

5. The Interest, the sole value of which is the Plan's undivided 2.86% interest in the Tucson Property, was appraised as of July 19, 1996 by Mr. Thomas A. Baker, MAI, SRA, a State of Arizona Certified General Real Estate Appraiser who is independent of the Plan and RSC. Mr. Baker applied the direct sales comparison approach to determine both the market value and fee simple interest of the total property and of the Plan's 2.86% interest in the subject property.

In addition, the appraiser used comparable sale information of partial interest sales in order to determine the fair market value of the Plan's 2.86% Interest in the REIT. Mr. Baker concluded that the fair market value of the Plan's 2.86% interest in the REIT, as of July 19, 1996 was \$10,900.

6. RSC represents that the plan would incur no expenses nor commissions with respect to the Sale. The applicant also represents that the proposed transaction is administratively feasible and protective of the Plan's participants and beneficiaries. Furthermore, the applicant represents that any amounts received by the Plan as a result of the Sale, which are in excess of the fair market value of the Interest, will be treated as contributions to the Plan, but that these contributions will not exceed limitations of section 415 of the Internal Revenue Code.

7. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (1) The Sale will be a one-time transaction for cash; (2) no commissions or fees will be paid by the Plan as a result of the Sale; (3) the Sale will facilitate full implementation of participant-directed investing of accounts, which was adopted by the Plan in January, 1994; and (4) the Sale price will be the higher of: (a) The fair market value of the Interest on the date of the Sale, or (b) the Plan's total investment in the Interest, in the amount of \$50,572.

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

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction

provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC, this 30th day of August, 1996.

Ivan Strasfeld,

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

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#### [Application No. D-10011]

#### **Notice of Proposed Individual Exemption to Make Permanent as Modified Prohibited Transaction Exemption (PTE) 91-8 Involving Equitable Life Assurance Society of the United States and Its Affiliates (Equitable) and Its Wholly-Owned Subsidiary, Equitable Real Estate Management, Inc. (ERE), Located in New York, New York**

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

**ACTION:** Notice of proposed individual exemption to make permanent as modified PTE 91-8, which involves Equitable and ERE.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor of a proposed individual exemption to make permanent as modified the temporary relief provided by PTE 91-8 (56 FR 1411/1419, January 14, 1991). PTE 91-8 is a temporary exemption which expired January 13, 1996. This proposed exemption, if granted, will make permanent as modified PTE 91-8 and will provide relief for the provision of property management and/or leasing services by ERE<sup>1</sup>, Equitable's wholly-owned subsidiary to an Account (as defined in Section IV below), provided that the conditions set forth in Section II are met.

**EFFECTIVE DATE:** The Department has determined to extend the temporary exemptive relief provided under PTE 91-8 effective January 13, 1996, until the date the final grant for this proposed exemption is published in the Federal Register.

Also, if granted, this proposed exemption to make permanent PTE 91-8 will be effective on the date the final grant is published in the Federal Register. However, the modification in the annual reporting requirement whereby Equitable will furnish the annual report to each authorizing plan fiduciary and the Independent Fiduciary no later than 90 days following the end of the period to which the annual report relates, as set forth in Section II(4)(a) in this proposed exemption, will be effective, as of January 13, 1996.

**DATES:** Written comments and requests for a public hearing must be received by the Department of Labor by no later than October 21, 1996.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attention: Application No. D-10011. The application for exemption

<sup>1</sup> In this regard, ERE represents that during the course of PTE 91-8 ERE changed its acronym from EREIM. This was solely a matter of preference and does not reflect a change in ownership or management of ERE. The description of Equitable Real Estate Investment Management, Inc., as set forth in the original notice of proposed exemption published on February 28, 1990 at 55 FR 7057/7069 and in the exemption application for permanent exemption and modification of PTE 91-8, dated April 24, 1995, continues to accurately reflect the ownership and management of ERE.

and the comments received will be available for public inspection in the Public Disclosure Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue NW., Washington DC 20210.

**FOR FURTHER INFORMATION CONTACT:**

Ekaterina A. Uzlyan, Office of Exemption Determinations, U.S. Department of Labor, telephone (202) 219-8883. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of a proposed exemption to make permanent as modified PTE 91-8. PTE 91-8 provides an exemption from the restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1) (A) through (E) of the Code.

The notice of proposed exemption to make permanent PTE 91-8 was requested in an exemption application by Equitable and ERE pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (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. Accordingly, the proposed exemption to make permanent PTE 91-8 is being issued solely by the Department.

**PTE 91-8**

PTE 91-8 is a temporary individual exemption which expired on January 13, 1996. A summary of the facts and representations pertaining to PTE 91-8 was contained in a notice of pendency of proposed exemption that was published in the Federal Register on February 28, 1990 at 55 FR 7057/7069. The grant of PTE 91-8 was published in the Federal Register on January 14, 1991 at 56 FR 1411/1419. PTE 91-8 permits the provision of certain real estate property management and, in some instances, leasing services by EREIM, an indirect wholly owned subsidiary of Equitable and the predecessor of ERE, affiliates of EREIM and Tishman Speyer Properties (TSP), a partnership in which Equitable has a 50 percent ownership interest, to various real estate separate accounts (the Accounts) in which employee benefit

plans participate. The Accounts are managed by Equitable, EREIM or subsidiaries thereof. PTE 91-8 also permits the provision, by the law department of Equitable (the Law Department), of certain legal services to the Accounts required in connection with individual properties held by the Accounts.

Equitable is a mutual life insurance company organized under the laws of the State of New York. Among the variety of products and services, Equitable offers asset management and other services to numerous employee benefit plans, including investments in the Accounts. The Accounts hold investments in income-producing real estate such as office buildings, hotels, shopping centers and industrial and commercial properties. As the investment manager with respect to the Accounts, Equitable has investment discretion to acquire and dispose of properties on behalf of the Accounts, and the responsibility to manage Account properties. Equitable represented that its direct or indirect subsidiaries may act as the investment manager with respect to existing or new Accounts.

Furthermore, Equitable represented that the provision of property management and leasing services to the Accounts by ERE and certain of its other affiliates is of central importance in maximizing returns available to its investors, including employee benefit plans. In this regard, large real estate investment managers typically manage properties themselves or through property management firms they have acquired. This strategy enables them to use unified leasing strategy and other efficient management strategies, and is a superior alternative to retaining independent managers for property management. Equitable stated that often the best arrangements for the provision of property services to the Accounts, and the highest quality of services can be provided through the use of its in-house personnel or through firms in which Equitable has an interest. Such firms possess special expertise in the type of properties held by the Accounts and knowledge of the Accounts and their properties.

The services provided to the Accounts by ERE and certain other affiliates of Equitable included day to day property management and leasing responsibilities associated with the operation of income-producing properties. Specifically, these responsibilities included: (a) using best efforts to lease the property to desirable tenants and negotiating the terms and renewals of such leases; (b) receiving and collecting rents; (c) arranging for all

necessary repairs and replacement and installation of equipment; (d) handling tenant complaints; (e) preparing and submitting to the owner proposed operating and capital budgets; and (f) performing marketing and promotional supervisory services.

To ensure that the transactions in PTE 91-8 operated in the interests of the Accounts and the participating plans therein, the exemption contained certain specified safeguards. These safeguards included: (1) the requirement that the arrangement under which the transactions were performed be subject to the prior authorization of an independent plan fiduciary for each plan invested in an Account; <sup>2</sup> (2) the requirement that not less than 45 days prior to the implementation of either the policy for property management and leasing services or the policy for legal services, Equitable or EREIM, as investment manager, furnish the authorizing plan fiduciary with reasonably available information; (3) a mechanism enabling the plans to terminate their investment in the Account; (4) an annual reporting requirement whereby Equitable furnished the annual report to each authorizing plan fiduciary and the Independent Fiduciary no later than 45 days following the end of the period to which the annual report related; (5) confirmation by the plans of the multiple services arrangement; (6) approval by the Independent Fiduciary of each transaction under the exemption, and a mechanism for the Independent Fiduciary's negotiation and approval of contracts for the provision of services by EREIM, TSP or the Law Department to the Accounts; (7) the requirement that the terms of a service provision arrangement must be reviewed by the Independent Fiduciary prior to implementation; (8) the requirement that Equitable and EREIM had to furnish certain information regarding transactions to the Independent Fiduciary for its periodic review of performance of EREIM, TSP, or the Law Department under the contracts; (9) a plan investor sophistication requirement; (10) percentage limitations on plan investment in the Accounts, including Equitable's in-house plans; (11) the requirement that the terms of the transactions must be as favorable to the Accounts as arm's length terms; and, (12) that the compensation paid to

<sup>2</sup>In this regard, under this proposed exemption to make permanent as modified PTE 91-8, Equitable represents that for plans which have previously authorized their participation in the Accounts under PTE 91-8, no reauthorization will be required.

EREIM, TSP or the Law Department shall not exceed reasonable compensation within the meaning of section 408(b)(2) of the Act and the regulations thereunder. In addition to these conditions, PTE 91-8 and the notice relating to PTE 91-8 contained other protective conditions that had to be met by Equitable and its affiliates with respect to the Accounts and the transactions which were the subject of PTE 91-8. Also, representations contained in Paragraph IV of the notice of proposed exemption relating to PTE 91-8 placed certain limitations on the fees that EREIM or TSP were permitted to receive for property management and leasing services rendered to the Accounts pursuant to PTE 91-8.

#### Procedure for Requesting Permanent Relief for Transactions in PTE 91-8

This proposed exemption was requested by Equitable and ERE pursuant to Paragraphs IX and X of the notice of proposed exemption relating to PTE 91-8. As mentioned, PTE 91-8 is a temporary exemption which expired on January 13, 1996. Pursuant to Paragraphs IX and X, prior to the expiration of PTE 91-8, Equitable and ERE could apply for a permanent exemption provided that, among other things, the application for a permanent exemption describes whether and how compliance with PTE 91-8 has been achieved. In particular, the application for a permanent exemption should describe:

- (a) the number of transactions engaged in under PTE 91-8;
- (b) the decisions made by the independent fiduciaries for various services; and
- (c) the fees that have been paid to the Law Department, EREIM or TSP for the property services and legal services that have been rendered under PTE 91-8.

Further, pursuant to Paragraphs IX and X of the notice of proposed exemption relating to PTE 91-8, the application for a permanent exemption should include a report from the Independent Fiduciary expressing such fiduciary views and rationales with respect to the extension of PTE 91-8 and whether the Independent Fiduciary believes that cost savings have been achieved for the Accounts. In paragraph X of the notice of proposed exemption relating to PTE 91-8, Equitable identified certain standards which may be applied by the Department in reviewing the fees charged by Equitable to determine whether cost savings have been achieved, and whether making PTE 91-8 permanent would be appropriate. Among other things, Equitable represented in Paragraph X,

that property management and leasing fees charged by unaffiliated property management firms generally range from 4 to 5 percent of gross receipts (depending upon such factors as property type, geographic location and project complexity) and average approximately 4.5 percent of gross receipts. Therefore, Equitable proposed in Paragraph X, that the standard of review adopted by the Department in evaluating the operation of property related services, should require Equitable to demonstrate that the aggregate annual property management and leasing fees charged to each Account (including the allocable cost of the services of the independent fiduciary under the exemption) were less than 4.5 percent of the gross receipts earned by the Account during each year that ERE or TSP has provided property management and leasing services pursuant to the exemption.

#### Cost Savings Report of the Independent Fiduciary

Jackson Cross Company (Jackson Cross), as the independent fiduciary (the Independent Fiduciary) for property management and leasing services under PTE 91-8, prepared a report regarding cost savings achieved by the Accounts (the Report). In the Report, Charles F. Seymor, CRE, MAI, and chairman of Jackson Cross, made the following representations. Mr. Seymor stated that the provision by Compass Management and Leasing and Compass Retail (collectively, Compass), two wholly-owned subsidiaries of ERE<sup>3</sup>, of property management and leasing services to the Accounts resulted in substantial savings to the Accounts. Mr. Seymor represented that in negotiating the final terms of the management or management and leasing contracts for each of the Accounts' properties, Jackson Cross reviewed market fee ranges in each market area and also the fees paid to the previous managers. In this regard, Jackson Cross required that a measurable economic benefit be evident before they approved a transaction and also quantified that benefit in their separate initial reports on each approved property. In the annual reports to ERE for the year 1994, Jackson Cross applied management fees

<sup>3</sup>The applicant represents that these two subsidiaries of ERE, which were formerly separate divisions of ERE are subject to the management and control of ERE, and their status as separate corporate entities rather than divisions of ERE was implemented solely for organizational reasons. ERE may in the future recognize one or both of the Compass entities as divisions within ERE.

and leasing fees<sup>4</sup> to actual 1994 gross collections and to the leases negotiated for the Accounts, and compared the results to what would have been charged if these fees were at the low end of the market range or the contractual fee for the previous managers.<sup>5</sup> In 1994, Jackson Cross visited over 40% of the Accounts' properties. Jackson Cross estimated that in 1994 alone, a savings of \$1,650,000 was obtained to the benefit of the Accounts. Furthermore, 95 transactions were completed through December 31, 1994, and on an annual basis, the fees earned by Compass were less than 4.5 percent of the gross receipts earned by the properties in each Account managed by Compass. Accordingly, Jackson Cross concluded that the property management and leasing services rendered by Compass to the Accounts resulted in substantial savings for their benefit. In preparing the annual reports, Jackson Cross also reviewed several additional measures of quality management and leasing services to ensure that the services provided to the Accounts are the best available as compared to the services provided by other first rate property managers in the locality of a property. In this regard, Jackson Cross considered the following criteria: how each property performed against budget; how the value of each property has been affected during the year; whether the management and leasing professionals engaged in continuing education and training during the year, and what professional designations they have achieved; and whether these professionals have adopted an appropriate long-range view as stewards of these properties, with a goal of maximizing the Accounts' investments.

#### Permanent Exemption for Transactions Under PTE 91-8

Equitable and ERE request that the exemptive relief for transactions which were the subject of PTE 91-8 be made permanent because as explained in the Jackson Cross report above, PTE 91-8 benefitted the employee benefit plans that participate in the Accounts. Furthermore, Equitable and ERE

<sup>4</sup>It is represented that most management fees and leasing commissions are typically calculated as a percentage of gross receipts during a given year and a percentage of new lease transactions, respectively.

<sup>5</sup>In this regard, Jackson Cross compared fee schedules charged by Compass to the fee schedules charged by previous unaffiliated property managers during the year preceding ERE's performance of such services under the exemption. Furthermore, Jackson Cross as the Independent Fiduciary is obligated to monitor property management fees currently charged by the unaffiliated managers and to assure that the fees charged by Equitable or ERE do not exceed these fees.

propose the following procedures to assure continued cost savings to the Accounts under a permanent exemption (the Cost Saving Procedures). The Cost Saving Procedures will be carried out as follows:

(a) After the fifth anniversary of the grant of this exemption, and after the beginning of each subsequent five-year period, ERE will prepare a survey of property management and leasing fees for the properties that have similar geographic location and property types to those held by the Accounts. The survey will include data regarding the fees that have been charged to the Accounts by several property management firms that are unaffiliated with Equitable or ERE for services that are contemplated by the exemption 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 Equitable or ERE for such services performed for the properties not held by the Accounts during the same period and other market data regarding the cost of property management and leasing services by geographic location and property types.

(b) The Independent Fiduciary will review ERE's internal survey referred to in (a) above, and will verify the accuracy of the data by independently reviewing a sampling of the properties to which such fees apply. Based upon its review of the survey and its own professional resources and expertise, the Independent Fiduciary will determine a typical range of annual fees for property management and 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 property management and leasing services policy (the Property Services Policy) has provided a cost savings to the Accounts.

(c) Equitable and ERE will demonstrate to the Independent Fiduciary at the end of the applicable five-year period that the aggregate property management and leasing fees charged to each Account pursuant to the Property Services Policy 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.

(d) The Independent Fiduciary will review the data supplied by ERE 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 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 (5) 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 pursuant to the Property Services Policy until Equitable and ERE have demonstrated to the satisfaction of the Independent Fiduciary that policies intended to assure cost savings to the Accounts have been implemented by Equitable and ERE. 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 Equitable or ERE in accordance with the recordkeeping requirements of Section III of this exemption.

Accordingly, the Department proposes to modify PTE 91-8 by adopting the language of the Cost Saving Procedures as stated in (a)-(d) above into a new paragraph (12) in Section II of this proposed exemption.

Requested Modifications and Changes in Circumstances to PTE 91-8.

#### A. *Tishman Speyer Properties*

Equitable represents that Tishman Speyer Properties (TSP), an affiliate of Equitable at the time PTE 91-8 was issued, is no longer affiliated with Equitable and, thus, requests that this exemption, if granted, be inapplicable to TSP. The Department proposes to modify PTE 91-8 by eliminating any references to TSP in this proposed exemption.

#### B. *Legal Services*

Equitable represents that the exemption under PTE 91-8 for the provision of legal services to the Accounts by Equitable in-house Law Department was never implemented. Accordingly, Equitable requests that this exemption eliminate reference to the relief for the provision of such legal services by the Law Department to the Accounts. The Department proposes to modify PTE 91-8 by eliminating relief for the provision of legal services by the Law Department to the Accounts.

#### C. *Modification of Acronym for EREIM*

Equitable requests that for purposes of this proposed exemption, if granted, EREIM should be referred to as ERE. Equitable represents that the change in acronym from EREIM to ERE is a matter of preference and does not reflect a change in ownership or management of EREIM. The description of EREIM, as set forth in the original notice of proposed exemption and in this exemption application, continues to accurately reflect the ownership and management of EREIM. Accordingly, the Department proposes to modify PTE 91-8 by substituting the acronym "ERE" for the acronym "EREIM" in this proposed exemption.

#### D. *Annual Reconfirmation Requirement*

Section II(4) of PTE 91-8 provides that the continued retention of the Independent Fiduciary with respect to the property management and leasing services arrangement for an Account is subject to the annual reconfirmation by the holders of a majority of the units of beneficial interests in that Account.<sup>6</sup> An annual report regarding the Account, which is furnished by Equitable and ERE to the authorizing plan fiduciaries and the Independent Fiduciary (the Annual Report), contains a ballot for the annual reconfirmation of the Independent Fiduciary, which is to be returned to Equitable.

Equitable and ERE represent that while the plans that participate in the Accounts support the continued service of the Independent Fiduciary,<sup>7</sup> it is often difficult to implement the Independent Fiduciary reconfirmation requirement. In many cases, these ballots are not returned by the plans for several months and then only after repeated reminders. A plan's failure to respond to the reconfirmation request by returning the ballot in a timely fashion creates uncertainty as to whether the exemption will continue to be available for ERE and its affiliates to continue providing property management and leasing services to the Accounts.

Equitable requests that the procedure for annual client reconfirmation of the Independent Fiduciary be modified to allow Equitable to treat a plan's failure to return the ballot within 30 days after

<sup>6</sup>The Independent Fiduciary may also be removed with or without cause by the vote of the holders of a majority of the units of beneficial interests in an Account voting in favor of such removal.

<sup>7</sup>In this respect, Equitable notes that at least 99 percent of the contractholders that have voted in the context of an annual reconfirmation of the Independent Fiduciary have voted in favor of such reconfirmation.

receipt of a request for reconfirmation as an indication of such plan's vote in favor of continued retention of the Independent Fiduciary. Equitable represents that this procedure will be implemented on an annual basis. Equitable also states that this proposed modification will increase efficiency in ensuring the continued service of a qualified Independent Fiduciary without adversely affecting the oversight conditions of the exemption.

The Department proposes to modify PTE 91-8 by adding the following language to the new Section II(4)(a):

"The Annual Report will also contain a ballot regarding the reconfirmation of the Independent Fiduciary, which is to be returned to Equitable. In this respect, at the time of delivery of each Annual Report, Equitable will specifically indicate to each plan that the Independent Fiduciary 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 and will request such plan to confirm the Independent Fiduciary's appointment. Following a plan's receipt of the Annual Report, Equitable may treat a plan's failure to return the ballot within thirty (30) days after receipt of a request for reconfirmation as a vote in favor of continued retention of the Independent Fiduciary."

In this regard, to ensure that the plans receive notification of the annual client reconfirmation procedure, the Department proposes to add the following language as a new paragraph (b) at the end of the new Section II(4):

"Equitable or ERE receives confirmation that the notice and the ballot sent to the authorizing plan fiduciary regarding the continued retention of the Independent Fiduciary has been received by the authorizing fiduciary and the Independent Fiduciary. The method used to confirm notice to the authorizing fiduciaries and the Independent Fiduciary must be sufficient to ensure that the authorizing fiduciaries and the Independent Fiduciary actually receive the 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."

The notice of proposed exemption relating to PTE 91-8 also indicated that Equitable will promptly designate a replacement Independent Fiduciary in the event of the removal or resignation of the Independent Fiduciary, but such appointment is also subject to the affirmative confirmation by the plans participating in the Accounts vis-a-vis a

ballot contained in the Annual Report. Equitable represents that the need for such affirmative approval could cause delay in replacing the Independent Fiduciary with a qualified new Independent Fiduciary. The possibility of such delays requires that contingency plans be made for using unaffiliated property management and/or leasing firms (and whose services may not be as advantageous to the Accounts as those that could be provided by an Equitable affiliate). Therefore, Equitable represents that the appointment of the replacement Independent Fiduciary will also be handled in accordance with the procedure described in Section II(4)(a).

#### *E. Annual Reporting Requirement*

Section II(4) of PTE 91-8 requires Equitable or ERE to furnish each authorizing plan fiduciary and the Independent Fiduciary with the Annual Report identifying detailed information about the fees incurred and services provided to the Account pursuant to PTE 91-8.<sup>8</sup> The Annual Report is required to be provided not later than 45 days following the end of each reporting period. Equitable furnishes the Annual Report within 45 days after the end of each calendar year.

Equitable represents that providing the Annual Report within the 45 day requirement makes it impossible to include actual year-end data for the Accounts' properties because this data is not generally available to Equitable early enough within that time period to allow for necessary verification, submission to the Independent Fiduciary and compilation and production of the Annual Reports. In addition, Equitable must also substantially complete end-of-year financial statements for the Accounts and other accounts managed by Equitable during this period.

Equitable requests that the Annual Report requirement of PTE 91-8 be modified to allow Equitable to submit the Annual Report no later than 90 days following the end of the period to which the Annual Report relates, and that this modification be effective retroactively, as of January 13, 1996, the date PTE 91-8 had expired.

<sup>8</sup>Specifically, under Section II(4) of PTE 91-8 the Annual Report must include a description of the properties and the services that have been performed by ERE or its affiliates for an Account and an indication of the fees that were paid for the preceding reporting period and which are anticipated to be paid to ERE or its affiliates in the coming year for services provided by these entities in connection with the properties held by an Account. The Annual Report must also contain a description of the method for terminating the multiple services arrangement and the reconfirmation and/or removal of the Independent Fiduciary by the plans investing in the Account.

In this regard, the Department proposes to modify PTE 91-8 by substituting "90 days" for "45 days" in Section II(4)(a), such that the new Section II(4)(a) should read, in relevant part:

\* \* \* with the Annual Report containing the information described in this paragraph, not less frequently than once a year and not later than 90 days following the end of the period to which the report relates.

This modification will be effective retroactively, as of January 13, 1996.

#### *F. Modification of Investment Limitations of Section II(10)*

##### *1. 5 Percent Investment Limitation*

Section II(10)(a) of PTE 91-8 limits the percentage of plan assets that can be invested in an Account by any plans covering employees of Equitable to 5 percent of the assets of the investing plan. Equitable believes that the 5 percent limitation unduly restricts the investments in the Accounts by Equitable's in-house plans and limits the investment by the trustees of Equitable's pension plan in real estate separate accounts, such as SA-8,<sup>9</sup> which they believe to be prudent investments that are appropriate for Equitable's plans. Fiduciaries of Equitable's plans should not be forced to look to competitors for real estate investment opportunities.

Therefore, Equitable is requesting that the percentage limitation applicable to in-house plans be modified to permit any plan in which employees of Equitable or an affiliate participate, to invest up to 10 percent of its assets in any Account covered by PTE 91-8. Equitable represents that a 10 percent limitation would give trustees of the in-house plans the flexibility necessary to deal with inadvertent fluctuations in the levels of participation in an Account, and to invest the assets of such Plans in what they determine are successful diversified real estate funds.

Accordingly, the Department proposes to modify PTE 91-8 by substituting "10 percent" for "5 percent" in Section II(10)(a), such that the new Section II(10)(a) should read, in relevant part:

Not more than 10 percent of the assets of a plan covering employees of Equitable will be invested in an Account. Notwithstanding the foregoing, this percentage requirement will continue to be satisfied by any plan that exceeds the 10 percent limitation of this subsection provided that no portion of any excess results from an increase in the assets transferred by such plan to the Accounts.

<sup>9</sup>Equitable represents that the primary means by which Equitable's in-house plans invest in real estate is through SA-8.

## 2. 20 Percent Investment Limitation

Section II(10)(c) of PTE 91-8 imposes a limitation on the percentage of total plan assets that can be invested in the Accounts by plans other than those covering Equitable employees.

This limitation has been set at 20 percent of the assets of the investing plan. PTE 91-8 states that this limitation will apply prospectively only and on an "acquisition" basis, i.e., the 20 percent limitation is tested only when additional investments in an Account are made by a plan. Equitable believes that it is unclear from the language of PTE 91-8, which uses the plural "Accounts" rather than "Account" to describe the limitation, whether the 20 percent limitation is intended to be applied on a single Account basis or on the basis of a plan's aggregate investment in all Accounts combined and accordingly, Equitable requests that the Department clarify the scope of this limitation.

The 20 percent limitation test of Section II(10)(c) of PTE 91-8 was intended to apply to Equitable Accounts on an aggregate basis. Accordingly, no modification of Section II(10)(c) is hereby necessary.

### G. Modifications to Limitations on Fees

Paragraph IV (Fees for Property Services) of the notice of proposed exemption relating to PTE 91-8 places certain limitations on the fees that EREIM or TSP<sup>10</sup> are permitted to receive for property management and leasing services rendered to the Accounts pursuant to PTE 91-8.

Specifically, Paragraph IV of the notice of proposed exemption relating to PTE 91-8 provides, among other things, that the fee for leases in which outside brokers are involved generally does not exceed one percent (1%) of the lease amount. This fee is applicable to circumstances where ERE as property manager is separately compensated for leasing services where outside brokers are involved. In this regard, Equitable requests that the 1% limitation be modified to 2.75 percent (2.75%) of the lease amount. Equitable and ERE have determined that the 1% limitation is not consistent with the current practice of establishing leasing commissions for transactions involving outside brokers. Equitable and ERE represent that in most leasing markets such "co-broker" leasing fees for the project leasing broker are computed at fifty percent (50%) of the normal new or renewal

lease commission fee, which is typically somewhere between four (4%) and seven (7%) percent of the total lease payments. Such a fee structure reflects the fact that the effort required of the exclusive project leasing broker is, in most instances, not reduced by the addition of a tenant's leasing broker, but can actually be more demanding. In this regard, Equitable and ERE have obtained an opinion from Jackson Cross, the independent fiduciary for property management and leasing, regarding modification of this fee limitation. Mr. Seymor from Jackson Cross, stated that based on their experience and studies, they found that leasing fees vary with building size and with the competitive situation in individual markets. In most markets, the project leasing broker received 50% of the normal new or releasing commission. The outside broker received the other 50%, but usually an "override" sufficient to pay a full market commission. Because the normal full leasing commission is typically in the range of 4% to 7% of the one year lease amount, the project leasing broker usually received 2% to 3.5% of the one year lease amount. In the opinion of Jackson Cross, restricting ERE to a maximum of 1% does not provide adequate compensation to cover the cost of appropriate professional leasing representation. In this regard, Jackson Cross suggests that this ceiling be raised to 2.75%, still subject to the market requirement that the Independent Fiduciary must certify an economic benefit to the Account on a case by case basis.

In this regard, the Department is proposing to modify PTE 91-8 by increasing the fee limitation to ERE for leases involving outside brokers to 2.75% of the lease amount. Additionally, the Department proposes to further modify PTE 91-8 by incorporating this fee limitation and other fee limitations as described in Paragraph IV of the notice of proposed exemption relating to PTE 91-8 into Section II as an additional condition. Accordingly, a new condition (13) is being added to Section II as follows:

"(13)(a) The fees paid to ERE and/or its affiliates for property management services provided in connection with a property held for an Account shall not exceed for any one year period: (1) In the case of property management services which include leasing services, 7 percent of the overall gross receipts of the property; and (2) in the case of property management services which do not include leasing services, 4 percent of the overall gross receipts of the property.

(b) Where a property manager is separately compensated for leasing services: (1) the fee for new leases will not exceed 7 percent of the lease amount; (2) the fee for renewal leases will not exceed 2 percent of the lease amount; and (3) the fee for leases in which outside brokers are involved will not exceed 2.75 percent of the lease amount."

The Department notes that this proposed exemption, if granted, is subject to the express condition that the summary of facts and representations set forth in the notice of proposed exemption relating to PTE 91-8, as amended by this notice to make permanent PTE 91-8 accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

After considering Equitable and ERE's application, the Department is proposing this exemption to make permanent PTE 91-8 pursuant to section 408(a) of the Act and section 4975 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.)

### Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include fiduciaries and participants of plans which have invested or may invest in an Account. Because of the large number of plans which currently invest in the Accounts, the Department has determined that the only practical form of providing notice to interested persons is the distribution by Equitable, of a notice to the fiduciaries of all plans currently invested in any Account. Such notice will contain a copy of the notice of the proposed exemption published in the Federal Register, and a statement advising interested persons of their right to comment and to request a hearing on the proposed exemption. Such distribution will occur within two (2) weeks of the date of publication of the notice of the proposed exemption in the Federal Register. Accordingly, comments and hearing requests on the proposed exemption are due forty four (44) days after the date of publication of this proposed exemption in the Federal Register.

### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary

<sup>10</sup>For purposes of this exemption, if granted, fee limitations described in Paragraph IV of the notice of proposed exemption relating to PTE 91-8 will apply to ERE and its affiliates.

or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply, and to the extent jurisdiction exists under Title I of the Act, 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 requirements of section 401(a) of the Code, e.g., the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

(5) This proposed exemption, if granted, is subject to the express condition that the summary of facts and representations set forth in the notice of proposed exemption relating to PTE 91-8, as amended by this notice to make permanent as modified PTE 91-8 accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

#### Written Comments and Hearing Requests

All interested persons are invited to submit written comments on the pending exemption to the address above, within forty four (44) days after the date of publication of this proposed exemption in the Federal Register. All comments will be made a part of the record. Comments received will be available for public inspection with the

application for exemption at the address set forth above.

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting the requested 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, August 10, 1990).

#### Section I—Covered Transactions

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 provision of property management and/or leasing services by ERE, Equitable's wholly-owned subsidiary to an Account (as defined in Section IV), provided that the conditions set forth in Section II are met.

#### Section II—Conditions

(1) The arrangement under which the covered transactions is performed is subject to the prior authorization of an independent plan fiduciary with respect to each plan whose assets are invested in an Account, following disclosure of information in the manner described in paragraph (2) below. For plans which have previously authorized their participation in the Accounts under PTE 91-8, no reauthorization will be required.<sup>11</sup> In the case of a plan whose assets are proposed to be invested in an Account subsequent to implementation of the property management and leasing services (the Property Services Policy), the plan's investment in the Account is subject to the prior written authorization of an independent plan fiduciary following disclosure of the information described in paragraph (2). The requirement that the authorizing fiduciary be independent of Equitable shall not apply in the case of plans maintained by Equitable on behalf of its employees.

(2) In the event Equitable proposes to implement the Property Services Policy for any additional Account, not less than 45 days prior to the implementation of the Property Services Policy, Equitable or ERE, as investment

manager, shall furnish the authorizing plan fiduciary with any reasonably available information which Equitable or ERE 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 description of the services to be performed by ERE; identification of properties for which services will be required; an estimate of the fees that would be paid to ERE if it is selected to provide such services; an explanation of the potential conflicts of interest involved in selecting ERE; an explanation of the selection process; and a description of the terms upon which a plan may withdraw from an Account.

(3) In the event an authorizing plan fiduciary of any plan whose assets are invested in an Account submits a notice in writing to Equitable or ERE, as investment manager, at least 15 days prior to implementation of the Property Services Policy, objecting to the implementation of the Property Services Policy, the 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 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 plan's written agreement to invest in the Account, if written objection to the Property Services Policy is submitted to Equitable or ERE any time after 15 days prior to implementation of the Property Services Policy (or after implementation), the 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 plans and to the non-withdrawing plans. However, Equitable or ERE need not discontinue operating pursuant to the Property Services Policy, once implemented, by reason of a plan electing to withdraw after 15 days prior to the scheduled implementation date of the Property Services Policy. Any plan which has a discretionary asset management arrangement with Equitable may terminate such arrangement and withdraw from an Account at any time.

(4)(a) Equitable or ERE shall furnish the authorizing plan fiduciary and the Independent Fiduciary acting on behalf of the plans participating in the Account with the Annual Report containing the information described in this paragraph, not less frequently than once a year and not later than 90 days following the end

<sup>11</sup> However, during the notification of interested persons period, Equitable will provide to all interested parties, including the plans participating in the Accounts, a copy of the notice of this proposed exemption. Accordingly, the plans will have the opportunity to submit written comments on the pending exemption during the comment period.

of the period to which the report relates. Such Annual Report shall disclose the total of all fees incurred by the Account during the preceding year under contracts with ERE; include a description of the properties and the services that have been performed by ERE for an Account; and delineate the fees that are anticipated to be paid to ERE in the coming year for services provided by these entities in connection with properties held by an Account. The Annual Report will contain a description of a method for the termination of the multiple services arrangement (see Section II(5)), and for the confirmation and/or removal of the Independent Fiduciary by investing plans in the Accounts. The Annual Report will also contain a ballot regarding reconfirmation of the Independent Fiduciary, which is to be returned to Equitable. In this respect, at the time of delivery of each Annual Report, Equitable will specifically indicate to each plan that the Independent Fiduciary 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 and will request such plan to confirm the Independent Fiduciary's appointment. Following a plan's receipt of the Annual Report, Equitable may treat a plan's failure to return the ballot within thirty (30) days after receipt of a request for reconfirmation as a vote in favor of continued retention of the Independent Fiduciary.

(b) Equitable or ERE receives confirmation that the notice and the ballot sent to the authorizing plan fiduciary regarding the continued retention of the Independent Fiduciary has been received by the authorizing fiduciary and the Independent Fiduciary. The method used to confirm notice to the authorizing fiduciaries and the Independent Fiduciary must be sufficient to ensure that the authorizing fiduciaries and the Independent Fiduciary actually receive the 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) The multiple services arrangement for an Account shall be subject to annual confirmation following receipt of the Annual Report, pursuant to which the arrangement shall 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. In the event of a vote to terminate the arrangement, Equitable shall cease submitting to the Independent Fiduciary

(as defined in Section IV) any new proposals to engage in covered transactions and Equitable will not renew or extend any covered transactions. Moreover, within 180 days after the vote of the contract holders, Equitable shall cease engaging in any existing covered transactions.

(6) (a) Each transaction shall be reviewed and approved by an Independent Fiduciary. However, prior to proposing a transaction to the Independent Fiduciary, Equitable or ERE shall first determine that such transaction is in the best interests of the Account.

(b) The Independent Fiduciary shall negotiate the contracts for the provision of services by ERE. 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 the particular transaction.

(c) The Independent Fiduciary shall review, as applicable, the performance of ERE under each of its contracts with the Accounts at least once each year and shall instruct Equitable and ERE of any action which should be taken by Equitable on behalf of the Accounts with respect to the continuation, termination or other exercise of rights available to the Account under the terms of the contracts. Equitable will carry out such instruction from the Independent Fiduciary to the extent it is legal and permitted by the terms of the service provision arrangement.

(7) (a) The terms of each such arrangement shall be in writing and must be reviewed by the Independent Fiduciary prior to implementation.

(b) If Equitable or ERE hold Account properties and general account properties in the same real estate market during a period when there is leasing competition between those properties, ERE will hire, during such period, a third party leasing agent for Account properties.

(c) In the case of any emergency circumstances, ERE may provide property services to an Account for a period not exceeding 90 days, but no compensation may be paid by an Account for such services without the prior approval of the Independent Fiduciary.

(8) (a) Equitable and ERE shall furnish the Independent Fiduciary with any reasonably available information which Equitable 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 the performance of ERE under the contracts.

(b) With respect to ERE, such information will include: a description of the Property Services Policy for the Account and the plan clients investing therein; a description of the real estate services which are required; the qualifications of ERE to do the job; a statement, supported by appropriate factual representations, of the reasons for Equitable's belief that ERE is qualified to provide the services; a copy of the proposed arrangement for services and the terms on which ERE would provide the services; the reasons why Equitable believes the retention of ERE would be in the best interests of the Account; information demonstrating why the fees and other terms of the arrangement are reasonable and comparable to 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 in any case that it is determined that the property manager will also provide leasing services, Equitable will disclose whether any affiliated property manager under consideration by the Independent Fiduciary is a property manager to any properties that are in competition for tenants with the property for which ERE is under consideration.

(9) Seventy-five percent or more of the units of beneficial interests in an Account must be held by plans or other investors having total assets of at least \$50 million. In addition, 50 percent or more of the plans investing in an Account must have assets of at least \$50 million. For purposes of the 50 percent test above, a group of plans will be counted as a single plan if either 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 Equitable who exercises such discretion with respect to plan assets in excess of \$50 million.

(10) (a) Not more than 10 percent of the assets of a plan covering employees of Equitable will be invested in an Account. Notwithstanding the foregoing, this percentage requirement will continue to be satisfied by any plan that exceeds the 10 percent limitation of this subsection provided that no portion of any excess results from an increase in the assets transferred by such plan to the Accounts.

(b) Not more than 10 percent of the assets of an Account will be represented by the plans covering employees of Equitable.



(c) For other plans, not more than 20 percent of the assets of each such plan can be invested in the Accounts. Notwithstanding the foregoing, this percentage requirement will continue to be satisfied by any plan that exceeds the 20 percent limitation of this subsection provided that no portion of any excess results from an increase in the assets transferred by such plan to the Accounts. Moreover, this 20 percent limitation shall not apply to any plan which, as of February 28, 1990, the date of the proposed exemption relating to PTE 91-8, had more than 20 percent of its assets invested in the Accounts provided that the plan makes no additional contribution to such Accounts subsequent to that date.

(11) At the time the transactions are entered into, the terms of the transactions must be at least as favorable to the Accounts as the terms generally available in arm's length transactions between unrelated parties. In addition, the compensation paid to ERE for services under its contracts with any Account must not exceed payments in an arm's length transaction between unrelated parties for comparable properties in similar locales, and shall not be in excess of reasonable compensation within the meaning of section 408(b)(2) of the Act and regulation 29 CFR 2550.408b-2.

(12) (a) After the fifth anniversary of the grant of this exemption, and after the beginning of each subsequent five-year period, ERE will prepare a survey of property management and leasing fees for the properties that have similar geographic location and property types to those held by the Accounts. The survey will include data regarding the fees that have been charged to the Accounts by several property management firms that are unaffiliated with Equitable or ERE for services that are contemplated by the exemption 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 Equitable or ERE for such services performed for the properties not held by the Accounts during the same period and other market data regarding the cost of property management and leasing services by geographic location and property types.

(b) The Independent Fiduciary will review ERE's internal survey referred to in (a) above, and will verify the accuracy of the data by independently reviewing a sampling of the properties to which such fees apply. Based upon its review of the survey and its own professional resources and expertise, the Independent Fiduciary will determine a

typical range of annual fees for property management and 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 property management and leasing services policy (the Property Services Policy) has provided cost savings to the Accounts.

(c) Equitable and ERE will demonstrate to the Independent Fiduciary at the end of the applicable five-year period that the aggregate property management and leasing fees charged to each Account pursuant to the Property Services Policy 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.

(d) The Independent Fiduciary will review the data supplied by ERE 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 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 (5) 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 pursuant to the Property Services Policy until Equitable and ERE have demonstrated to the satisfaction of the Independent Fiduciary that policies intended to assure cost savings to the Accounts have been implemented by Equitable and ERE. 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 Equitable or ERE in accordance with the recordkeeping requirements of Section III.

(13) (a) The fees paid to ERE and/or its affiliates for property management services provided in connection with a property held for an Account shall not exceed for any one year period: (1) In the case of property management services which include leasing services, 7 percent of the overall gross receipts of the property; and (2) in the case of

property management services which do not include leasing services, 4 percent of the overall gross receipts of the property.

(b) Where a property manager is separately compensated for leasing services; (1) the fee for new leases will not exceed 7 percent of the lease amount; (2) the fee for renewal leases will not exceed 2 percent of the lease amount; and (3) the fee for leases in which outside brokers are involved will not exceed 2.75 percent of the lease amount.

### *Section III—Recordkeeping*

(1) Equitable or ERE will maintain for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (2) of this section to determine whether the conditions of this exemption have been met. Included in these records maintained by Equitable or ERE will be written records of the Independent Fiduciary which had been periodically furnished by the Independent Fiduciary to ERE or Equitable and the records described in paragraph (12) of Section II. Such records are described in Parts III and VI of the summary of facts and representations of the notice of proposed exemption relating to PTE 91-8 and in paragraph (12) of Section II. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond Equitable's or ERE's control, the records are lost or destroyed or the records of the Independent Fiduciary are not maintained or produced prior to the end of the six-year period.

(2) (a) Except as provided in subsection (b) 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 (1) of this section are unconditionally available at their customary location for examination during normal business hours by:

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

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

(3) Any contributing employer to any 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 plan participating in the Accounts, or any duly authorized employee or representative of such participant or beneficiary; and

(5) The Independent Fiduciary.

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

#### Section IV—Definitions

(1) The Accounts—The Accounts are Equitable's Separate Account No. 8, Separate Account No. 16–I, Separate Account No. 16–II, Separate Account No. 16–III, Separate Account No. 16–IV, Separate Account No. 16–VII, Separate Accounts Nos. 136, 141, 149 and 174 for the IBM Retirement Plan, Investment Management Account No. 230 for the Westinghouse Electric Corporation Pension Plan; and such other pooled or single-customer accounts, joint ventures, general or limited partnerships or other real estate investment vehicles that may be established by Equitable for the investment of employee benefit plan assets in real estate related investments to the extent disposition of its assets is subject to the discretionary authority of Equitable.

(2) Equitable—For purposes of this exemption, the term Equitable includes Equitable and/or affiliates of Equitable as defined in paragraph (4) of this section which act as investment managers with respect to an Account.

(3) ERE—For purposes of this exemption, the term ERE includes ERE and/or affiliates of ERE as defined in paragraph (4) of this section, which provides services to an Account pursuant to this exemption.

(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 [as defined in Section IV(4)] of Equitable or ERE;

(b) is not an officer, director, employee of, or partner in, Equitable or ERE [or affiliates thereof as defined in Section IV(4)];

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

(d) does not have an ownership interest in Equitable or ERE, or its affiliates;

(e) is not a fiduciary with respect to any plan participating in an Account; and

(f) 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 judgment 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 Equitable or ERE, or their affiliates, (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 Equitable or ERE, their affiliates, or any Account maintained by Equitable or ERE, their affiliates, 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 proposed exemption, if granted, is subject to the express condition that the summary of facts and representations set forth in the notice of proposed exemption relating to PTE 91–8, as amended by this notice to make permanent as modified PTE 91–8 accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

Signed at Washington, D.C., this 30th day of August 1996.

Ivan Strasfeld,

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

[FR Doc. 96–22716 Filed 9–5–96; 8:45 am]

BILLING CODE 4510–29–P

## NUCLEAR REGULATORY COMMISSION

Docket No. STN 50–456

### Commonwealth Edison Company; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–72, issued to Commonwealth Edison Company (ComEd, the licensee), for operation of the Braidwood Station, Unit 1, located in Will County, Illinois.

The proposed amendment would revise Technical Specification 3/4.4.5 to allow continued operation of Unit 1 for the remainder of Cycle 6, provided that the projected distributions of indications found in the top of the steam generators' roll transitions resulting from the reanalysis of previous non-destructive testing data results in a probability of burst less than  $1 \times 10^{-2}$  and predicted leakage less than the site allowable leak limit.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By October 7, 1996, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Wilmington Public library, 201 S. Kankakee Street, Wilmington, Illinois 60481. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a