions are satisfied: (1) The sale is a one-time transaction for cash; (2) the Plan pays no commissions nor any other expenses relating to the sale; (3) the purchase price is the greater of: (a) The fair market value of the Workstations as determined by a qualified, independent appraiser, or (b) the Plan's initial acquisition cost plus opportunity costs attributable to the Workstations while in storage; (4) Aircon reimburses the Plan for the fair market rental value with respect to the prohibited use of certain of the Workstations; (5) Aircon reimburses the Plan for losses and opportunity costs assocaited with the sale of certain of the Workstations to an unrelated third party; and (6) within 90 days of the publication in the Federal Register of the grant of this notice of proposed exemption, Aircon files Form 5330 with the Internal Revenue Service (the Service) and pays all applicable additional excise taxes that are due by reason of the prohibited use transactions.

Summary of Facts and Representations

1. The Plan is a profit sharing plan sponsored by Aircon. As of December 31, 1994, the Plan had approximately 43 participants and total assets of approximately $1,638,373. The trustees of the Plan are officers, employees, or shareholders of Aircon as follows: Scott Slavensky, President; Atlthea Slavensky, Administrative Clerk; Frank Slavensky, Service Consultant; and Chris Costi, Shareholder. Aircon, a California corporation, is engaged in the business of installing and repairing residential and commercial heating and air conditioning systems and is located in Sacramento, California.

2. Among the assets of the Plan are 45 Workstations. The Plan originally purchased 48 used mahogany Workstations on December 8, 1989 for a total of $41,125 ($856.77 per unit), including shipping and handling costs, from an unrelated third party, R&M Office Furniture of Sacramento, California. Scott Slavensky, a Plan trustee, made the decision to invest in the Workstations after determining that the purchase price was well below the then prevailing market rate.[12] On September 30, 1993, three of the Workstations owned by the Plan were sold to an unrelated third party for $3,600 ($1,200 per unit) through Innovators Office Furniture, a broker of used office furniture. Net of commissions and other expenses of sale, the Plan received a total of $2,160 ($720 per unit).

[10] In this regard, please note that $2,825,000+$3,178,000+$2,924,000=$8,927,000 divided by 3=$2,975,666.

[11] The Appraisal states that the Company pays the Plan a base rental rate of $4,628.41 per month plus a percentage rent of 40% of the increase on gross sales over the base year (1991) for the entire premises.

[12] The Department expresses no opinion herein on whether the acquisition and holding of the Workstations by the Plan violated any of the provisions of Part 4 of Title I in the Act.

Of the remaining 45 Workstations, 25 Workstations are being held in storage, while 20 Workstations are currently being used by Aircon. The applicant represents that various Workstations were set up in Aircon's offices at various times. Initially, the Plan trustees set up four Workstations in January 1990 for demonstration purposes. Subsequently, additional Workstations came into use as follows: Six in May 1990, three in December 1992, and seven in September 1994. Aircon has paid all storage costs associated with the Workstations.

3. The applicant obtained an independent appraisal of 18 of the Workstations currently being used by Aircon from Alex Sabbadini, F.A.S.A., of Alex Sabbadini, Inc., a professional personal property appraiser in Sacramento, California. Using the sales comparison valuation method, Mr. Sabbadini estimated that the aggregate fair market value of the 18 Workstations as of March 17, 1995 was $7,245 ($402.50 per unit).

4. The applicant represents that despite diligent marketing efforts paid for by Aircon, the Plan trustees have been unable to sell the remaining Workstations and have concluded that there is no current market for the Workstations. In order to divest the Plan of non-income producing, illiquid assets, and to correct the ongoing prohibited transactions resulting from the use of 20 of the Workstations, Aircon proposes to purchase all 45 Workstations from the Plan for the greater of: (a) The fair market value of the Workstations as determined by a qualified, independent appriaser, or (b) the Plan's initial acquisition cost plus opportunity costs attributable to the Workstations. Because the fair market value of the Workstations is less than their acquisition cost, Aircon will purchase the Workstations from the Plan for the amount specified under (b) above. Accordingly, Aircon wil pay the Plan a purchase price of $51,770.34. The purchase price was calculated by taking the Workstations' acquisition cost ($38,564.65) and adding to that amount an assumed eight percent annual return[13] for each of the years the Plan has held the Workstations in storage since December 1989 ($13,205.69). Accordingly, the total opportunity costs attritutable to the Workstations while in storage was calculated as follows: [(Unit cost×No. Units×.08)/(12 Mos.)]×(No. Mos.).

Period	Unit cost	No. units	Mos. @ 8%	Opp'ty cost
12/89–4/90	$856.77	41	5	$1,170.90
5/90–11/92	856.77	35	31	6,197.21
12/92–8/94	856.77	32	21	3,838.38
9/94–10/95	856,77	25	14	1,999.20
Subtotal				13,205.69

The Plan will pay no commissions nor any other expenses relating to the sale.

5. The applicant acknowledges that Aircon's ongoing use of 20 Workstations without paying any compensation to the Plan constitutes a violation of the prohibited transaction provisions of the Act. Aircon proposes to make the Plan whole by paying the fair market rental value with respect to the prohibited use of these Workstations. The applicant represents that because the custom for the industry is a lease-to-own arrangement (rather than a pure rental), and because the total rent paid under a lease-to-own arrangement would greatly exceed the purchase price of the Workstations within a short time, a rental rate of $20 per month per unit is an appropriate rate of compensation to the Plan, a total of $17,580. This rate is at least as favorable to the Plan as that obtainable in an arm's length transaction because it is based on the average of quotes received from various local office furniture rental companies with respect to the rental value of a new executive desk with a retail price of $500. The applicant represents that the three companies contacted provided the following rental rates for such an office desk, based on a one-year contract: Evans Furniture Rental ($21 per month); Globe Furniture Rental ($19 per month); and Brook Furniture Rental ($21 per month). Moreover, a rental rate of $20 per month represents a 28 percent annual return on the initial cost per Workstation paid by the Plan. The rent is to be assessed from the time that each Workstation came into use through October 31, 1995, as follows:

Period	No. units	Mos.	Rent/mo.	Amount
01/90–10/95	4	70	$20	$5,600.00
05/90–10/95	6	66	20	7,920.00
12/92–10/95	3	35	20	2,100.00
09/94–10/95	7	14	20	1,960.00
Subtotal				17,580.00

The applicant represents that within 90 days of the publication in the Federal Register of the grant of this notice of proposed exemption, Aircon will file Form 5330 with the Service and pay all applicable additional excise taxes that are due by reason of the prohibited use transactions.

6. Aircon will also reimburse the Plan $1,267.25 for losses and opportunity costs associated with the sale of three of the Workstations to an unrelated third party on September 30, 1993. This amount was calculated as follows. Aircon will restore to the Plan $410.31, which represents the difference between the three Workstations' acquisition cost ($2,570.31) and the net sales price ($2,160). In addition, Aircon will pay the Plan $788.44, which represents an assumed eight percent annual return on the acquisition cost of the three Workstations while in storage for the period from December 1989 to

[13] The Department notes the applicant's representation that the eight percent figure is 105% of the five-year average of the Applicable Federal Funds Rate (AFR). The AFR is calculated by the Service and is used for determining reasonable rates of interest. The applicant represents that the AFR is thus an appopriate measure to calculate opportunity costs attributable to the Workstations.

September 30, 1993. Finally, Aircon will pay the Plan $68.50, which represents an assumed eight percent annual return for the period from October 1993 to October 31, 1995 on the $410.31 loss the Plan incurred on the sale of the three Workstations.

7. Aircon's total obligation to the Plan will thus be $70,617.59 and was calculated as follows:

Acquisition cost of 45 Workstations	$38,564.65
Opp'ty costs on 45 Workstations in storage	13,205.69
Fair market rental value of 20 Workstations	17,580.00
Loss and opp'ty costs on 3 Workstations sold	1,267.25
Total	70,617.59

The applicant represents that the proposed transaction is in the interests of the Plan because if the Plan is forced to attempt a sale of the Workstations on the open market, the Plan will receive substantially less than the amount the applicant is willing to pay. In addition, the sale will convert non-income producing, illiquid assets into liquid assets that could then be redirected into more productive investments.

8. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(1) The sale will be a one-time transaction for cash; (2) the Plan will pay no commissions nor any other expenses relating to the sale; (3) the sale will enhance the liquidity of the assets of the Plan; (4) the sale will enable Aircon to correct ongoing prohibited transactions; (5) the purchase price will be the greater of: (a) The fair market value of the Workstations as determined by a qualified, independent appraiser, or (b) the Plan's initial acquisition cost plus opportunity costs attributable to the Workstations while in storage; (6) Aircon will reimburse the Plan for the fair market rental value with respect to the prohibited use of 20 of the Workstations; (7) Aircon will reimburse the Plan for losses and opportunity costs associated with the sale of three of the Workstations; and (8) within 90 days of the publication in the Federal Register of the grant of this notice of proposed exemption, Aircon will file Form 5330 with the Service and pay all applicable additional excise taxes that are due by reason of the prohibited use transactions.

Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and therefore must be examined under applicable provisions of the Code, including sections 401(a)(4), 404 and 415.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons by personal delivery and by first-class mail within 15 days of the date of publication of the notice of pendency in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and/or to request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 45 days of the date of publication of this notice in the Federal Register.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 25th day of January, 1996.

Ivan Strasfeld,

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

[FR Doc. 96–1778 Filed 1–30–96; 8:45 am]

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[Prohibited Transaction Exemption 96–1; Exemption Application No. D–09877, et al.]

Grant of Individual Exemptions; First Hawaiian Bank, et al.

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, DC. 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.