

edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, DC this 16th day of September, 1999.

**Carl J. Poleskey,**

*Chief, Branch of Construction Wage Determinations.*

[FR Doc. 99-24643 Filed 9-23-99; 8:45 am]

BILLING CODE 4510-27-M

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### Proposed Information Collection Request Submitted for Public Comment and Recommendations; Approval, Exhaust Gas Monitoring, and Safety Requirements for the Use of Diesel-Powered Equipment in Underground Coal

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection related to the Approval, Exhaust Gas Monitoring, and Safety Requirements for the Use of Diesel-Powered Equipment in Underground coal. MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

**DATES:** Submit comments on or before November 23, 1999.

**ADDRESSES:** Send comments to Theresa M. O'Malley, Program Analysis Officer, Office of Program Evaluation and Information Resources, 4015 Wilson Boulevard, Room 715, Arlington, VA 22203-1984. Commenters are encouraged to send their comments on a computer disk, or via Internet E-mail to [tomalley@msha.gov](mailto:tomalley@msha.gov), along with an original printed copy. Ms. O'Malley can be reached at (703) 235-1470 (voice), or (703) 235-1563 (facsimile).

**FOR FURTHER INFORMATION CONTACT:** Theresa M. O'Malley, Program Analysis Officer, Office of Program Evaluation and Information Resources, U.S. Department of Labor, Mine Safety and Health Administration, Room 719, 4015 Wilson Boulevard, Arlington, VA 22203-1984. Mrs. O'Malley can be reached at [TOMalley@msha.gov](mailto:TOMalley@msha.gov) (Internet E-mail), (703) 235-1470 (voice), or (703) 235-1563 (facsimile).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The rule addresses three major areas: Diesel engine design and testing requirements; safety standards for the maintenance and use of this equipment; and exhaust gas sampling provisions to protect miners' health.

First, the rule requires that diesel engines and their critical components meet design specifications and tests to show that they are explosion-proof and will not cause a fire in a mine. Second, the safety requirements for diesel equipment include many proven features required in existing standards for electric-powered equipment. The rule also sets safety requirements for fuel handling and storage and fire suppression. Finally, the rule requires sampling of diesel exhaust emissions to protect miners from overexposure to carbon monoxide and nitrogen dioxide contained in diesel exhaust.

## **II. Current Actions**

The recordkeeping requirements contained in the rule are the minimum necessary to ensure the safe and healthful operation of diesel-powered equipment in underground coal mines; to verify compliance with the regulations, and provide important information to mine operators and miners' representatives about safety and health conditions in miners' workplaces. Reduction of these recordkeeping requirements increase the likelihood that unsafe and unhealthy conditions would go undetected and uncorrected in underground coal mines.

*Type of Review:* Extension.

*Agency:* Mine Safety and Health Administration.

*Title:* Approval, Exhaust Gas Monitoring, and Safety Requirements for the Use of Diesel-Powered Equipment in Underground coal.

*OMB Number:* 1219-0119.

*Recordkeeping:* Indefinitely.

*Affected Public:* Business or other for-profit.

*Total Respondents:* 199.

*Frequency:* On occasion.

*Total Responses:* 234,308.

*Average Time per Response:* 0.24 hours.

*Estimated Total Burden Hours:* 56,339.

*Total Burden Cost (capital/startup):* \$45,094.

*Total Burden Cost (operating/maintaining):* \$617,238.

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

Dated: September 20, 1999.

**Theresa M. O'Malley,**

*Chief, Records Management Group.*

[FR Doc. 99-24957 Filed 9-23-99; 8:45 am]

BILLING CODE 4510-43-M

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10688, et al.]

#### Proposed Exemptions; Bankers Trust Company (BTC)

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

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the

prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

#### Written Comments and Hearing Requests

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 requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 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, N.W., Washington, D.C. 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.

#### Bankers Trust Company (BTC), Located in New York, New York

[Application Nos. D-10688 through D-10691]

#### 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) 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 (D) of the Code, shall not apply to the proposed execution by certain employee benefit plans (the Plans) investing in Transwestern Office Partners II, L.P. (the LP) of a partner agreement and estoppel (the Estoppel) under which the Plans agree to honor capital calls made to the Plans by BTC as the representative of certain lenders (the Lenders) that will fund a so-called "credit facility" providing credit to the LP in connection with the Plans' capital commitments to the LP where the LP has granted to BTC security interests in the capital commitments, and where the Lenders are parties in interest with respect to the Plans; provided that (a) the proposed grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (b) the decisions on behalf of each Plan to invest in the LP and to execute such grants and agreements in favor of BTC are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BTC; (c) with respect to Plans that have invested or may invest in the LP in the future, such Plans have or will have assets of not less than \$100 million and not more than 5% of the assets of any such Plan are or will be invested in the LP. For purposes of this condition (c), in the case of multiple plans maintained

by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis, (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans; and d) the general partner of the LP must be independent of BTC, the Lenders and the Plans.

#### Summary of Facts and Representations

1. The LP is a Delaware limited partnership, the sole general partner of which is Transwestern Office GP II, L.L.C. (the General Partner), a Delaware limited liability company. The General Partner is a separate affiliate of Transwestern Investment Company, L.L.C. (TWIC), a Delaware limited liability company. The General Partner is an entity unrelated to BTC, the Lenders and the Plans. The LP shall exist for five years from the end of its acquisition period (which is expected to last up to 30 months), but may be extended for an additional three years. The LP was formed by the General Partner (as sole General Partner), with the intent of seeking capital commitments from a limited number of prospective investors who would become limited partners (the Partners) of the LP. There are 17 current and prospective Partners having, in the aggregate, irrevocable, unconditional capital commitments of at least \$150,000,000.

2. The LP has been organized to establish an integrated, self-administered and self-managed real estate operating company (see paragraph 11, below) to acquire real property assets primarily used for office purposes. The LP will make acquisitions and provide leasing and property management services. As described in the Private Placement Memorandum, the LP believes that significant opportunities exist to achieve superior risk-adjusted returns on its investments in excess of 15% over a five-year period. The LP will identify and commit to all investments within thirty months of closing (the Acquisition Period). Strategies to maximize proceeds and create liquidity for the LP include single asset sales, portfolio transactions, formation and exchange of assets for equity and a public market offering.

3. The LP will distribute to the Partners any revenue that exceeds current and anticipated cash needs as determined by the General Partner. Proceeds from the sale or financing of properties will generally be distributed in this manner. However, invested capital returned from investments sold or financed by the LP within 30 months

of the final closing date will be subject to reinvestment, provided that such amounts do not exceed a Partner's capital commitment (as discussed below).

4. The agreement dated May 1, 1997, under which the LP is organized (the Agreement) requires each Partner to execute a subscription agreement that obligates the Partner to make contributions of capital up to a specified maximum. The Agreement requires Partners to make capital contributions to fulfill this obligation upon receipt of notice from the General Partner. Under the Agreement, the General Partner may make calls for cash contributions (Capital Calls) up to the total amount of a Partner's capital commitment upon 10 business days' notice, subject to certain limitations. The Partners' capital commitments are structured as unconditional, binding commitments to contribute capital when Capital Calls are made by the General Partner. In the event of a default by a Partner, the LP may exercise any of a number of specific remedies.

The Partners constituting over 90% of the equity interests and their investments in the LP are:

Name of partner	Capital commitment (millions)
The General Partner .....	\$7.175
The Northwestern Mutual Life Ins. Co. ....	10
ERI Trans Inc. ....	15
Allstate Insurance Company	30
State Street Bank and Trust as Master Trustee of the Northrop Employees Benefit Plans Master Trust .....	20
Mayo Foundation .....	5
Mayo Foundation Pension Fund .....	5
Greenwood Properties, Inc. ..	7.5
New York Life Insurance Company .....	15
Pew Memorial Trusts .....	10.5
J.H. Pew Freedom Trust .....	2.1
J.N. Pew, Jr. Trust .....	1.05
Mabel Pew Myrin Trust .....	1.35
Northwestern Memorial Hospital .....	1.5
Northwestern Memorial Hospital Employees' Pension Plan Trust .....	1.5
Fruit of the Loom Pension Trust, for the Benefit of Union Underwear Pension Plan .....	3
Northwestern University .....	15

5. The applicant states that the LP will incur indebtedness in connection with many of its investments. In addition to mortgage indebtedness, the LP will incur short-term indebtedness for the acquisition of particular

investments. The indebtedness for the LP will be no more than 75% of the acquisition cost of the investments and no more than 70%, on a portfolio basis, of the aggregate book value of all properties of the LP. This indebtedness will be non-recourse except in connection with a Credit Facility, described in representation 6, below, secured by, among other things, a pledge and assignment of each Partner's capital commitment. This type of facility will allow the LP to consummate investments quickly without having to finalize the debt/equity structure for an investment or having to arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Partners and the LP. Under the Agreement, the General Partner may encumber Partners' capital commitments, including the right to call for capital contributions, to one or more financial institutions as security for the Credit Facility. Each of the Partners has appointed the General Partner as its attorney-in-fact to execute all documents and instruments of transfer necessary to implement the provisions of the Agreement. In connection with this Credit Facility, each of the Partners is required to execute documents customarily required in secured financings, including an agreement to honor Capital Calls unconditionally.

6. BTC will become agent for a group of Lenders providing a 37 revolving Credit Facility to the LP. BTC will also be a participating Lender. Some of the Lenders may be parties in interest with respect to some of the Plans that invest in the LP by virtue of such Lenders' (or their affiliates') provisions of fiduciary or other services to such Plans with respect to assets other than the Plans' interests in the LP. BTC is requesting an exemption to permit the Plans to enter into security agreements with BTC, as the representative of the Lenders, whereby such Plans' capital commitments to the LP will be used as collateral for loans made under the Credit Facility to the LP, when such loans are funded by Lenders who are parties in interest to one or more of the Plans. However, BTC represents that neither it nor any Lender will act in any fiduciary capacity for the decision made by any of the Plans to invest in the LP (as discussed in Paragraph 13, below).

The Credit Facility will be used to provide immediate funds for real estate acquisitions made by the LP, as well as for the payment of LP expenses. Repayments will be secured generally by the LP from the Partners' capital contributions, and Capital Calls on the

Partners' capital commitments. The Credit Facility is intended to be available until November 1, 1999. The LP can use its credit under the Credit Facility either by direct or indirect borrowings or by requesting that letters of credit be issued. All Lenders will participate on a pro rata basis with respect to all cash loans and letters of credit up to the maximum of the Lenders' respective commitments. All such loans and letters of credit will be issued to the LP or an entity in which the LP owns a direct or indirect interest (a Qualified Borrower), and not to any individual Partner. All payments of principal and interest made by the LP or a Qualified Borrower will be allocated pro rata among all Lenders.

7. The Credit Facility will be a recourse obligation of the LP, the repayment of which is secured primarily by the grant of a security interest to BTC, as agent under the Credit Facility for the benefit of the Lenders, from the LP, in both: (a) The Partners' capital commitments and (b) a collateral account (the Borrower Collateral Account) under which the LP must deposit all Partners' capital contributions when paid. In addition, the LP and the General Partner will grant BTC, as agent under the Credit Facility for the benefit of the Lenders, a security interest in: (a) The right to call capital under the Agreement; (b) Capital Call notices; and (c) the Partners' capital commitments. The Borrower Collateral Account will be assigned to BTC to secure repayment of the indebtedness incurred under the Credit Facility. BTC has the right to apply any or all funds in the Borrower Collateral Account toward payment of the indebtedness in any manner it may elect. The capital commitments are fully recourse to all the Partners and to the General Partner. In the event of default under the Credit Facility, the agent (i.e., BTC) has the right to make capital calls unilaterally on the Partners to pay their unfunded capital commitments, and will apply cash received from such capital calls to any outstanding debt.

8. Under the Credit Facility, each Partner that is a Plan will execute an Estoppel pursuant to which it acknowledges that the LP and the General Partner have pledged and assigned to BTC, for the benefit of each Lender which may be a party in interest (as defined in Act section 3(14)) of such Partner, all of their rights under the Agreement relating to capital commitments and Capital Call notices. The Estoppel will include an acknowledgment and covenant by the Plan that, if an event of default exists, such Plan will unconditionally honor

any capital call made by BTC in accordance with the Agreement up to the unfunded capital commitment of such Plan to the LP.

9. BTC is requesting an exemption to permit each trust to enter into an Estoppel under the terms and conditions described herein. The trusts which hold assets of the Plans (the Trusts) are Partners in the LP and therefore own limited partnership interests. Some of the Lenders are parties in interest with respect to some of the Plans in the Trusts by virtue of such Lenders' (or their affiliates') provisions of fiduciary (or other) services to such Plans. These services are provided with respect to Trust assets other than the LP interests. Thus, BTC states that there is an immediate need for each Trust to enter into the Estoppel under the terms and conditions described herein. The Trusts owning limited partnership interests in the LP and the extent of their respective capital commitments to the LP are described as follows:

(a) The Northrop Employee Benefit Plans Master Trust (the Northrop Trust), Located in New York, New York; State Street Bank and Trust as Master Trustee. This Trust holds the assets of nine defined benefit plans sponsored by the Northrop Grumman Corporation and two defined benefit plans sponsored by Northrop Grumman Norden Systems, Inc. (the Northrop Plans), which own interests in the LP. The total number of participants in the eleven Northrop Plans is approximately 122,976, and the approximate fair market value of the total assets of the Northrop Plans held in the Northrop Trust as of December 31, 1997 was \$10.25 billion. The Northrop Trust has made a capital commitment of \$20 million to the LP. The fiduciary responsible for reviewing and authorizing the investment in the LP by the Northrop Trust is Forstmann-Leff International, Inc. (FLI). FLI was organized in 1968 as an investment counseling firm. It is a multi-asset class, global investment management firm. FLI manages approximately \$7 billion in domestic and international equity, fixed income and private markets' accounts.

(b) The Fruit of the Loom Pension Trust (the Fruit of the Loom Trust), Located in Chicago, Illinois; The Northern Trust Company, Trustee. This Trust holds the assets of one defined benefit plan (the Union Underwear Plan), which owns interests in the LP. The total number of participants in the Union Underwear Plan is approximately 20,935, and the approximate fair market value of the total assets of the Union Underwear Plan held in the Fruit of the Loom Trust as of December 31, 1997 is

\$161 million. The Fruit of the Loom Trust has made a capital commitment of \$3 million to the LP. The fiduciary responsible for reviewing and authorizing the investment in the LP by the Fruit of the Loom Trust is William Farley, Pension Investment Committee of the Fruit of the Loom, Inc. Board of Directors.

(c) The Mayo Foundation Master Retirement Trust (the Mayo Trust), Located in New York, New York; BTC, Trustee. This Trust holds the assets of one defined benefit plan (the Mayo Plan), which owns interests in the LP. The total number of participants in the Mayo Plan is approximately 25,028, and the approximate fair market value of the total assets of the Mayo Plan held in the Mayo Trust as of December 31, 1997 is \$1.283 billion. The Mayo Trust has made a capital commitment of \$5 million to the LP. The fiduciary responsible for reviewing and authorizing the investment in the LP by the Mayo Plan is John H. Herrell, Vice President of the Mayo Foundation.

(d) The Northwestern Memorial Hospital Employees Pension Plan Trust (The Memorial Hospital Trust) holds the assets of one defined benefit plan, the Northwestern Memorial Hospital Employees Pension Plan (the Memorial Hospital Plan), which owns interests in the LP. The total number of participants in the Memorial Hospital Plan is approximately 7,804, and the approximate fair market value of the total assets of the Memorial Hospital Plan held in the Memorial Hospital Trust as of December 31, 1997 is \$213 million. The Memorial Hospital Trust has made a capital commitment of \$1.5 million to the LP. The fiduciary responsible for reviewing and authorizing the investment in the LP by the Memorial Hospital Trust is Thomas M. Satkus, Jr., Assistant Treasurer, Northwestern Memorial Hospital.

10. The applicant represents that the Northrop Plans, the Union Underwear Plan, the Mayo Plan and the Memorial Hospital Plan are currently the only employee benefit plans subject to the Act that are Partners of the LP. However, the applicant states that it is possible that one or more other Plans will become Partners of the LP in the future. Thus, the applicant requests relief for any such Plan under this proposed exemption, provided the Plan meets the standards and conditions set forth herein. In this regard, such Plan must be represented by a fiduciary independent of the General Partner, the Lenders and BTC. Furthermore, the General Partner, who also must be independent of the Lenders and BTC,

must receive from the Plan one of the following:

(1) A representation letter from the applicable fiduciary with respect to such Plan substantially identical to the representation letter submitted by the fiduciaries of the Northrop, Fruit of the Loom, Mayo and Memorial Hospital Trusts, in which case this proposed exemption, if granted, will apply to the investments made by such Plan if the conditions required herein are met; or

(2) Evidence that such Plan and its responsible fiduciaries are eligible for relief under Prohibited Transaction Exemption 96-23 (PTE 96-23, 61 FR 15975, April 10, 1996), the class exemption for transactions by a plan with certain parties in interest where such plan's assets are managed by an in-house asset manager (INHAM) that has total assets under its management, attributable to plans maintained by its affiliates, in excess of \$50 million (see Part IV(a) of PTE 96-23); or

(3) Evidence that an insurance company which is investing general account funds is eligible for relief under Prohibited Transaction Exemption 95-60 (PTE 95-60, 60 FR 35925, July 12, 1995), the class exemption for insurance companies; or

(4) Evidence that such Plan is eligible for another class exemption<sup>1</sup> or has obtained an individual exemption from the Department covering the potential prohibited transactions which are the subject of this proposed exemption.

11. BTC represents that the LP will obtain an opinion of counsel that the LP will constitute an "operating company" under the Department's plan asset regulations [see 29 CFR 2510.3-101(c)] if the LP is operated in accordance with the Agreement and the private placement memorandum distributed in connection with the private placement of the LP Partnership interests.<sup>2</sup>

<sup>1</sup> For example, PTE 84-14 (49 FR 9497, March 13, 1984) permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are managed by a "qualified professional asset manager" (QPAM) who is independent of the parties in interest (with certain limited exceptions) and meets specified financial standards.

<sup>2</sup> The Department notes that the term "operating company" as used in the Department's plan asset regulation cited above includes an entity that is considered a "real estate operating company" as described therein (see 29 CFR 2510.3-101(e)). However, the Department expresses no opinion in this proposed exemption regarding whether the LP would be considered either an operating company or a real estate operating company under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the LP or for transactions involving third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to carefully examine

12. BTC represents that the Estoppel constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships or limited liability companies, wherein the financing institutions do not obtain security interests in the real property assets of the partnership or limited liability companies. BTC also represents that the obligatory execution of the Estoppel by the Partners for the benefit of the Lenders was fully disclosed in the Private Placement Memorandum as a requisite condition of investment in the LP during the private placement of the Partnership interests. BTC represents that the only direct relationship with respect to the LP between any of the Partners and any of the Lenders is the execution of the Estoppel. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, are exclusively between the Lenders and the LP. BTC represents that the proposed execution of the Estoppel will not affect the abilities of the Trusts to withdraw from investment and participation in the LP.<sup>3</sup> The only Plan assets to be affected by the proposed transactions are any funds which must be contributed to the LP in accordance with requirements under the Agreement to make Capital Calls to honor a Partner's capital commitments.

13. BTC represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to any of the Trusts' investments in the LP and that BTC is independent of and unrelated to those fiduciaries (the Fiduciaries) responsible for authorizing and overseeing the Trusts' investments in the LP. Each of the Fiduciaries represents independently that its authorization of Trust investments in the LP was free of any influence, authority or control by the Lenders, including BTC. Each of the Fiduciaries represents that the Trust's investments in and capital commitments to the LP were made with the knowledge that each Partner would be required subsequently to grant a security interest in Capital Calls and capital commitments to the Lenders and to honor requests for cash contributions, also known as "drawdowns", made on

all aspects of the LP's proposed real estate investment program in order to determine whether the requirements of the Department's regulations will be met.

<sup>3</sup>In this regard, the Department cautions Plan fiduciaries to fully understand all aspects of the Agreement, including the terms of the Estoppel, prior to making any capital commitments to the LP. The Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently when making investment decisions for the plan.

behalf of the Lenders without recourse to any defenses against the General Partner. Each of the Trust Fiduciaries individually represents that it is independent of and unrelated to BTC and the Lenders and that the investment by the Trust for which that Fiduciary is responsible continues to constitute a favorable investment for the Plan(s) participating in that Trust and that the execution of the Estoppel is in the best interests and protective of the participants and beneficiaries of such Plan(s). In the event another Plan proposes to become a Partner, the applicant represents that it will require similar representations to be made by such Plan's independent fiduciary. Any Plan proposing to become a Partner in the future and needing to avail itself of the exemption proposed herein will have assets of not less than \$100 million<sup>4</sup>, and not more than 5% of the assets of such Plan will be invested in the LP. As noted in paragraph 9 above, the Northrop Plans, the Union Underwear Plan, the Mayo Plan and the Memorial Hospital Plan all have total assets which exceed \$100 million and have committed amounts to the LP which are less than 5% of their total assets.

14. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The Plans' investments in the LP were authorized and are overseen by the Fiduciaries, which are independent of the Lenders and BTC, and other Plan investments in the LP from other employee benefit plans subject to the Act will be authorized and monitored by independent Plan fiduciaries; (2) None of the Lenders (including BTC) has any influence, authority or control with respect to any of the Trusts' investment in the LP or the Trusts' execution of the Estoppel; (3) Each Fiduciary invested in the LP on behalf of a Plan with the knowledge that the Estoppel is required of all Partners investing in the LP, and all other Plan fiduciaries that invest their Plan's assets in the LP will be treated the same as other Partners are currently treated with regard to the Estoppel; (4) Any Plan which has invested or may invest in the LP in the future, which needs to avail itself of the exemption proposed herein, has or will have assets of not less than \$100

<sup>4</sup>In the case of multiple plans maintained by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis, (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans.

million,<sup>5</sup> and not more than 5% of the assets of any such Plan are or will be invested in the LP; and (5) the General Partner of the LP is independent of BTC, the Lenders and the Plans.

*For Further Information Contact:* Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**Donaldson, Lufkin & Jenrette Securities Corporation (DLJ), Located in New York, NY**

[Exemption Application No. D-10772]

#### *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).<sup>6</sup>

#### **Section I. Covered Transactions**

A. The restrictions of section 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply to any purchase or sale of a security between certain affiliates of DLJ which are foreign broker-dealers (the Foreign Affiliates, as defined below) and employee benefit plans (the Plans) with respect to which the Foreign Affiliates are parties in interest, including options written by a Plan, DLJ or a Foreign Affiliate provided that the following conditions and the General Conditions of Section II, are satisfied:

(1) The Foreign Affiliate customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer;

(2) The terms of any transaction are at least as favorable to the Plan as those which the Plan could obtain in a comparable arm's length transaction with an unrelated party; and

(3) Neither the Foreign Affiliate nor an affiliate thereof has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets, and the Foreign Affiliate is a party in interest or disqualified person with respect to the Plan assets involved in the transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason

<sup>5</sup> See footnote 4, *ibid*.

<sup>6</sup> For purposes of this proposed exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

of a relationship to a person described in such sections. For purposes of this paragraph, the Foreign Affiliate shall not be deemed to be a fiduciary with respect to Plan assets solely by reason of providing securities custodial services for a Plan.

B. The restrictions of sections 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply to any extension of credit to the Plans by the Foreign Affiliates to permit the settlement of securities transactions, regardless of whether they are effected on an agency or a principal basis, or in connection with the writing of options contracts, provided that the following conditions and the General Conditions of Section II are satisfied:

(1) The Foreign Affiliate is not a fiduciary with respect to any Plan assets involved in the transaction, unless no interest or other consideration is received by the Foreign Affiliate or an affiliate thereof, in connection with such extension of credit; and

(2) Any extension of credit would be lawful under the Securities Exchange Act of 1934 (the 1934 Act) and any rules or regulations thereunder if such Act, rules or regulations were applicable.

C. The restrictions of section 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply to the lending of securities to the Foreign Affiliates by the Plans, provided that the following conditions and the General Conditions of Section II are satisfied:

(1) Neither the Foreign Affiliate nor an affiliate thereof has discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(2) The Plan receives from the Foreign Affiliate (by physical delivery or by book entry in a securities depository, wire transfer, or similar means) by the close of business on the day on which the loaned securities are delivered to the Foreign Affiliate, collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, or irrevocable U.S. bank letters of credit issued by persons other than the Foreign Affiliate or an affiliate of the Foreign Affiliate, or any combination thereof. All collateral shall be in U.S. dollars, or dollar-denominated securities or bank letters

of credit, and shall be held in the United States;

(3) The collateral has, as of the close of business on the preceding business day, a market value equal to at least 100 percent of the then market value of the loaned securities (or, in the case of letters of credit, a stated amount equal to same);

(4) The loan is made pursuant to a written loan agreement (the Loan Agreement), which may be in the form of a master agreement covering a series of securities lending transactions, and which contains terms at least as favorable to the Plan as those the Plan could obtain in an arm's length transaction with an unrelated party;

(5) In return for lending securities, the Plan either (a) receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan, or (b) has the opportunity to derive compensation through the investment of cash collateral. In the latter case, the Plan may pay a loan rebate or similar fee to the Foreign Affiliate, if such fee is not greater than the Plan would pay an unrelated party in a comparable arm's length transaction with an unrelated party;

(6) The Plan receives at least the equivalent of all distributions on the borrowed securities made during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities that the Plan would have received (net of tax withholdings)<sup>7</sup> had it remained the record owner of such securities.

(7) If the market value of the collateral as of the close of trading on a business day falls below 100 percent of the market value of the borrowed securities as of the close of trading on that day, the Foreign Affiliate delivers additional collateral, by the close of the Plan's business on the following business day, to bring the level of the collateral back to at least 100 percent. However, if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, the Foreign Affiliate may require the Plan to return part of the collateral to reduce the level of the collateral to 100 percent;

(8) Before entering into a Loan Agreement, the Foreign Affiliate furnishes to the independent Plan

fiduciary (a) the most recent available audited statement of the Foreign Affiliate's financial condition, (b) the most recent available unaudited statement of its financial condition (if more recent than the audited statement), and (c) a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition that has not been disclosed since the date of the most recent financial statement furnished to the independent Plan fiduciary. Such representation may be made by the Foreign Affiliate's agreeing that each loan of securities shall constitute a representation that there has been no such material adverse change;

(9) The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the Foreign Affiliate shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Plan within (a) the customary delivery period for such securities, (b) five business days, or (c) the time negotiated for such delivery by the Plan and the Foreign Affiliate, whichever is least, or, alternatively such period as permitted by Prohibited Transaction Class Exemption (PTCE) 81-6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987), as it may be amended or superseded.<sup>8</sup>

(10) In the event that the loan is terminated and the Foreign Affiliate fails to return the borrowed securities or the equivalent thereof within the time described in paragraph (9), the Plan may purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the Foreign Affiliate under the Loan Agreement, and any expenses associated with the sale and/or purchase. The Foreign Affiliate is obligated to pay, under the terms of the Loan Agreement, and does pay, to the Plan, the amount of any remaining obligations and expenses not covered by the collateral, plus interest at a reasonable rate. Notwithstanding the foregoing, the Foreign Affiliate may, in the event it fails to return borrowed securities as

<sup>7</sup>The Department notes the applicant's representation that dividends and other distributions on foreign securities payable to a lending Plan may be subject to foreign tax withholdings and that the Foreign Affiliate will always put the Plan back in at least as good a position as it would have been in had it not lent the securities.

<sup>8</sup>PTCE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the 1934 Act (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein).

described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided that such replacement is approved by the independent Plan fiduciary; and

(11) The independent Plan fiduciary maintains the situs of the Loan Agreement in accordance with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404b-1. However, in the event that the independent Plan fiduciary does not maintain the situs of the Loan Agreement in accordance with the indicia of ownership requirements of section 404(b) of the Act, the Foreign Affiliate shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or the taxes imposed by section 4975(a) and (b) of the Code.

If the Foreign Affiliate fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the Plan fiduciary which caused the Plan to engage in such transaction shall not be deemed to have caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the Foreign Affiliate's failure to comply with the conditions of the exemption.

## Section II. General Conditions

A. The Foreign Affiliate is a registered broker-dealer subject to regulation by a governmental agency, as described in Section III. B., and is in compliance with all applicable rules and regulations thereof in connection with any transactions covered by this exemption;

B. The Foreign Affiliate, in connection with any transactions covered by this exemption, is in compliance with the requirements of Rule 15a-6 (17 CFR 240.15a-6) of the 1934 Act, and Securities and Exchange Commission (the SEC) interpretations thereof, providing for foreign affiliates a limited exemption from U.S. broker-dealer registration requirements.

C. Prior to the transaction, the Foreign Affiliate enters into a written agreement with the Plan in which the Foreign Affiliate consents to the jurisdiction of the courts of the United States for any civil action or proceeding brought in respect of the subject transactions.

D. The Foreign Affiliate maintains, or causes to be maintained, within the United States for a period of six years from the date of any transaction such records as are necessary to enable the persons described in paragraph E, to determine whether the conditions of

this exemption have been met except that—

(1) A party in interest with respect to a Plan, other than the Foreign Affiliate, shall not be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) or (b) of the Code, if such records are not maintained, or are not available for examination, as required by paragraph E.; and

(2) A prohibited transaction shall not be deemed to have occurred if, due to circumstances beyond the control of the Foreign Affiliate, such records are lost or destroyed prior to the end of such six year period;

E. Notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the Foreign Affiliate makes the records referred to above in paragraph D., unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

(1) The Department, the Internal Revenue Service or the SEC;

(2) Any fiduciary of a Plan;

(3) Any contributing employer to a Plan;

(4) Any employee organization any of whose members are covered by a Plan; and

(5) Any participant or beneficiary of a Plan. However, none of the persons described above in paragraphs (2)–(5) of this paragraph E. shall be authorized to examine trade secrets of the Foreign Affiliate, or any commercial or financial information which is privileged or confidential.

F. Prior to any Plan's approval of any transaction with a Foreign Affiliate, the Plan is provided copies of the proposed and final exemption with respect to the exemptive relief granted herein.

## Section III. Definitions

For purposes of this proposed exemption,

A. The term "DLJ" as referred to in Parts A., B., and C. of Section I., means Donaldson, Lufkin & Jenrette Securities Corporation.

B. The term "affiliate" of another person shall include:

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

(2) Any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner. (For purposes of this

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

C. The term "Foreign Affiliate," shall mean a current or future affiliate of DLJ that is subject to regulation as a broker-dealer by—

(1) The Securities and Futures Authority (the SFA), in the United Kingdom; or

(2) The Australian Securities & Investments Commission (ASIC) in Australia.

C. The term "security" shall include equities, fixed income securities, options on equity and on fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term "security" does not include swap agreements or other notional principal contracts.

## Summary of Facts and Representations

1. DLJ is a broker-dealer registered with the SEC, a full-line investment services firm which is a member of the New York Stock Exchange and other principal securities exchanges in the United States, and a member of the National Association of Securities Dealers. DLJ is one of the largest investment services firms in the United States. DLJ is the principal operating subsidiary of Donaldson, Lufkin & Jenrette, Inc. (DLJ, Inc.) which is currently owned by The Equitable Companies Incorporated as well as public shareholders. As of March 31, 1999, DLJ, Inc. had total assets of \$90,254,264,000 and \$3,069,124,000 in stockholders' equity.

DLJ has several foreign affiliates that are broker-dealers or banks. The proposed exemption would cover the Foreign Affiliates listed below, any current or future affiliates that meet the requirements of the exemption and their respective regulating entities as follows:

(a) *London Global Securities*, located in London, England, is subject to regulation in the United Kingdom by the SFA; and

(b) *DLJ Australia Pty. Ltd.*, located in Melbourne, Victoria, Australia will be subject to regulation by ASIC.

DLJ requests an individual exemption to permit the Foreign Affiliates identified above, as well as those others which, in the future, may be subject to governmental regulation in the United Kingdom and Australia,<sup>9</sup> to engage in

<sup>9</sup> For a description of the SFA, see Representations 5 and 6 of the Notice of Proposed Exemption for Barclays Bank PLC (63 FR 53714,

the securities transactions described below with Plans. The proposed exemption is necessary because the Foreign Affiliates may be parties in interest with respect to the Plans under the Act, by virtue of being a fiduciary (for assets of the Plans other than those involved in the transactions) or a service provider to such Plans, or by virtue of a relationship to such fiduciary or service provider.

2. DLJ represents that the Foreign Affiliates are subject to regulation by a governmental agency in the foreign country. DLJ further represents that registration of a foreign broker-dealer with the governmental agency in these cases addresses regulatory concerns similar to those concerns addressed by registration of a broker-dealer with the SEC under the 1934 Act. The rules and regulations set forth by the above-referenced agencies and the SEC share a common objective: the protection of the investor by the regulation of the securities market.

The United Kingdom and Australia both have comprehensive financial resource and reporting/disclosure rules concerning broker-dealers. Broker-dealers are required to demonstrate their capital adequacy. The reporting/disclosure rules impose requirements on broker-dealers with respect to risk management, internal controls and records relating to counterparties. All such records must be produced at the request of the agency at any time. The agencies' registration requirements for broker-dealers are enforced by fines and penalties and thus constitute a comprehensive disciplinary system for the violation of such rules.

DLJ represents that in connection with the transactions covered by this proposed exemption, the Foreign Affiliates' compliance with any applicable requirements of Rule 15a-6 (17 CFR 240.15a-6) of the 1934 Act (as discussed further in Representation 6, below), and SEC interpretations thereof, providing for foreign affiliates a limited exemption from U.S. registration requirements, will offer additional protections to the Plans.

#### Principal Transactions

3. DLJ represents that the Foreign Affiliates operate as traders in dealers' markets wherein they customarily purchase and sell securities for their own account in the ordinary course of their business as broker-dealers and engage in purchases and sales of

securities, including options on securities, with their clients. Such trades are referred to as principal transactions. DLJ represents that the role of a broker-dealer in a principal transaction in the subject foreign countries is virtually identical to that of a broker-dealer in a principal transaction in the United States.

DLJ requests an individual exemption to permit the Foreign Affiliates to engage in principal transactions with the Plans under terms and conditions equivalent to those required in PTCE 75-1 (40 FR 50845, October 31, 1975), Part II.<sup>10</sup> DLJ states that because PTCE 75-1 provides an exemption only for U.S. registered broker-dealers, the principal transactions at issue would fall outside the scope of relief provided by PTCE 75-1.<sup>11</sup>

4. DLJ represents that like the U.S. dealer markets, international equity and debt markets, including the options markets, are not less dependent on a willingness of dealers to trade as principals. Over the past decade, Plans have increasingly invested in foreign equity and debt securities, including debt securities issued by foreign governments. Thus, Plans seeking to enter into such investments may wish to increase the number of trading partners available to them by trading with the Foreign Affiliates.

5. Under the conditions of this proposed exemption, as in PTCE 75-1, Part II, the Foreign Affiliate must customarily purchase and sell securities for its own account in the ordinary course of its business as a broker-dealer. The terms of any principal transaction will be at least as favorable to the Plan as those the Plan could obtain in a comparable arm' length transaction with an unrelated party. Neither the Foreign Affiliate nor an affiliate thereof will have discretionary authority or control with respect to the investment of the Plan assets involved in the principal transaction or render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets. In addition, the Foreign Affiliate will be a party in interest or disqualified person

<sup>10</sup> PTCE 75-1, Part II, provides an exemption, under certain conditions, from section 406(a) of the Act and section 4975(c)(1)(A) through (D) of the Code, for principal transactions between employee benefit plans and U.S. registered broker-dealers or U.S. banks that are parties in interest with respect to such plans.

<sup>11</sup> The Department notes that the proposed principal transactions are subject to the general fiduciary responsibility provisions of Part 4 of Title I of the Act. Section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently and solely in the interest of the plan and its participants and beneficiaries, when making investment decisions on behalf of the plan.

with respect to the Plan assets involved in a principal transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code (i.e., a service provider to the Plan), or by reason of a relationship to such a person as described in such sections.

6. DLJ represents that Rule 15a-6 of the 1934 Act provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor," provided that the foreign broker dealer, among other things, enters into these transactions through a U.S. registered broker or dealer intermediary.

The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Act if:

(a) The investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment adviser, or

(b) The employee benefit plan has total assets in excess of \$5 million, or

(c) The employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended.

The term "major U.S. institutional investor," as defined in Rule 15a-6(b)(4), includes a U.S. institutional investor that has total assets in excess of \$100 million.<sup>12</sup> DLJ represents that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

DLJ represents that under Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major institutional investor in accordance with Rule 15a-6 must, among other things:

(a) Provide written consent to service of process for any civil action brought by or proceeding before the SEC or a self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody

<sup>12</sup> Note that a SEC No-Action Letter has expanded the categories of entities that qualify as "major U.S. institutional investors." See SEC No-Action letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997 (the April 9, 1997 No-Action Letter).

53717, October 6, 1998). Similarly, for a description of ASIC, see Representation 2 of the Notice of Proposed Exemption for Citibank, N.A. and Salomon Smith Barney, Inc. (64 FR 10493, 10496, March 4, 1999).



or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker or dealer through which the principal transactions with the U.S. institutional and major U.S. institutional investors are effected to (among other things):

(1) Effecting the transactions, other than negotiating their terms;

(2) Issuing all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extending or arranging for the extension of credit in connection with the transactions;

(4) Maintaining required books and records relating to the transactions, including those required by Rules 17a-3 (Records to be Made by Certain Exchange Members) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;<sup>13</sup>

(5) Receiving, delivering, and safeguarding funds and securities in connection with the transactions on behalf of the U.S. institutional investor or the major U.S. institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities);<sup>14</sup> and

(6) Participating in certain oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the major U.S. institutional investor) and accompanying the foreign associated person on certain visits with both U.S. institutional and major U.S. institutional investors. Under certain circumstances, the foreign associated person may have direct communications and contact with the U.S. institutional investor. (See the April 9, 1997 No-Action Letter).<sup>15</sup>

#### Extensions of Credit

7. DLJ represents that a normal part of the execution of securities transactions by broker-dealers on behalf of clients, including Plans, is the extension of credit to clients so as to permit the settlement of transactions in the

<sup>13</sup> DLJ represents that all such requirements relating to recordkeeping of principal transactions would be applicable to any Foreign Affiliate in a transaction that would be covered by this proposed exemption.

<sup>14</sup> Under certain circumstances described in the April 9, 1997 No-Action Letter (e.g., clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and a Foreign Affiliate. Please note that in such situations (as in other situations covered by Rule 15a-6), the U.S. registered broker-dealer will not be acting as a principal with respect to any duties it is required to undertake pursuant to Rule 15a-6.

<sup>15</sup> Under certain circumstances described in the April 9, 1997 No-Action Letter (e.g., clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and a Foreign Affiliate. Please note that in such situations (as in other situations covered by Rule 15a-6), the U.S. broker-dealer will not be acting as a principal with respect to any duties it is required to undertake pursuant to Rule 15a-6.

customary settlement period. Such extensions of credit are customary in connection with the buying and writing of option contracts.

DLJ requests that the proposed exemption include relief for extensions of credit to the Plans by the Foreign Affiliates in the ordinary course of their purchases or sales of securities, regardless of whether they are effected on an agency or a principal basis, or in connection with the writing of options contracts. In this regard, an exemption for such extensions of credit is provided under PTCE 75-1, Part V, only for transactions between Plans and U.S. registered broker-dealers and banks.<sup>16</sup>

8. Under the conditions of this proposed exemption, as in PTCE 75-1, Part V, the Foreign Affiliate may not be a fiduciary with respect to Plan assets involved in the transaction. However, an exception to such condition would be provided herein, as in PTCE 75-1, if no interest or other consideration were received by the Foreign Affiliate or an affiliate thereof, in connection with any such extension of credit. In addition, the extension of credit must be lawful under the 1934 Act and any rules or regulations thereunder, if the 1934 Act rules or regulations were applicable. If the 1934 Act would not be applicable, the extension of credit must still be lawful under applicable foreign law, in the country where the particular Foreign Affiliate is domiciled.

#### Securities Lending

9. The Foreign Affiliates, acting as principals, actively engage in the borrowing and lending of securities, typically foreign securities, from various institutional investors, including employee benefit plans.

DLJ requests an exemption for securities lending transactions between the Foreign Affiliates and the Plans under terms and conditions equivalent to those required in PTCE 81-6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987).<sup>17</sup> Because PTCE 81-6 provides an exemption only for U.S. registered broker-dealers and U.S. banks, the securities lending transactions at issue would fall outside

<sup>16</sup> PTCE 75-1, Part V, provides an exemption, under certain conditions, from section 406 of the Act and section 4975(c)(1) of the Code, for extensions of credit, in connection with the purchase or sale of securities, between employee benefit plans and U.S. registered broker-dealers that are parties in interest with respect to such plans.

<sup>17</sup> PTCE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to U.S. registered broker-dealers that are parties in interest with respect to such plans.

the scope of relief provided by PTCE 81-6.

10. The Foreign Affiliates utilize borrowed securities either to satisfy their own trading requirements or to lend to other broker-dealers and entities that need a particular security for a certain period of time. As described in the Federal Reserve Board's Regulation T, borrowed securities are often used to meet delivery obligations in the case of short sales or the failure to receive securities that a broker-dealer is required to deliver. DLJ represents that foreign broker-dealers are those broker-dealers most likely to seek to borrow foreign securities. Thus, the requested exemption will increase the lending demand for such securities, providing the Plans with increased securities lending opportunities, which will earn such Plans additional rates of return on the borrowed securities (as discussed below).

11. An institutional investor, such as a pension plan, lends securities in its portfolio to a broker-dealer in order to earn a fee while continuing to enjoy the benefits of owning securities (e.g., from the receipt of any interest, dividends or other distributions due on those securities and from any appreciation in the value of the securities). The lender generally requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash, irrevocable U.S. bank letters of credit issued by a bank other than a Foreign Affiliate, or high quality liquid securities such as U.S. Government or Federal Agency obligations.

12. With respect to the subject securities lending transactions, neither the Foreign Affiliate nor an affiliate of the Foreign Affiliate will have discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or render investment advice, within the meaning of 29 CFR 2510.3-21(c) with respect to those assets.

13. By the close of business on the day the loaned securities are delivered, the Plan will receive from the Foreign Affiliate (by physical delivery, book entry in a U.S. securities depository, wire transfer or similar means) collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies, irrevocable U.S. bank letters of credit issued by persons other than the Foreign Affiliate or an affiliate of the Foreign Affiliate, or any combination thereof. All collateral will be in U.S. dollars, or dollar-denominated securities or bank letters of credit, and will be held in the United States. The collateral will have, as of the close of business on the business day

preceding the day it is posted by the Foreign Affiliate, a market value equal to at least 100 percent of the then market value of the loaned securities (or, in the case of letters of credit, a stated amount equal to same).

14. The loan will be made pursuant to a written Loan Agreement, which may be in the form of a master agreement covering a series of securities lending transactions between the Plan and the Foreign Affiliate. The terms of the Loan Agreement will be at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party. The Loan Agreement will also contain a requirement that the Foreign Affiliate pay all transfer fees and transfer taxes relating to the securities loans.

15. In return for lending securities, the Plan will either (a) receive a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan, or (b) have the opportunity to derive compensation through the investment of cash collateral. In the latter case, the Plan may pay a loan rebate or similar fee to the Foreign Affiliate if such fee is not greater than what the Plan would pay in a comparable arm's length transaction with an unrelated party.

Earnings generated by non-cash collateral will be returned to the Foreign Affiliate. The Plan will be entitled to at least the equivalent of all distributions on the borrowed securities made during the term of the loan. Such distributions will include cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings) had it remained the record owner of such securities.

16. If the market value of the collateral as of the close of trading on a business day falls below 100 percent of the market value of the borrowed securities as of the close of trading on that day, the Foreign Affiliate will deliver additional collateral, by the close of business on the following business day, to bring the level of the collateral back to at least 100 percent. However, if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, the Foreign Affiliate may require the Plan to return part of the collateral to reduce the level of the collateral to 100 percent.

17. Before entering a Loan Agreement, the Foreign Affiliate will furnish to the independent Plan fiduciary (a) the most recent available audited statement of the Foreign Affiliate's financial condition, (b) the most recent available unaudited

statement of its financial condition (if more recent than the audited statement), and (c) a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the independent Plan fiduciary. Such representation may be made by the Foreign Affiliate's agreeing that each loan of securities shall constitute a representation that there has been no such material adverse change.

18. The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the Foreign Affiliate will deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of a reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Plan within (a) the customary delivery period for such securities, (b) five business days, or (c) the time negotiated for such delivery by the Plan and the Foreign Affiliate, whichever is least, or alternatively, such period as permitted by PTCE 81-6, as it may be amended or superseded. In the event the Foreign Affiliate fails to return the borrowed securities, or the equivalent thereof, within the designated time, the Plan will have certain rights under the Loan Agreement to realize upon the collateral. The Plan may purchase securities identical to the borrowed securities, or the equivalent thereof, and may apply the collateral to the payment of the purchase price, any other obligations of the Foreign Affiliate under the Loan Agreement, and any expenses associated with replacing the borrowed securities. The Foreign Affiliate is obligated to pay to the Plan the amount of any remaining obligations and expenses not covered by the collateral, plus interest at a reasonable rate as determined in accordance with an independent market source. Notwithstanding the foregoing, the Foreign Affiliate may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided that such replacement is approved by the independent Plan fiduciary.

19. The independent Plan fiduciary will maintain the situs of the Loan Agreement in accordance with the indicia of ownership requirements of section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404b-1.<sup>18</sup>

<sup>18</sup> Section 404(b) of the Act states that no fiduciary may maintain the indicia of ownership of

20. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) With respect to principal transactions effected by the Foreign Affiliates, the proposed exemption will enable Plans to realize the same benefits of efficiency and convenience which such Plans could derive from principal transactions with U.S. registered broker-dealers pursuant to PTCE 75-1, Part II;

(b) With respect to extensions of credit in connection with purchases or sales of securities, the proposed exemption will enable the Foreign Affiliates and the Plans to extend credit in the ordinary course of the Foreign Affiliate's business to effect agency or principal transactions within the customary settlement period, or in connection with the writing of options contracts, for transactions between plans and broker-dealers, as is possible for U.S. registered broker-dealers pursuant to PTCE 75-1, Part V;

(c) With respect to securities lending transactions effected by the Foreign Affiliates, the proposed exemption will enable the Plans to realize a low-risk return on securities that otherwise would remain idle, as in securities lending transactions executed by Plans and U.S. registered broker-dealers or U.S. banks, pursuant to PTCE 81-6; and

(d) The proposed exemption will provide Plans with virtually the same protections and benefits as those provided by PTCE 75-1 and PTCE 81-6.

#### *Notice to Interested Persons*

The applicant represents that because those Plans that will be potentially interested in the transactions cannot be identified at this time, the only practical means of notifying Plan fiduciaries is by the publication of the notice of proposed exemption in the **Federal Register**. Therefore, comments and requests for a hearing must be received by the Department not later than 30 days from the date of the publication of this proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady 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

any assets of a plan outside the jurisdiction of the district courts of the United States, except as authorized by regulation by the Secretary of Labor.

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 21st day of September 1999.

**Ivan Strasfeld,**

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

[FR Doc. 99-24940 Filed 9-23-99; 8:45 am]

BILLING CODE 4510-29-P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99-117]

### Notice of Prospective Copyright License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of prospective copyright license.

**SUMMARY:** NASA hereby gives notice that Vanguard Integrity Professionals of Orange, CA has applied for an exclusive copyright license described and claimed in NASA Software entitled "Enforcer" Version 5.0 and "CERU" Version 2.0, which is assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Johnson Space Center.

**DATE:** Responses to this notice must be received by November 23, 1999.

**FOR FURTHER INFORMATION CONTACT:** Hardie Barr, National Aeronautics and Space Administration, Johnson Space Center, Mail Stop HA, Houston, TX 77058-8452, telephone (281) 483-1002.

Dated: September 16, 1999.

**Edward A. Frankle,**

*General Counsel.*

[FR Doc. 99-24942 Filed 9-23-99; 8:45 am]

BILLING CODE 7510-01-P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99-118]

### Notice of Prospective Patent License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of prospective patent license.

**SUMMARY:** NASA hereby gives notice that TechConsulting, of South Pasadena, California, has applied for an exclusive license to practice the invention disclosed in U.S. Patent No. 4,975,704 entitled "Method for Detecting Surface Motions and Mapping Small Terrestrial or Planetary Surface Deformations with Synthetic Aperture Radar," which is assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to the NASA Management Office at the Jet Propulsion Laboratory.

**DATES:** Responses to this notice must be received by November 23, 1999.

**FOR FURTHER INFORMATION CONTACT:** John H. Kusmiss, Assistant Patent Counsel, NASA Management Office, Jet Propulsion Laboratory, 4800 Oak Grove Drive, Mail Station 180-801, Pasadena, CA 91109-8099; (818) 354-7770.

Dated: September 16, 1999.

**Edward A. Frankle,**

*General Counsel.*

[FR Doc. 99-24943 Filed 9-23-99; 8:45 am]

BILLING CODE 7510-01-P

## NATIONAL CREDIT UNION ADMINISTRATION

### Change of Subject of Meetings, Sunshine Act Notice

The National Credit Union Administration Board determined that its business requires the deletion of the following items from the previously announced open meeting (**Federal Register**, Vol. 64, No. 177, Page 49823, Tuesday, September 14, 1999) scheduled for Thursday, September 16, 1999.

6. Proposed Rule: Amendments to Parts 724 and 745, NCUA's Rules and Regulations, Individual Retirement Accounts in Puerto Rico Federal Credit Unions.

7. Board Resolution to Clarify Board Policy and Agency Procedures on Community Charter Conversions as per IRPS 99-1.

The Board voted unanimously that agency business requires that these items be deleted from the open agenda and that no earlier announcement of this change was possible.

The National Credit Union Administration Board also determined that its business requires the deletion of the following item from the previously announced closed meeting.

2. One (1) Personnel Matter. Closed pursuant to exemptions (2) and (6).

The Board voted unanimously that agency business requires that this item be deleted from the closed agenda and that no earlier announcement of this change was possible.

The previously announced agenda was:

**TIME AND DATE:** 2:30 p.m., Thursday, September 16, 1999.

**PLACE:** Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, Virginia 22314-3428.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Proposed Amendment to IRPS 99-1: Establishing Low-Income Member Service Requirement.