

through oil and gas wells using the specific procedures outlined in this petition for modification. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

#### 6. Elk Run Coal Company, Inc.

[Docket No. M-2000-090-C]

Elk Run Coal Company, Inc., Box 497, Sylvester, West Virginia 25193 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Castle Mine (I.D. No. 46-07009) located in Boone County, West Virginia. The petitioner requests a modification of the standard to allow air coursed through belt haulage entries to be used to ventilate active working places. The petitioner proposes to install a low-level carbon monoxide detection system in all belt entries at certain locations as an early warning fire detection system. The petitioner also proposes to adhere to other conditions. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

#### 7. Freeman United Coal Mining Company

[Docket No. M-2000-091-C]

Freeman United Coal Mining Company, 1999 Wabash Avenue, Suite 2008, Springfield, Illinois 62704-5364 has filed a petition to modify the application of 30 CFR 75.1909(b)(6) (nonpermissible diesel-powered equipment; design and performance requirements) to its Crown III Mine (I.D. No. 11-02632) located in Montgomery County, Illinois. The petitioner requests a modification of the standard to permit a diesel-powered road grader to be operated without front wheel brakes. The petitioner proposes to operate its diesel grader at a maximum speed of 10 miles per hour, lower the grader blade (mold board) to increase stopping capability in emergencies, and provide training for the grader operators on how to recognize appropriate levels of speed for different road and slope conditions. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

#### 8. 3-D Management Services, Inc.

[Docket No. M-2000-092-C]

3-D Management Services, Inc., P.O. Box 186, Madison, West Virginia 25130 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Campbells Creek #5

Mine (I.D. No. 46-08718) located in Kanawha County, West Virginia. The petitioner proposes to use a threaded ring and a spring-loaded device on battery plug connectors for mobile battery powered machines to prevent the plug connector from accidentally disengaging while under load instead of using padlocks. The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and that the proposed alternative method would provide at least the same measure of protection as the existing standard.

#### 9. Elk Run Coal Company, Inc.

[Docket No. M-2000-093-C]

Elk Run Coal Company, Inc., Box 497, Sylvester, West Virginia 25193 has filed a petition to modify the application of 30 CFR 75.1002-1(a) (location of other electric equipment; requirements for permissibility) to its White Knight Mine (I.D. No. 46-08055) located in Boone County, West Virginia. The petitioner proposes to use a Joy Technologies, Inc., high-voltage (4,160 volts) longwall mining machine at the face. The petitioner asserts that application of its alternative method will not result in a diminution of safety to the miners.

#### 10. Elk Run Coal Company, Inc.

[Docket No. M-2000-094-C]

Elk Run Coal Company, Inc., Box 497, Sylvester, West Virginia 25193 has filed a petition to modify the application of 30 CFR 75.1002-1(a) (location of other electric equipment; requirements for permissibility) to its Castle Mine (I.D. No. 46-08055) located in Boone County, West Virginia. The petitioner proposes to use a Joy Technologies, Inc., high-voltage (4,160 volts) longwall mining machine at the face. The petitioner asserts that application of its alternative method will not result in a diminution of safety to the miners.

#### 11. Contour Erection and Siding Systems, Inc., d/b/a Contour Steel

[Docket No. M-2000-006-M]

Contour Erection and Siding Systems, Inc., d/b/a/ Contour Steel, 17 Court Street, Buffalo, New York 14202 has filed a petition to modify the application of 30 CFR 56.15003 (protective footwear) to its American Rock Salt Mine (I.D. No. 30-03255) located in Livingston County, New York. The petitioner requests a modification of the existing standard to permit Contour employees who are Ironworkers, not to wear steel capped footwear while climbing structural columns, erecting reinforcing steel, or performing other work where foot

protection would reduce their safety. The petitioner states that modification of the existing standard would apply only to Contour's employees who would be engaged in mining or other mine related work activities, and that application of the existing standard would compromise the safety of the Ironworkers and affect their job performance.

#### Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to "comments@msha.gov," or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 11, 2000. Copies of these petitions are available for inspection at that address.

Dated: July 28, 2000.

**Carol J. Jones,**

*Director, Office of Standards, Regulations, and Variances.*

[FR Doc. 00-20316 Filed 8-9-00; 8:45 am]

**BILLING CODE 4510-43-P**

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2000-37; Exemption Application No. D-10624, et al.]

### Grant of Individual Exemptions; The Banc Funds Company, LLC (TBFC)

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

**ACTION:** Grant of individual exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The

notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### Statutory Findings

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

(a) The exemptions are administratively feasible;

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

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

### The Banc Funds Company, LLC (TBFC)

Located in Chicago, IL

[Prohibited Transaction Exemption 2000-37; Exemption Application No. D-10624]

### Exemption

#### Section I. Covered Transactions

The restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective July 15, 1998, to: (1) The purchase or redemption of interests in the Banc Fund V, L.P. (the Partnership) by employee benefit plans (the Plans) investing in the Banc Fund V Group Trust (the BF V Group Trust), where TBFC, a party in interest with respect to the Plans, is the general partner of MidBanc V, L.P., which is, in turn, the general partner (the General Partner) of the Partnership; (2) the sale, for cash or other consideration, by the Partnership of certain securities that are held as Partnership assets, to a party in interest with respect to a Plan

participating in the Partnership through the BF V Group Trust, where the party in interest proposes to acquire or merge with the portfolio company (the Portfolio Company) that issued such securities; and (3) the payment to the General Partner, by Plans participating in the Partnership through the BF V Group Trust, of an incentive fee (the Performance Fee) which is intended to reward the General Partner for the superior performance of investments in the Partnership.

This exemption is subject to the following conditions as set forth below in Section II.

#### Section II. General Conditions

(a) Prior to a Plan's investment in the BF V Group Trust and the Partnership, a Plan fiduciary which is independent of TBFC and its affiliates (the Independent Fiduciary) approves such investments on behalf of the Plan.

(b) Each Plan investing in the BF V Group Trust and the Partnership has total assets that are in excess of \$50 million.

(c) No Plan may invest more than 10 percent of its assets in the BF V Group Trust, and the interests held by the Plan may not exceed 25 percent of the assets of the BF V Group Trust.

(d) No Plan may invest more than 25 percent of its assets in investment vehicles (*i.e.*, collective investment funds or separate accounts) managed or sponsored by TBFC and/or its affiliates.

(e) Prior to investing in the BF V Group Trust and the Partnership, each Independent Fiduciary contemplating investing therein receives a Private Placement Memorandum and its supplement containing descriptions of all material facts concerning the purpose, structure and the operation of the BF V Group Trust and the Partnership.

(f) An Independent Fiduciary which expresses further interest in the BF V Group Trust and Partnership receives—

(1) A copy of the BF V Group Trust Agreement outlining the organizational principles, investment objectives and administration of the BF V Group Trust, the manner in which shares in the Group Trust may be redeemed, the duties of the parties retained to administer the BF V Group Trust and the manner in which BF V Group Trust shares are to be valued; and

(2) A copy of the Partnership Agreement describing the organizational principles, investment objective and administration of the Partnership, the manner in which the Partnership interests may be redeemed, the manner in which Partnership assets are to be valued, the duties and responsibilities

of the General Partner, the rate of remuneration of the General Partner, and the conditions under which the General Partner may be removed.

(g) If accepted as an investor in the BF V Group Trust and the Partnership, the Independent Fiduciary is—

(1) Furnished with the names and addresses of all other participating Plan and non-Plan investors in the Partnership;

(2) Required to acknowledge, in writing, prior to purchasing a beneficial interest in the BF V Group Trust (and a corresponding limited partnership interest in the Partnership) that such Independent Fiduciary has received copies of such documents; and

(3) Required to acknowledge, in writing, to the General Partner that such fiduciary is independent of TBFC and its affiliates, capable of making an independent decision regarding the investment of Plan assets, knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the BF V Group Trust and the Partnership.

(h) Each Plan, including the trustee (the Trustee) of the BF V Group Trust, receives the following written disclosures from the General Partner with respect to its ongoing participation in the BF V Group Trust and the Partnership:

(1) Within 90 days after the end of each fiscal year of the BF V Group Trust as well as at the time of termination, an annual financial report containing a balance sheet for the BF V Group Trust and the Partnership as of the end of such fiscal year and a statement of changes in the financial position for the fiscal year, as audited and reported upon by independent, certified public accountants. The annual reports will also disclose the remuneration that has accrued or is paid to the General Partner;

(2) Within 60 days after the end of each quarter (except in the last quarter) of each fiscal year of the Partnership and the BF V Group Trust, an unaudited quarterly financial report consisting of at least a balance sheet for the Partnership and the BF V Group Trust as of the end of such quarter and a profit and loss statement for such quarter. The quarterly report will also specify the remuneration that is actually paid or accrued to the General Partner; and

(3) Such other written information as may be needed by the Plans (including copies of the proposed exemption and grant notice describing the exemptive relief provided herein).

(i) At least annually, the General Partner will hold a meeting of the Partnership, at which time, the Independent Fiduciaries of the participating Plans will have the opportunity to decide on whether the Partnership, the BF V Group Trust, the Trustee or the General Partner should be terminated as well discuss any aspect of the Partnership, the BF V Group Trust and the agreements promulgated thereunder with the General Partner.

(j) During each year of the BF V Group Trust and the Partnership, representatives of the General Partner will be available to confer by telephone or in person with independent Plan fiduciaries to discuss matters concerning the BF V Group Trust or the Partnership.

(k) The terms of all transactions that are entered into on behalf of the Partnership remain at least as favorable to a Plan investing in the BF V Group Trust as those obtainable in arm's length transactions with unrelated parties. In this regard, the valuation of assets in the Partnership that is done in connection with the distribution of any part of the General Partner's Performance Fee will be based upon independent market quotations or (where the same are unavailable) determinations made by an independent appraiser.

(l) In the case of the sale by the Partnership of Portfolio Company securities to a party in interest with respect to a participating Plan that occurs in connection with the acquisition of a Portfolio Company represented in the Partnership's portfolio, the party in interest may not be the General Partner, TBFC, any employer of a participating Plan, or any affiliate thereof, and the Partnership receives the same terms as is offered to other shareholders of a Portfolio Company.

(m) As to each Plan, the total fees paid to the General Partner and its affiliates constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(n) Any increase in the General Partner's Performance Fee is based upon a predetermined percentage of net realized gains minus net unrealized losses determined annually between the date the first contribution is made to the Partnership until the time the Partnership disposes of its last investment. In this regard,

(1) Except as provided below in Section II(o), no part of the General Partner's Performance Fee may be withdrawn before December 31, 2005, which represents the end of the Acquisition Phase (the Acquisition Phase) for the Partnership, and not until

the BF V Group Trust has received distributions equal to 100 percent of its capital contributions made to the Partnership;

(2) Prior to the termination of the Partnership, no more than 75 percent of the Performance Fee credited to the General Partner may be withdrawn by the General Partner;

(3) The debit account established for the General Partner to calculate the Performance Fee (the Performance Fee Account) is credited annually with a predetermined percentage of net realized gains minus net unrealized losses, minus Performance Fee distributions;

(4) No portion of the Performance Fee may be withdrawn if the Performance Fee Account is in a deficit position; and

(5) The General Partner repays all deficits in its Performance Fee Account and it maintains a 25 percent cushion in such account prior to receiving any further distribution.

(o) During the Acquisition Phase of the Partnership only,

(1) The General Partner is entitled to take distributions with respect to the Performance Fee in the amount of any income tax liability it or its affiliates become subject to with respect to net capital gains of the Partnership, provided such gains are based upon the sale of Portfolio Company securities that is initiated by a third party in connection with a merger, tender offer or acquisition, and does not involve the exercise of discretion by the General Partner;

(2) The tax distributions are deducted from the Performance Fee;

(3) The General Partner repays to the Partnership any tax refund received to the extent a distribution has been made to such General Partner; and

(4) The General Partner provides the Trustee and the Plans with an annual report and accounting of all distributions and repayments attributable to income taxation of the General Partner and its affiliates, including written evidence that the distributions have been utilized exclusively to pay the income tax liability.

(p) The General Partner maintains, for a period of six years, the records necessary to enable the persons described in paragraph (q) of this Section II to determine whether the conditions of this exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the General Partner, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than the General Partner shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (q) below.

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

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

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

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

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

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

### Section III. Definitions

For purposes of this exemption,

(a) The term "TBFC" means The Banc Funds Company and any affiliate of TBFC as defined in paragraph (b) of Section III.

(b) An "affiliate" of TBFC includes—

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

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

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

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

(d) An "Independent Fiduciary" is a Plan fiduciary which is independent of TBFC and its affiliates and is either a Plan administrator, trustee, named fiduciary, as the recordholder of beneficial interests in the BF V Group Trust or an investment manager.

(e) The term "Portfolio Companies" include commercial banks and other depository institutions such as savings banks, savings and loan associations, holding companies controlling those entities, and companies providing financial services in the United States, which include, but are not limited to, consumer finance companies and demutualizing life insurance companies.

(f) The term "net realized gains" refers to the excess of realized gains over realized losses.

(g) The term "net realized losses" refers to the excess of realized losses over realized gains.

(h) The term "net unrealized losses" refer to the excess of unrealized losses over unrealized gains.

(i) The term "net unrealized gains" refers to the excess of unrealized gains over unrealized losses. For a gain or loss to be "realized," an asset of the Partnership must be sold for more than or less than its acquisition price. For a

gain or loss to be "unrealized," the Partnership asset must increase or decrease in value but not be sold.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) that was published on May 23, 2000 at 65 FR 33360.

*Effective Date:* This exemption is effective as of July 15, 1998.

**Written Comments**

The Department received two written comments with respect to the Notice and no requests for a public hearing. The comments, which were submitted by TBFC, requested certain modifications to the Notice and the Summary of Facts and Representations (the Summary). Discussed below are TBFC's suggested changes to the Notice and the Summary, as well as the Department's responses with respect thereto.

1. *"Effective" Dates.* TBFC has pointed out several discrepancies in the anticipated term of BF V as well as during the period in which the Performance Fee can typically be drawn. TBFC represents that the scheduled termination date of the Partnership is December 31, 2007, according to Section 9.02 of the Trust Agreement and Section 5 of the Partnership Agreement. However, TBFC states that the Notice indicates that the Partnership is scheduled to terminate on December 31, 2008 and the Performance Fee draw down period is scheduled to occur during 2007 and 2008. Thus, TBFC explains that the dates contained in the Notice are in arrears of the actual commencement, operation and termination of the Partnership.

In this regard, TBFC states that examples of these date discrepancies can be summarized in the following table:

FR page no.	Location	Comment
33362	Section II(n)(1)	Describes the beginning of the Performance Fee draw down period (i.e., the end of the Acquisition Phase) as being after December 31, 2006 when it really begins after December 31, 2005.
33364	Summary, Representation 6, second paragraph, second sentence.	TBFC notes that the expected termination date of the Partnership is correctly identified as December 31, 2007 here.
33365	Summary, Representation 10, third paragraph, first sentence.	Identifies the date after which Management Fees may be reduced (if return of capital has been sufficient) as December 31, 2006, when the date is December 31, 2005.
33366	Summary, Representation 11(c), first sentence	Describes the beginning of the Performance Fee draw down period as January 1, 2007 when the actual date is January 1, 2006.
33366	Summary, Representation 12, first paragraph, second sentence.	Describes the period over which the Performance Fee can be drawn as running through 2007 and 2008, when the actual years are 2006 and 2007.
33367	Summary, Representation 14, first and second sentences.	Identifies the expected termination date of the Partnership as December 31, 2008 when the actual date is December 31, 2007.
33370	Summary, Representation 21(k)(1), second sentence	Describes the Performance Fee draw down period as beginning after December 31, 2006 when the actual date is December 31, 2005.

In response to this comment, the Department wishes to emphasize its original understanding that TBFC would not organize the Partnership until after the final exemption had been granted. Assuming the Partnership had become operational then, there would be no discrepancies in the dates for the general draw down periods for the Performance Fee or the termination of the Partnership. Nevertheless, the Department has noted the aforementioned changes to the operative language of the Notice and the Summary. The Department has also modified Section II(n)(1) of the final exemption to reflect the fact that the

Performance Fee can be drawn down after December 31, 2005.

At TBFC's request, the Department has also agreed to make the final exemption retroactive to July 15, 1998. TBFC explains that this is the date that the Partnership received its first cash contributions from investors.

2. *Other Clarifications.* TBFC has identified a typographical error on page 33364 of the Summary, in the fifth sentence of Footnote 6. In this regard, TBFC explains that the reference should be to "BF III" and not to "BF II."

In addition, TBFC observes that on page 33366 of the Summary, the word "repay" in Representation 11(f) should

be substituted for the word "prepay" in the sentence stating "The General Partner must prepay any deficit in the Performance Fee Account."

In response to these comments, the Department has noted the aforementioned clarifications to the Summary.

For further information regarding TBFC's comment letters and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10624) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions

received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Accordingly, after giving full consideration to the entire record, including TBFC's written comments, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

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

### **Standard Insurance Company (Standard)**

Located in Portland, OR

[Prohibited Transaction Exemption 2000-38; Exemption Application No. D-10705]

### **Exemption**

#### *Section I. Covered Transactions*

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, effective April 21, 1999, to (1) the receipt of common stock (Stock) of the StanCorp Financial Group, Inc. (the Holding Company), the parent of Standard, or (2) the receipt of cash (Cash) or policy credits (Policy Credits), by or on behalf of any eligible policyholder (the Eligible Member) of Standard which is an employee benefit plan (the Plan), including the Standard Group Life, Supplemental Life and AD&D Plan for Employees and Agents and the Standard Group Term and Short Term Disability Employees Plan (the Standard Welfare Plans), in exchange for such Eligible Member's interest in Standard, in accordance with the terms of a plan of demutualization (the Plan of Demutualization or Demutualization Plan) adopted by Standard and implemented pursuant to Chapter 732 of the Oregon Revised Statutes.<sup>1</sup>

In addition, the restrictions of section 406(a)(1)(E) and (a)(2) and section 407(a)(2) of the Act shall not apply, effective April 21, 1999, to the receipt or holding by the Standard Welfare Plans, of employer securities in the form of excess Holding Company Stock, in

accordance with the terms of the Demutualization Plan.

The exemptions described above are subject to the following conditions:

(a) The Plan of Demutualization was implemented in accordance with procedural and substantive safeguards that were imposed under Oregon Insurance Law and was subject to review and supervision by the Director of the Department of Consumer and Business Services of the State of Oregon (the Director).

(b) The Director reviewed the terms of the options that were provided to Eligible Members of Standard, which included, but were not limited to the subject Plans, as part of his review of the Demutualization Plan, and only approved such Demutualization Plan following a determination that the Plan was fair and equitable to all Eligible Members and was not detrimental to the public.

(c) Each Eligible Member had an opportunity to vote to approve the Plan of Demutualization after full written disclosure was given to the Eligible Member by Standard.

(d) One or more independent fiduciaries of a Plan that was an Eligible Member received Holding Company Stock, Cash or Policy Credits, pursuant to the terms of the Demutualization Plan, and neither Standard nor any of its affiliates exercised any discretion or provided "investment advice," within the meaning of 29 CFR 2510.3-21(c), with respect to such acquisition.

(e) With respect to the Standard Plans, where the consideration was in the form of Holding Company Stock, Northwestern Trust and Advisory Company, the independent Plan fiduciary appointed to represent the interests of each of the Standard Plans,

(1) Exercised its authority and responsibility to vote on behalf of the Standard Plans at the special meeting of Eligible Members on the proposal to approve the Demutualization Plan;

(2) Monitored the Holding Company Stock received by a Standard Plan; and  
(3) Provided instructions with respect to the voting, the continued holding and the disposition of Holding Company Stock held by all of the Standard Plans.

(f) After each Eligible Member was allocated at least 52 shares of Holding Company Stock, additional consideration was allocated to Eligible Members who owned participating policies based on actuarial formulas that took into account each participating policy's contribution to the surplus of Standard which formulas have been approved by the Director.

(g) All Eligible Members that were Plans participated in the transactions on

the same basis within their class groupings as other Eligible Members that were not Plans.

(h) No Eligible Member paid any brokerage commissions or fees in connection with the receipt of Holding Company Stock, nor has (or will) such Eligible Member pay any brokerage commissions or fees in connection with the implementation of the commission-free sales and purchase program.

(i) All of Standard's policyholder obligations will remain in force and will not be affected by the Plan of Demutualization.

#### *Section II. Definitions*

For purposes of this exemption:

(a) The term "Standard" means The Standard Insurance Company and any affiliate of Standard as defined in paragraph (b) of this Section II.

(b) An "affiliate" of Standard includes—

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

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

(c) The term "Eligible Member" means a policyholder who is eligible to vote and to receive consideration under Standard's Demutualization Plan. Such Eligible Member must have been a policyholder of Standard on September 28, 1998, the date the Plan of Demutualization was adopted by the Board of Directors of Standard.

(d) The term "policy credit" means an increase in the accumulation account value<sup>2</sup> (to which no surrender or similar charges are applied) in the general account or an increase in a dividend accumulation on a policy.

*Effective Date:* This exemption is effective as of April 21, 1999.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of

<sup>2</sup> In general, a policy's accumulation account value is expressed in dollar terms and reflects contributions and interest credited under the policy, less expenses and withdrawals. Accumulation values may be applied for the purchase of annuity benefits, or depending on the provisions of the contract, withdrawn by the policyholder in a lump sum or installments. Under Standard's Plan of Demutualization, where a policy eligible for distributions under such Plan has an accumulation value, the policy's accumulation value will be increased by an amount equal to the distribution the policyholder is entitled to under the Plan.

<sup>1</sup> Unless otherwise noted, the client Plans and the Standard Welfare Plans and other Plans sponsored by Standard and its affiliates are collectively referred to as the Plans. In addition, unless otherwise noted, the Standard Welfare Plans and other Plans sponsored by Standard and its affiliates are together referred to as the Standard Plans.

proposed exemption (the Notice) that was published on May 23, 2000 at 65 FR 33370.

#### Written Comments

The Department received one written comment with respect to the Notice. The comment was submitted by Standard and it requested clarification to the Notice and the Summary of Facts and Representations (the Summary) of the Notice in certain areas. Discussed below is Standard's comment letter and the Department's responses to Standard's concerns.

1. *Citation of Oregon Law.* Standard represents that throughout the Notice, the reader is cited to "Section 732 of the Oregon Revised Statutes." Unless a statutory number is included (e.g., 732.600), Standard suggests that it is appropriate to cite to "Chapter 732."

In response to this comment, the Department has revised the operative language of the Notice by substituting the word "Chapter" for the word "Section" in the reference to the Oregon Revised Statutes. The Department also acknowledges corresponding modifications to the Notice, on pages 33372 and 33373 of the Summary, in Representations 8 and 9.

2. *Relevant Dates.* On page 33371 of the Notice, Section II of the Definitions states, in pertinent part, that "[s]uch Eligible Member must have been a policyholder of Standard on December 17, 1997, the date the Plan of Demutualization was adopted by the Board of Directors of Standard." However, on page 33373 of the Summary, Representation 9 of the Notice indicates that December 17, 1998 was the day on which "Standard's Board of Directors adopted the Demutualization Plan."

Standard explains that December 17, 1997 was the date on which Standard publicly announced its Board of Directors' intention to pursue the Plan of Demutualization rather than December 17, 1998. In addition, Standard indicates that the Plan of Demutualization was subsequently adopted by its Board of Directors on September 28, 1998.

Finally, on page 33372 of the Summary, Representation 7 of the Notice states that the Director approved the Plan of Demutualization in January 1999. Standard wishes to clarify that the Plan was approved on February 12, 1999.

In response to these comments, the Department has revised Section II(c) of the Definitions to reflect the September 28, 1998 adoption date of Standard's Plan of Demutualization by its Board of Directors and acknowledges this change

in Representation 9 of the Summary. In addition, the Department notes the February 12, 1999 approval date of Standard's Plan of Demutualization in Representation 7 of the Summary.

3. *Number of Outstanding Policies.* On page 33371 of the Notice, Representation 1 of the Summary discusses, in the fourth paragraph, the number of outstanding policies that were subject to provisions of the Act. Standard notes that the figures provided were only its preliminary estimates rather than final figures. After cross-checking and eliminating duplicate entries, Standard represents that approximately 27,600 of its policies were issued to pension plans or welfare plans that were governed by the Act. Of these policies, approximately 4,600 covered pension plans and 23,000 covered welfare benefit plans. In addition, Standard states that the same paragraph contains a reference to "group health" plans which are included within the "welfare plan" category. Standard wishes to point out that it does not issue a group health plan.

The Department notes the foregoing clarifications to Representation 1 of the Summary.

4. *Ownership of Standard's Affiliates.* On page 33371 of the Notice, Representation 3 of the Summary indicates that the assets of Standard Mortgage Investors and Standard Real Estate Investors are owned completely by Standard through Standard Management. For purposes of clarification, Standard represents that as of the effective date of the demutualization (i.e., April 21, 1999), Standard Mortgage Investors and Standard Real Estate Investors were purchased by StanCorp Financial Group, the Holding Company. Therefore, Standard explains that these entities are currently owned by the Holding Company.

Similarly, on page 33371 of the Summary, Representation 3 states that Standard, through Standard Management, Inc., owns 100 percent of several named subsidiaries. As of the effective date of the Plan of Demutualization, Standard states that it sold Standard Management, Inc. and its subsidiaries to the Holding Company. Therefore, as of that date and currently, Standard indicates that the Holding Company owns 100 percent of Standard Management, Inc. and its subsidiaries.

In response to these comments, the Department acknowledges the foregoing clarifications to Representation 3 of the Summary.

5. *Policyholder Consideration.* On page 33373 of the Notice,

Representation 9 of the Summary lists the Standard policyholders who were entitled to receive Cash in lieu of Stock. In addition to this list, Standard explains that public entities, such as States and their political subdivisions, also received Cash in lieu of Stock because of potential State constitutional and statutory restrictions on such entities receiving and owning Stock.

However, Standard asserts that on page 33373 of the Notice, the third paragraph of Representation 10 states that "The decision to receive Holding Company Stock, Cash or Policy Credits by a Plan was made by one or more fiduciaries of such Plan which was independent of Standard and its affiliates." Standard represents that the decision regarding which policyholders would receive Stock, Cash or Policy Credits was determined by the Plan of Demutualization, as approved by the Director, except for those policyholders who received 99 or less shares or Stock, in which case the Plan fiduciary made the election to receive Cash or Stock.

The Department acknowledges this comment and is aware that Standard's Plan of Demutualization essentially governed the form of consideration that was distributed to an Eligible Member and that, except in limited instances, the Eligible Member had no choice in the allocation process. However, the Department believes that the sentence should be read in conjunction with the next sentence in the paragraph which states, in part, that "\* \* \* neither Standard nor any of its affiliates exercised discretion or provided 'investment advice' within the meaning of 29 CFR 2510.3-21(c), with respect to such acquisition." If read in this manner, the Department wishes to emphasize that the primary thrust of both sentences is the notion that Standard did not, in any way, influence or advise an independent Plan fiduciary to accept whatever form of consideration that was allocated to such Eligible Member.

For further information regarding Standard's comment letter and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application files [Exemption Application Nos. D-10705 and D-10604] the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, after giving full consideration to the entire record, including Standard's written comment, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

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

**Standard & Poor's (S&P), Standard and Poor's Investment Advisory Services, LLC (SPIAS)**

Located in New York, New York

[Prohibited Transaction Exemption 2000-39; Exemption Application No. D-10720]

**Exemption**

The restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the provision of asset allocation services (the Service) by SPIAS to Plan participants and the receipt of fees by SPIAS from Service Providers in connection with the provision of such asset allocation services, provided that the following conditions are met.

*I. General Conditions*

A. The retention of SPIAS to provide the Service will be expressly authorized in writing by an Independent Fiduciary of each Plan.

B. SPIAS shall provide the Independent Fiduciary of each Plan with the following, in writing:

(1) Prior to authorization, a complete description of the Service and disclosures of all fees and expenses associated with the Service.

(2) Any other reasonably available information regarding the Service that the Independent Fiduciary requests.

(3) A contract for the provision of the Service which defines the relationship between SPIAS, the Service Providers and the Plan sponsor, and the obligations thereunder. Such contract shall be accompanied by a termination form with instructions on the use of the form. The termination form must expressly state that a Plan may terminate its participation in the Service without penalty at any time. However, a Plan which terminates its participation in the Service before the expiration of the contract will pay its pro-rata share of the fees that it would otherwise owe for the Service under the contract and, if applicable, any direct costs actually incurred by SPIAS which would have been recovered from the Plan but for the termination of the

contract, including any direct setup expenses not previously recovered. Thereafter, the termination form shall be provided no less than annually.

(4) At least 45-days prior to the implementation of any material change to the Service or increase in fees or expenses charged for the Service, notification of the change and an explanation of the nature and the amount of the change in the Service or increase in fees or expenses.

(5) A copy of the proposed and final exemption, as published in the **Federal Register**.

(6) An annual report of Plan activity which summarizes the performance of the asset allocation categories provided to the Plan and provides a breakdown of all fees and expenses paid to SPIAS in connection with the provision of the Service to the Plan for the year. Such report shall be provided no more than 45 days after the period to which it relates. Upon the Independent Fiduciary's or Plan sponsor's request, such report may be provided more frequently.

C. SPIAS will provide each Plan participant with the following:

(1) Written notice that the Service is available and provided by SPIAS, an entity independent of the Service Provider and the Plan sponsor.

(2) Prior to using the Service, full written disclosures that will include information about SPIAS and a description of the Service.

(3) Access to SPIAS's website or paper-based communications which will clearly indicate that the Plan participant is receiving the Service from SPIAS, and that SPIAS is independent of the Service Provider.

(4) A risk tolerance questionnaire which must be completed prior to utilization of the Service.

D. Any investment advice given to a Plan participant by SPIAS under the Service will be based solely on the responses provided by the Plan participant through the Service's interactive computer program or through a paper or telephone interview and will be based on the application of an objective methodology developed by S&P Financial Information Service (S&P FIS) and the S&P Investment Committee.

E. Any investment advice given to a Plan participant will be implemented only at the express direction of the Plan participant.

F. The total fees paid to SPIAS and a Service Provider, in connection with the provision of the Service, by each Plan does not exceed "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

G. The only fees which are payable to SPIAS in connection with the provision of the Service include, subject to negotiation, one or more of the following:

(1) An annual flat fee based on a fixed dollar amount per Plan participant for the Service. This fee may be paid by the Plan, Plan sponsor, Plan participant or the Service Provider.

(2) A technology licensing fee payable by the Service Provider in the first year that the Service is provided to a Plan. The fee will be a fixed dollar amount based on the number of Plan participants and beneficiaries contained on the Service Provider's record-keeping system. Each time the number of Plan participants and beneficiaries on the Service Provider's record-keeping system increases by 10%, an additional fixed dollar amount based on the increase in Plan participants and beneficiaries will be assessed and charged to the Service Provider for the new participants and beneficiaries (the Revised Technology Fee).

(3) For subsequent years, SPIAS will charge the Service Provider an annual technology maintenance fee equal to 20% of the technology licensing fee charged to the Service Provider in the first year plus 20% of the Revised Technology Fee.

(4) SPIAS will charge the Plan or Plan sponsor an Internet customization fee where a Plan sponsor contracts directly with SPIAS for the provision of the Service. This flat fee will be based on the time spent by SPIAS personnel on its customization of the Service for the particular Plan.

(5) For those Plan sponsors electing to receive a Plan analysis report, an annual flat fee based on a fixed dollar amount per Plan investment analysis report. This fee will be paid by the Plan sponsor or Service Provider.

H. No portion of any fee or other consideration payable by the Plans or the Plan sponsor to S&P or SPIAS in connection with the Service will be received or shared with a Service Provider.

I. Neither the fees charged nor the compensation received by SPIAS will be affected by the investment elections or the decisions made by the Plan participants and beneficiaries regarding investment of the assets in their accounts.

J. Each Service Provider shall represent to SPIAS that it will not impose any additional fees and/or charges (relating to the investment products made available to Plans) on Plans who contract for the Service unless such fees and charges are imposed on the Service Provider's

similarly situated clients who do not contract for the Service.

K. All asset allocations are reviewed and approved by the S&P Investment Policy Committee (IPC) before they are made available to the Plan.

L. No Service Provider will at any time own any interest, by vote or value in SPIAS, and neither SPIAS nor any affiliates will own any interest, by vote or value in a Service Provider.

M. The annual revenues derived by SPIAS from any one Service Provider shall not constitute more than 5% of the annual revenues of S&P FIS.

N. S&P will guarantee the payment of any liabilities of SPIAS that may arise by reason of a breach of a fiduciary duty described in section 404 of the Act or a violation of the prohibited transaction provisions in section 406 of the Act and 4975 of the Code.

O. SPIAS will maintain for a period of six years, the records necessary to enable the persons described in paragraph (P) of this section to determine whether the conditions of the exemption are met, including records of the recommendations made to Plan participants and beneficiaries, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of SPIAS, the records are lost or destroyed prior to the end of the six year period.

(2) No party in interest, other than SPIAS shall be subject to the civil penalty that may be assessed under section 502 (i) of the Act, or the taxes imposed by section 4975(a) and (b) of the Code if records are not maintained or not available for examination as required by this paragraph and paragraph P(1) below.

P. (1) Except as provided in subparagraph (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of Section 504 of the Act, the records referred to paragraph (O) of this section are unconditionally available at their customary location for examination during normal business hours by—

(a) Any duly authorized employee or representative of the Department of Labor, the Internal Revenue Service, or the Securities and Exchange Commission;

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

(c) Any contributing employer to any participating Plan, any duly authorized representative of such employer or an employee organization whose members are participants and beneficiaries of a participating Plan; or (d) Any Plan participant or beneficiary of any

participating Plan or any duly authorized representative of such Plan participant or beneficiary.

(2) None of the persons described in paragraph (1)(b)–(d) of this paragraph (P) shall be authorized to examine trade secrets of SPIAS, or commercial or financial information which is privileged or confidential.

## II. Definitions

A. The term “Service” means the asset allocation service provided by SPIAS to Plans which is accessed through computer software and other written communications in order to provide personalized recommendations to Plan participants regarding the allocation of their investments among the options offered under their Plan.

B. The term “Service Provider” means an entity that has been in the financial services business for at least three years, and during such period, has not been convicted of a felony offense involving abuse or misuse of such entity’s employee benefit plan position or employment, or any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary. Such entity is also described in one of the following categories:

1. A bank, savings and loan association, insurance company or registered investment adviser which meets the definition of a “qualified professional asset manager” (QPAM) set forth in section V(a) of Prohibited Transaction Exemption 84–14 (49 FR 9494 (Mar. 13, 1984), as corrected at 50 FR 41430 (Oct. 10, 1985)) and in addition, has, as of the last day of its most recent fiscal year, total client assets under management and control in an amount not less than \$250 million; or

2. A broker dealer registered under the Securities Exchange Act of 1934, which has, as of the last day of its most recent fiscal year, \$1 million in shareholders’ or partners’ equity, and total client assets under management and control in an amount not less than \$250 million.

C. The term “Independent Fiduciary” means a Plan fiduciary which is independent of SPIAS and its affiliates and independent of the Service Provider and its affiliates.

D. The term “affiliate” means:

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

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

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

E. The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

F. The term “Plan” means an employee pension benefit plan as defined in section 3(2) of the Act.

*Effective Date:* This exemption is effective for transactions occurring on or after March 22, 2000.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the notice of proposed exemption published at 65 FR 15360 (March 22, 2000.)

## Written Comments

The Department received four comments from interested persons regarding the notice of proposed exemption (the Notice).

One commentator urged the Department to clarify that the relief provided by the exemption and the conditions of the exemption granted herein applies only to SPIAS’s asset allocation services, and that the issuance of the exemption does not constitute an endorsement of the SPIAS program. The Department concurs with the commentator and directs the commentator to the Department’s exemption procedures set forth in 29 CFR Part 2570, (55 FR 32836, August 10, 1990). Specifically, sections 2570.49 (b) and (c) state that an exemption is effective only under the conditions set forth in the exemption and only the specific parties to whom an exemption grants relief may rely on the exemption. The Department also notes that the exemption process provides relief from the prohibited transaction provisions of the Act, but not from the Act’s general fiduciary responsibility provisions. Thus, the granting of this exemption should not be interpreted as an endorsement by the Department of the investment program described therein.

The commentator also asked the Department to clarify that the standards and conditions of the exemption are not intended to be exclusive standards to be applied in all future exemptions relating to participant investment advisory programs. A second commentator expressed concern that the conditions set forth in this exemption are too restrictive allowing only a narrow range of financial institutions, service providers and plans to provide investment advisory services to Plan participants. This commentator requested that the Department issue a



class exemption which would provide relief for a broad range of investment advisory programs. The Department recognizes that there are many participant investment advisory programs and that these programs are structured in a variety of different ways. Some of these programs may not require exemptions from the self-dealing and conflict of interest provisions contained in the Act.<sup>3</sup> The Department wishes to emphasize that, the granting of this exemption does not foreclose future consideration of a class exemption, or other individual exemptions that may be issued for participant investment advisory programs that would be subject to protective conditions that may differ from those set forth in this exemption.

One of the commentators requested that the Department modify the description of the covered transaction to limit relief to the receipt of fees. Accordingly, the commentator suggested changing the final exemption to read as follows: "The restrictions of section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(E) and (F) of the Code, shall not apply to the receipt of fees by SPIAS as a result of the provision of advice in connection with Plan investments under the Program." The Department has determined not to modify the final exemption as requested by the commentator.

A commentator expressed concern that the record-keeping requirements of the exemption set forth in section I(P) might permit S&P to refuse to make available necessary information to Plan fiduciaries on the basis that such information would disclose trade secrets or commercial or financial information which is privileged or confidential. The commentator suggests that the exemption require that the Plan fiduciary be provided with otherwise protected information to the extent that it is necessary or appropriate for the fiduciary to fully understand the methodology underlying the Service. To the extent that SPIAS is unwilling to disclose information or materials that the Independent Fiduciary believes is necessary to fulfill its duty to prudently select and/or monitor SPIAS, that fiduciary is under no obligation to select or otherwise retain SPIAS to provide asset allocation services. The Department does not believe that the

information required by a Plan fiduciary to perform its responsibilities to the Plan will necessarily involve trade secrets or commercial or financial information which is privileged or confidential. Accordingly, the Department has determined not to modify the exemption as requested.

The fourth comment was from S&P (the Applicant).

1. *Effective Date.* S&P requested that the effective date of the exemption be made retroactive to the date of publication of the proposed exemption in the **Federal Register**. The Department concurs and has made the final exemption effective as of March 22, 2000.

2. *Successors and Affiliates of SPIAS.* The Applicant urged the Department to expand the exemption to include future successors to, and affiliates of, SPIAS to account for the possibility of corporate reorganization. The Department believes that it is inappropriate to extend relief to parties who are currently unidentified or not ascertainable. However, the Department notes that if SPIAS is the subject of a corporate reorganization, SPIAS may, if necessary, apply for an amendment to this exemption.

3. *Section 408(b)(2) of ERISA.* On page 15363 of the Notice, footnote 2 stated:

The provision of investment advisory services to plans would be exempt from the prohibitions of section 406(a) of ERISA if the conditions of section 408(b)(2) are met. Section 2550.408b-2(a) of the Department's regulations provides that section 408(b)(2) of the Act exempts from the prohibitions of section 406(a), payment by a plan to a party in interest, including a fiduciary for \* \* \* any service (or combination of services) if (1) such \* \* \* service is necessary for the establishment or operation of the plan; (2) such \* \* \* service is furnished under a contract or arrangement which is reasonable; and (3) no more than reasonable compensation is paid for such \* \* \* service. The regulation also provides that section 408(b)(2) does not contain an exemption from acts described in section 406(b) even if such act occurs in connection with a provision of services that is exempt under section 408(b)(2). Section 2550.408b-2(e)(1) further provides that a fiduciary does not engage in an act described in section 406(b)(1) of the Act if the fiduciary does not use any of the authority, control or responsibility which makes such person a fiduciary to cause the plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which the fiduciary has an interest which may affect the exercise of such fiduciary's best judgement as a fiduciary. In general, whether a violation of section 406(b) occurs during the operation of an investment advisory program is an inherently factual matter. See Advisory Opinion 84-04 (January 4, 1984).

The Applicant asked the Department to make a finding that, based on the facts and representations in the Notice, the conditions of section 408(b)(2) are satisfied with respect to those situations in which fees for the Service are paid by the Plan sponsor or the Plan. The Department notes that whether the conditions of section 408(b)(2) of ERISA have been met in each case is inherently factual in nature. Therefore the appropriate plan fiduciaries must determine, based upon all of the relevant facts and circumstances surrounding each investment advisory program, whether the conditions of section 408(b)(2) are satisfied.

4. *Periodic Reporting.* Section I(B)(6) of the Notice stated in part, that SPIAS shall provide the Independent Fiduciary of each Plan with "An annual report of Plan activity which summarizes the performance of the Service and asset allocation recommendations and provides a breakdown of all fees and expenses paid by the Plan and participants for the year." The Applicant requested clarification that the summary of the performance of the Service relates to the performance of the asset allocation categories provided to the Plan, and suggested the following language: "An annual report which summarizes the performance of asset allocation categories provided to the Plan (not including the performance of individual participant accounts) and provides a breakdown of all fees and expenses paid to SPIAS by the Plan or participants for the Service for the year. Such reports shall be provided no more than 45 days after the period to which it relates. Upon the Independent Fiduciary's or the Plan sponsor's request, such report may be provided more frequently." The Department concurs with the Applicant and has clarified the condition accordingly.

In addition, the Applicant requested that the Department clarify that this condition refers to the fees paid to SPIAS by the Plan and the Plan sponsor. In response to the comment, the Department has determined to clarify this condition under the final exemption. Accordingly, for purposes of I(B)(6), the annual report must disclose a breakdown of all fees and expenses paid to SPIAS in connection with the provision of the Service to participants under the Plan. The Department believes that disclosure of all fees recovered by SPIAS from all sources in connection with the provision of the Service to a particular Plan, will assist the Independent Fiduciary evaluate the reasonableness of the arrangement.

5. *Dealings Between a Service Provider and Plans.* Section I(J) stated

<sup>3</sup> The Department notes that section 408(b)(2) of the Act exempts from the prohibitions of section 406(a) of the Act any reasonable arrangement for the provision of necessary service to a plan. However, that statutory exemption does not provide relief from the prohibitions described in section 406(b) of the Act. See 29 CFR 2550.408b-2(a).

that "All dealings between the Service Provider and the Plans participating in the Service are on a basis no less favorable to the Plans than dealings with other investors of the Service Provider." The Applicant represents that Plans are clients of a Service Provider and not necessarily investors of the Service Provider, except to the extent that Plans are shareholders of a mutual fund advised or administered by an affiliate of a Service Provider. SPIAS has no control over any Service Provider's dealings with any Plan. The Applicant requests that I(J) be deleted. The Department is not persuaded by the argument submitted in favor of deletion of this condition. The Department believes that this condition is necessary to assure that plans that contract with SPIAS pay no more for investment products than other clients of a Service Provider who do not participate in the Service. The Department notes, however, that this condition does not preclude Service Providers from charging fees related to a Plan's participation in the Service provided that the amount of the fees and the services to which the fees relate have been previously disclosed to, and approved by the Plan. Thus, in response to the comment, the Department has modified I(J) as follows: "Each Service Provider shall represent to SPIAS that it will not impose any additional fees and/or charges (relating to the investment products made available to Plans) on Plans who contract for the Service unless such fees and charges are imposed on a Service Providers's similarly situated clients who do not contract for the Service."

6. *Records.* Section I(O) provides in part, that SPIAS "will maintain for a period of six years, the records necessary to enable persons described in paragraph (P) of this section to determine whether the conditions of the exemption are met, including records of the recommendations made to the Plan participants and beneficiaries and their investment choices \* \* \*" The Applicant urges the Department to delete the requirement regarding maintenance of records relating to participant and beneficiary investment choices because S&P and SPIAS will have no practical way of tracking the actual investment choices of participants or tracking whether a participant actually used the advice. Further, if the Service is not provided through the Internet, there is no electronic record linking the advice to investment actions of the participant. The Department concurs with the comment and has deleted the

requirement to retain records of participant investment choices.

7. *Definition of Service Provider.*

Section II(B) defines the term "Service Provider" as

"an entity that has been in the financial services business for at least three years, and during such period, has not been found liable or guilty by a court of law, or has not been a party to a settlement agreement with the IRS or the Department related to any matter concerning an employee benefit plan, and which is described in one of the following categories:

1. A bank, savings and loan association, insurance company or registered investment adviser which meets the definition of a "qualified professional asset manager (QPAM) set forth in section V(a) of Prohibited Transaction Exemption 84-14 (49 Fed. Reg. 9494 (Mar. 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985) and in addition, has, as of the last day of its most recent fiscal year, total client assets under management and control in an amount not less than \$250 million; or

2. A broker dealer registered under the Securities Exchange Act of 1934, which has, as of the last day of its most recent fiscal year, \$1 million in shareholders' or partners' equity, and total client assets under management and control in an amount not less than \$250 million.

In its application, the Applicant requested that the definition of Service Provider include third-party record-keeping firms. The Applicant requested that the Department reconsider its decision not to include third-party record-keeping firms in the definition of "Service Provider." The Applicant asserted that the criteria outlined in its application and subsequent submission provided adequate safeguards to limit coverage of the exemption to a small number of very substantial and reputable organizations. The Department is unable to conclude that the limitations suggested by the Applicant provide suitable protections to employee benefit plans participating in the Service. Accordingly, the Department has not included third-party record-keeping firms in the definition of "Service Provider."

In addition, the Applicant urged the Department to modify section II(B) with respect to the requirement that a Service Provider not have been a party to a settlement agreement with the Department or the IRS related to any matter concerning an employee benefit plan. The Applicant was concerned that this language would exclude many Service Providers which have utilized various voluntary settlement programs at the Department or the IRS. The Department concurs and has modified the definition to read as follows: "The term 'Service Provider' means an entity that has been in the financial services

business for at least three years, and during such period, has not been convicted of a felony offense involving abuse or misuse of such entity's employee benefit plan position or employment, or any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary.

8. *Definition of Plan.* At the request of the Applicant, the Department has added section II(F) to the final exemption which defines the term "plan" to mean "an employee pension benefit plan described in section 3(2) of the Act."

9. *Definition of Affiliate.* Section II(D) defines the term "affiliate" to include:

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

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

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

The Applicant requested that the Department clarify that it did not intend the definition to encompass stock ownership of public companies by employees regardless of how de minimis or indirect. Accordingly, the Applicant suggested that the Department delete employees. The Department has modified the definition of affiliate to delete "employees."

10. *Miscellaneous.* (a) Page 15364 of the Notice, Representation No. 7 described how plan participants could access the Service and the form of the risk tolerance questionnaire. The Applicant noted that S&P expects that, depending on a client's particular situation, the risk tolerance questionnaire may change and the number of asset allocation investment recommendations will vary. Thus, the Applicant requested the following changes be made to the Summary of Facts and Representations of the Notice:

(i) The third sentence of the second paragraph of paragraph No. 7 stated that "A Plan participant will answer a questionnaire which consists of ten to fifteen questions with three or four multiple choice answers per question." The Applicant would like the phrase, "in its current form" added following the words, "questionnaire which";

(ii) In paragraph No. 7, The third sentence of the fourth paragraph stated "Based on the score, the Plan participant is categorized into one of six investment recommendations." The Applicant asked that the phrase "or more" be added after the word "six";

(iii) Footnote 3 read, "Each participant who completes the risk-tolerance questionnaire will be categorized, based on his/her score, into one of these six recommendations as discussed in paragraph

no. 7." The Applicant requested that the word "six" be deleted.

(iv) In the first sentence of the fifth paragraph of Paragraph no. 7, it is stated that "The advice provided to a Plan participant through the Service may only be implemented if it is expressly authorized in writing by the Plan participant." The applicant asked that the words "in writing" be removed because the Service may not be provided in the paper-based form, but rather by telephone or over the by Internet.

The Department has made the above described revisions.

(b) Lastly, The Applicant would like to note that S&P and SPIAS may be required to make payments to Service Providers for costs incurred in connection with the establishment, implementation and maintenance of the Service.

**FOR FURTHER INFORMATION CONTACT:**

Allison Padams Lavigne, U.S. Department of Labor, (202) 219-8971. (This is not a toll free number.)

**Washington County Hospital Association Employees' Cash Balance Plan (the Plan)**

Located in Hagerstown, Maryland

[Prohibited Transaction Exemption 2000-40; Exemption Application No. D-10839]

**Exemption**

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the past contribution by Washington County Hospital Association to the Plan of certain publicly-traded securities (the Securities), provided: (a) The contribution was a one-time transaction; (b) the Securities were valued at their fair market value as of the date of the contribution, as determined by an independent broker; (c) no commissions were paid in connection with the transaction; and (d) the Securities represented less than 5% of the assets of the Plan at the time of the contribution.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 13, 2000 at 65 FR 37182.

*Effective Date:* This exemption is effective June 18, 1998.

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

**General Information**

The attention of interested persons is directed to the following:

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

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 4th day of August, 2000.

**Ivan Strasfeld,**

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

[FR Doc. 00-20208 Filed 8-9-00; 8:45 am]

**BILLING CODE 4510-29-P**

**NUCLEAR REGULATORY COMMISSION**

**Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request**

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of the OMB review of information collection and solicitation of public comment.

**SUMMARY:** The NRC has recently submitted to OMB for review the

following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* Policy Statement on Cooperation with States at Commercial Nuclear Power Plants and Other Production or Utilization Facilities.

3. *The form number if applicable:* N/A.

4. *How often the collection is required:* On occasion—when a State wishes to observe NRC inspections or perform inspections for NRC.

5. *Who will be required or asked to report:* Those States interested in observing or performing inspections.

6. *An estimate of the number of responses:* Maximum of 50, although not all States participate in the program.

7. *The estimated number of annual respondents:* 50.

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* An average of 10 hours per State, or 500 hours if all States participated in the program.

9. *An indication of whether section 3507(d), Pub. L. 104-13 applies:* Section 3507(d) does not apply, since the collection is not contained in a proposed rule.

10. *Abstract:* States wishing to enter into an agreement with NRC to observe or participate in NRC inspections at nuclear power facilities are requested to provide certain information to the NRC to ensure close cooperation and consistency with the NRC inspection program as specified by the Commission's Policy of Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW. (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (<http://www.nrc.gov/NRC/PUBLIC/OMB/index.html>). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by September 11, 2000. Comments received after this date will