

was required by the Lease under PTE 87-28.

4. The Property is located at 7201 West Friendly Street in Greensboro, North Carolina. The Property consists of 8.52 acres of land with improvements. These improvements are a one and two-story, single-user professional office building, containing approximately 98,717 square feet of gross building area. The Property was appraised on March 7, 2002 (the Appraisal) by Mark A. Morgan and Fred H. Beck, Jr., MAI, CCIM, both qualified independent real estate appraisers (collectively, the Appraisers). The Appraisers are with Fred H. Beck and Associates, LLC, Real Estate Appraisers and Consultants, which is located on 6525 Morrison Boulevard, Charlotte, North Carolina.

In determining the fee simple estate<sup>29</sup> value of the Property, the Appraisers considered the Cost Approach, the Income Approach, and the Sales Comparison Approach. Based on their analysis, the Property had a fair market value of approximately \$7.5 million, as of March 7, 2002. In addition, the Appraisal states that the current fair market rental rate for the entire Property, as would be leased to one tenant on an absolute net basis, was \$72,058 per month, as of March 7, 2002. Unifi represents that it is currently paying this amount to the Plan each month as rent for the Property.

The applicant states that the Appraisal will be updated at the time of the proposed transaction, in order to ensure that the Plan receives no less than the current fair market value of the Property (i.e., the fee simple estate) on the date of the sale. In any event, the applicant represents that the purchase price of the Property to be paid by Unifi will be the greater of: (i) \$7,500,000, the fair market value as currently appraised; or (ii) the fair market value of the Property as determined by the updated Appraisal.

5. The applicant proposes that Unifi purchase the Property from the Plan in a one-time cash transaction. The applicant represents that the proposed transaction would be in the best interest and protective of the Plan because, among other things, the Plan will pay no expenses or commissions associated with the sale. Unifi will pay the Plan an amount equal to the current fair market value of the Property, as established by an independent, qualified appraiser. In this regard, the applicant maintains that

the Property is not adjacent to any other real estate owned by Unifi or the Plan. The sale of the Property by the Plan to Unifi will help to avoid the time and expense of locating an unrelated third party buyer<sup>30</sup> or lessee for the Property. In addition, the applicant wants to avoid the time and expense of obtaining the Department's approval for a new lease of the Property to Unifi, pursuant to a new PTE with a new I/F.

6. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) the proposed sale will be a one-time cash transaction;

(b) the Plan will receive the greater of: (i) \$7,500,000; or (ii) the fair market value for the Property, as established by an independent qualified appraiser at the time of the sale;

(c) the Plan will pay no commissions or other expenses associated with the sale;

(d) the sale will enable the Plan to sell the Property, which is currently subject to a lease that became a prohibited transaction under the Act as of March, 2002; and

(e) the applicant will file Form 5330 with the IRS and pay appropriate excise taxes within 60 days of the date of a grant of this proposed exemption.

*For Further Information Contact:*  
Ekaterina A. Uzlyan of the Department at (202) 693-8540. (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 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 3rd day of June, 2002.

**Ivan Strasfeld,**

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

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## **DEPARTMENT OF LABOR**

### **Pension and Welfare Benefits Administration**

**[Prohibited Transaction Exemption 2002-28; (Exemption Application No. D-10869), et al.]**

### **Grant of Individual Exemptions; Massachusetts Mutual Insurance Company (MassMutual)**

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

**ACTION:** Grant of individual exemption.

**SUMMARY:** This document contains an exemption 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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for

<sup>29</sup> The Appraisal defines the term "fee simple estate" as " \* \* \* absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the government powers of taxation, eminent domain, police power and escheat."

<sup>30</sup> The applicant represents that the Plan has been unsuccessful in locating an independent third party buyer for the Property.

exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is 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 exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

#### Massachusetts Mutual Insurance Company (MassMutual) Located in Springfield, Massachusetts

[Prohibited Transaction Exemption 2002- ; Exemption Application No. D-10869]

#### Exemption

##### *Section I. Retroactive Exemption for the Purchase of Fund Shares*

For the period from April 1, 1995 until June 6, 2002, the restrictions of sections 406(a) and 406(b) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase by an employee benefit plan (the Client Plan) (directly or through a single customer or pooled separate account or other pooled vehicle) of shares of one or more diversified open-end management

investment companies (Fund or Funds) in exchange for Client Plan assets transferred in-kind to a Fund from a single customer or pooled separate account or other pooled vehicle holding plan assets maintained by MassMutual (a Separate Account), where MassMutual or its affiliate is the Fund's investment adviser and a Client Plan fiduciary.

The exemption is subject to the following conditions:<sup>1</sup>

(a) No sales commissions, redemption fees, or other fees are paid by the Client Plan in connection with the purchase of Fund shares by a Client Plan.

(b) All transferred assets are either cash or securities for which market quotations are readily available.

(c) The assets transferred in-kind to the Funds constitute the Client Plan's pro rata portion of the assets held by the Separate Account immediately prior to the transfer.

(d) The Client Plan receives Fund shares having a total net asset value equal to the value of the assets transferred by the Client Plan on the date of the transfer, as determined in a single valuation performed in the same manner at the close of the same business day with respect to all Client Plans participating in the transaction on such date, in accordance with the procedures set forth in Rule 17a-7 of the Investment Company Act of 1940 (the 1940 Act) (using sources independent of MassMutual and the Fund) and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets.

(e) An Independent Fiduciary with respect to each Client Plan receives advance written notice of an in-kind transfer and purchase of assets and full written disclosure of information concerning the Funds, including:

(1) A current prospectus for each Fund to which the Separate Account's assets may be transferred, updated as necessary, deliverable: (i) In hard copy format either automatically or upon timely notification to the Independent Fiduciary that a hard copy format is available upon request; or (ii) in electronic copy format upon timely notification to the Independent Fiduciary that such electronic format is available by accessing MassMutual's internet website.

(2) A statement describing the investment advisory and other fees to be

charged to, or paid by, a Client Plan and the Funds to the Fund Adviser, including the nature and extent of any differential between the rates of the fees paid by the Fund and the rates of the fees paid by the Client Plan in connection with the Client Plan's investment in the Separate Account;

(3) A statement of the reasons why MassMutual considers such investment to be appropriate for the Client Plan; and

(4) A statement describing whether there are any limitations applicable to MassMutual with respect to which Client Plan assets may be invested in Fund shares, including the nature of the limitations.

(f) The Independent Fiduciary may:

(1) Opt-out of the in-kind transfer of the Client Plan's interest in the Separate Account for shares of the Funds (including by selling its interest in a pooled vehicle) without penalty; or (2) approve the in-kind transfer (on the basis of the prospectus and disclosure referred to in paragraph (e) of this Section) consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Approval for the in-kind transfer of a Client Plan's interest in the Separate Account in exchange for Fund shares may be presumed notwithstanding that MassMutual does not receive any response from a Client Plan pursuant to MassMutual's two written requests (one by certified mail) for such approval, provided that the first such request occur at least 45 days before the in-kind transfer and the second written request occur at least 30 days before the in-kind transfer.

(g) MassMutual sends a written confirmation by regular mail or personal delivery to the Independent Fiduciary of each Client Plan participating in the in-kind transfer, no later than 105 days after completion of each purchase, containing:

(1) The number of Separate Account units held by the Client Plan immediately before the transfer, and the related per unit value and the total dollar amount of such units; and

(2) The number of Fund shares held by the separate account immediately following the transfer, and the related per share net asset value and the total dollar amount of such shares.

(h) All other dealings between the Client Plan and the Funds are on a basis no less favorable to the Client Plan than dealings between the Funds and other shareholders holding the same class of shares as the Client Plans.

(i) Conditions (a) and (f) of Section III have been met.

<sup>1</sup> The Department notes that the exemption does not provide relief for any prohibited transactions that may arise in connection with terminating a separate investment account, or permitting certain plans to withdraw from a separate investment account that is not terminating, or liquidating or transferring any plan assets held by the separate investment account.

## *Section II. Prospective Exemption for the Purchase of Fund Shares*

Effective after [insert date of publication of this final exemption in the **Federal Register**], the restrictions of sections 406(a) and 406(b) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase by a Client Plan (directly or through a single customer or pooled separate account or other pooled vehicle) of shares of one or more Fund(s) in exchange for Client Plan assets transferred in-kind to a Fund from a Separate Account, where MassMutual or its affiliate is the Fund's investment adviser and a Client Plan fiduciary.

The exemption is subject to the following conditions:

(a) The assets transferred in-kind to the Funds constitute the Client Plan's pro rata portion of the assets held by the Separate Account immediately prior to the transfer. Notwithstanding the foregoing, the allocation among Client Plans of fixed-income securities held by a Separate Account on the basis of each Client Plan's pro rata share of the aggregate value of such securities will not fail to meet the requirements of this subsection if:

(1) The aggregate value of the fixed-income securities does not exceed one percent of the total value of the assets held by the Separate Account immediately prior to the transfer; and

(2) Such securities have the same coupon rate and maturity, and at the time of the transfer, the same credit ratings from nationally recognized statistical rating agencies.

(b) An Independent Fiduciary with respect to each Client Plan receives advance written notice of the in-kind transfer and purchase and full written disclosure of information concerning the Funds including:

(1) The identity of the securities that will be valued in accordance with Rule 17a-7(b)(4) under the 1940 Act;

(2) The identity of any fixed-income securities allocated on the basis of each Client Plan's pro rata share of the aggregate value of such securities pursuant to Section II (a);

(3) Upon request of the Independent Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption; and

(4) The date on which the in-kind purchase will take place.

(c) MassMutual sends by regular mail or personal delivery to the Independent Fiduciary of each Client Plan that purchases Fund shares pursuant to the in-kind transfer:

(1) Not later than 30 days after the completion of the purchase, a written confirmation containing:

(A) The identity of each security valued in accordance with Rule 17a-7(b)(4) under the 1940 Act;

(B) The current market price, as of the date of the in-kind transfer, of each such security involved in the purchase of Fund shares; and

(C) The identity of each pricing service or market-maker consulted in determining the current market price of such securities; and

(2) Not later than 90 days after each in-kind transfer, a written confirmation which contains:

(A) The number of Separate Account units held by such affected Client Plan immediately before the in-kind transfer (and the related per unit value and the aggregate dollar value of the units transferred); and

(B) The number of shares in the Funds that are held by such affected Client Plan following the in-kind transfer (and the related per share net asset value and the aggregate dollar value of the shares received).

(d)(1) MassMutual provides the Independent Fiduciary of each Client Plan holding shares of the Funds with—

(A) A copy of an updated prospectus, deliverable in the manner specified in paragraph (e) of Section I, of such Fund, at least annually; and

(B) Upon request of the Independent Fiduciary, a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other written statement) containing a description of all fees paid by the Fund to MassMutual or its affiliates.

(2) With respect to each of the Funds in which a Client Plan invests, in the event such Fund places brokerage transactions with an affiliate of MassMutual, MassMutual will provide the Independent Fiduciary of such Client Plan at least annually with a statement specifying:

(A) The total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid to an affiliate of MassMutual by such Fund;

(B) The total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to MassMutual;

(C) The average brokerage commissions per share, expressed as cents per share, paid to an affiliate of MassMutual by each portfolio of a Fund; and

(D) The average brokerage commissions per share, expressed as cents per share, paid by each portfolio

of a Fund to brokerage firms unrelated to MassMutual.

(e) The Independent Fiduciary may:

(1) Opt-out (including by selling its interest in a pooled vehicle) of the in-kind exchange of the Client Plan's interest in the Separate Account for shares of the Funds without penalty; or

(2) approve the in-kind transfer (on the basis of the prospectus and disclosure referred to in paragraph (b) of this Section and paragraph (e) of Section I) consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Approval for the in-kind transfer of a Client Plan's interest in the Separate Account in exchange for Fund shares may be presumed notwithstanding that MassMutual does not receive any response from a Client Plan pursuant to MassMutual's two written requests (one by certified mail) for such approval, provided that the first such request occurs at least 90 days before the in-kind transfer and the second such request occurs within 45 days thereafter.

(f) All of a Client Plan's assets held in a Separate Account (other than Fund shares already held in the Account) are transferred in-kind to one or more of the Funds in exchange for Fund shares, except that any Plan assets in the Separate Account which are not suitable for acquisition by the Funds shall be liquidated as soon as reasonably practicable, and the cash proceeds shall be invested directly in shares of the Funds.

(g) The authorization described in paragraph (e) of this section is terminable at will by the Independent Fiduciary of a Client Plan, without penalty to such Client Plan. Such termination will be effected by MassMutual redeeming the shares of the Fund(s) held by the affected Client Plan or selling its interest in a Separate Account, in one business day, provided that if, due to circumstances beyond the control of MassMutual, the redemption cannot be executed within one business day, MassMutual shall have one additional business day to complete such redemption.

(h) Conditions (a), (b), (d), (e), and (h) of Section I, Conditions (a) and (e) of Section III, and Conditions (a) and (b) of Section V have been met.

## *Section III. Retroactive Exemption for the Receipt of Fees*

For the period from April 1, 1995 until June 6, 2002, the restrictions of sections 406(a) and 406(b) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply to the receipt of fees by

MassMutual from the Funds for acting as an investment adviser for such Funds, as well as for providing other services to the Funds which are "Secondary Services", as defined in Section VI(i), in connection with the investment by the Client Plans for which MassMutual serves as a fiduciary in shares of the Funds.

The exemption is subject to the following conditions:

(a) As to each Client Plan, the combined total of all fees received by MassMutual for the provision of services to the Client Plan, and for the provision of services to a Fund in which a Client Plan holds shares, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(b) The price paid or received by a Client Plan for shares in a Fund is the net asset value of such shares, as defined in Section VI(g), at the time of the transaction and is the same price that would have been paid or received for the shares by any other investor at that time.

(c) Neither MassMutual, other than in its capacity as agent for the Funds, nor any officer or director of MassMutual, purchases or sells shares of the Funds from or to any Client Plan.

(d) The Independent Fiduciary approves the fees to be paid by the Funds to MassMutual as such fees relate to:

(1) Fund shares purchased by a Client Plan for cash;

(2) Fund shares purchased by a Client Plan pursuant to an in-kind transfer (upon the Independent Fiduciary's consideration of the information described in paragraph (e) of Section I);

(3) the addition of a Secondary Service (as defined in Section V (i)) provided by MassMutual to the Fund for which a fee is charged, or an increase in the rate of any fee paid by the Funds to MassMutual for any Secondary Service that results either from an increase in the rate of such fee or from a decrease in the number or kind of services performed by MassMutual for such fee over an existing rate for such Secondary Service that had been authorized by the Independent Fiduciary of a Client Plan. The approvals required in this paragraph may be presumed notwithstanding that MassMutual does not receive any response from a Client Plan to MassMutual's two written requests (one by certified mail) for approval of a change in the rates of fees provided that the first such request occurs at least 45 days before the in-kind transfer and the second written request occur at least 30 days before the in-kind transfer. Such approval may be

limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by a Client Plan and need not relate to any other aspects of such investment.

(e) The Fund Adviser does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the acquisition of Fund shares in exchange for Client Plan assets.

(f) The Plan does not pay any plan-level investment management, investment advisory or similar fee with respect to the Client Plan assets invested in such shares for the entire period of such investment. This condition does not preclude the payment of investment advisory fees by an investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940.

(g) On an annual basis, MassMutual provides the Independent Fiduciary of each Client Plan holding shares of the Funds with—

(1) A copy of an updated prospectus of such Fund, deliverable in the manner specified in paragraph (e) of Section I of this exemption; and

(2) Upon request of the Independent Fiduciary, a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other written statement) containing a description of all fees paid by the Fund to MassMutual or its affiliates.

(3) Oral or written responses to inquiries of the Independent Fiduciary as they arise.

(h) Conditions (a), (e), (h) and (i) of Section I, Condition (b) of Section II, and Conditions (a) and (b) of Section V have been met.

#### *Section IV. Prospective Exemption for the Receipt of Fees*

Effective after June 6, 2002, the restrictions of sections 406(a) and 406(b) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply to the receipt of fees by MassMutual from the Funds for acting as an investment adviser for such Funds, as well as for providing other services to the Funds which are "Secondary Services," as defined in Section VI(i), in connection with the investment by the Client Plans for which MassMutual serves as a fiduciary in shares of the Funds, provided that the following conditions are met:

(a) For each Client Plan using the fee structure described in paragraph (d)(2) of this Section with respect to investments in a particular Fund, the Independent Fiduciary of the Client

Plan receives full written disclosure in a Fund prospectus or otherwise of any increases in the rates of fees charged by MassMutual to the Funds for investment advisory services.

(b) All authorizations made by an Independent Fiduciary regarding investments in a Fund and the fees paid to MassMutual are subject to an annual reauthorization, wherein any such prior authorization referred to in Section III(d) shall be terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by MassMutual of written notice of termination. The Independent Fiduciary must be supplied with a Termination Form, at the times specified in paragraph (c) of this Section, with instructions on the use of the form, including the following information:

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Client Plans, upon receipt by MassMutual of written notice from the Independent Fiduciary; and

(2) Failure by the Independent Fiduciary to return the Termination Form on behalf of a Client Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or increase in the rate of any fees, if such Termination Form is supplied pursuant to the requirements of this Section, and will result in the continuation of the authorizations of MassMutual to engage in the transactions on behalf of such Client Plan.

(c) The Independent Fiduciary is supplied with a Termination Form no less than annually; provided that the Termination Form need not be supplied to the Independent Fiduciary pursuant to this paragraph sooner than six months after such Termination Form is supplied pursuant to paragraph (e) below, except to the extent required to disclose an additional service or an increase in fees.

(d) Each Client Plan satisfies either (but not both) of the following:

(1) For a Client Plan for which MassMutual serves as a non-discretionary trustee, the Plan does not pay any Plan-level investment management fees, investment advisory fees, or similar fees to MassMutual with respect to Client Plan assets invested in shares of the Funds. This condition does not preclude the payment of investment advisory fees, or similar fees, by a Fund to MassMutual under the terms of its investment advisory agreement adopted in accordance with section 15 of the 1940 Act, nor does it preclude the payment of fees for Secondary Services to MassMutual pursuant to a duly

adopted agreement between MassMutual and the Funds.

(2) For a Client Plan for which MassMutual serves as a discretionary fiduciary (i.e., a trustee or investment manager), such Client Plan pays MassMutual an investment advisory fee based on total Client Plan assets from which a credit had been subtracted representing such Client Plan's pro rata share of all investment advisory fees paid by the Funds. This condition does not preclude the payment of fees for Secondary Services to MassMutual pursuant to a duly adopted agreement between MassMutual and the Funds.

(e)(1) For each Client Plan using the fee structure described in paragraph (d)(1) of this Section with respect to investments in a particular Fund, an increase in the rate of fees paid by the Fund to MassMutual regarding any investment management services, investment advisory services, or similar services that MassMutual provides to the Fund over an existing rate for such services that had been authorized by an Independent Fiduciary in accordance with paragraph (d) of Section III; or

(2) For any Client Plan under this exemption, an addition of a Secondary Service (as defined in Section V (i)) provided by MassMutual to the Fund for which a fee is charged, or an increase in the rate of any fee paid by the Funds to MassMutual for any Secondary Service that results either from an increase in the rate of such fee or from a decrease in the number or kind of services performed by MassMutual for such fee over an existing rate for such Secondary Service that had been authorized by the Independent Fiduciary of a Client Plan in accordance with paragraph (d) of Section III—

MassMutual will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the increase in fees) to the Independent Fiduciary of the Client Plan. Such notice shall be accompanied by a Termination Form with instructions as described above.

(f) Conditions (a), (e) and (h) of Section I, Conditions (b) and (d) of Section II, Conditions (a), (b), (c), (d), (e), and (g) of Section III, and Conditions (a) and (b) of Section V have been met.

#### Section V. General Conditions

(a) MassMutual maintains for a period of six years the records necessary to enable the persons described in

paragraph (b) of this section to determine whether the conditions of this exemption, and the proper crediting of fees described in paragraph (d)(2) of Section IV, have been met, except that:

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

(2) No party in interest other than MassMutual 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 (b) below.

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

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

(ii) Any fiduciary of the Client Plans who has authority to acquire or dispose of shares of the Funds owned by the Client Plans, or any duly authorized employee or representative of such fiduciary, and

(iii) Any participant or beneficiary of the Client Plans or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in paragraph (b)(1)(ii) and (iii) above shall be authorized to examine trade secrets of MassMutual, or commercial or financial information that is privileged or confidential.

#### Section VI. Definitions

For purposes of this exemption:

(a) An "affiliate" of a person includes—

(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 or relative of such person, or partner in any such person; and

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

(b) The term "Client Plan" means a pension plan described in 29 CFR 2510.3-2, a welfare benefit plan described in 29 CFR 2510.3-1, and a plan described in section 4975(e)(1) of the Code.

(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) The term "fixed income security" means any interest-bearing or discounted government or corporate debt security with a face amount of \$1,000 or more that obligates the issuer to pay the holder a specified sum of money, and to repay the principal amount of the loan at maturity.

(e) The term "Fund" or "Funds" means any diversified open-end management investment company or companies registered under the Advisers Act for which MassMutual or its affiliates serves as an investment adviser, and may also serve as a custodian, shareholder servicing agent, transfer agent or provide some other secondary service (as defined in paragraph (j) of this section).

(f)(1) The term "Independent Fiduciary" means a fiduciary of a Client Plan who is unrelated to, and independent of, MassMutual. For purposes of this exemption, a Client Plan fiduciary will be deemed to be unrelated to, and independent of, MassMutual if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in Section I, II, III, or IV is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of MassMutual and represents that such fiduciary shall advise MassMutual if those facts change.

(2) Notwithstanding anything to the contrary in this Section VI(f), a fiduciary is not independent if:

(i) such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Insurer;

(ii) such fiduciary directly or indirectly receives any compensation or other consideration from MassMutual for his or her own personal account in connection with any transaction described in this exemption;

(iii) any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of MassMutual, responsible for the transactions described in Section I, II, III or IV is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Client Plan sponsor or of the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in Section I, II, III or IV. However, if such individual is a director of

MassMutual or of the responsible fiduciary and if he or she abstains from participation in the decision to authorize or terminate authorization for transactions described in Section I, II, III or IV, then Section VI(f)(2)(iii) shall not apply.

(g) The term "Net Asset Value" means the amount calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and Statement of Additional Information, and other assets belonging to each of the portfolios in such Fund, less the liabilities chargeable to each portfolio, by the number of outstanding shares.

(h) The term "pooled separate account" means a pooled investment fund maintained by MassMutual or an affiliate for the collective investment of assets attributable to two or more plans maintained by unrelated employers.

(i) The term "secondary service" means a service provided by MassMutual or an affiliate to a Fund other than investment management, investment advisory or similar services.

(j) The term "security" shall be defined by section 2(36) of the Advisers Act, as amended, 15 U.S.C. 80a-2(36) (1996).

(k) The term "Fund Adviser" means (i) any affiliate of MassMutual which serves as an investment adviser to a Fund, and (ii) any affiliate of an investment adviser identified in subsection (i).

(l) The term "Termination Form" means the form supplied to the Independent Fiduciary, at the times specified above, which expressly provides an election to the Independent Fiduciary to terminate on behalf of the Client Plans the authorizations described in Paragraph (b) of Section IV. Such Termination Form may be used at will by the Independent Fiduciary to terminate such authorization without penalty to the Client Plans and to notify MassMutual in writing to effect such termination by redeeming the shares of the Fund held by the Client Plans requesting termination by the close of the business day following the date of receipt by MassMutual, whether by mail, hand delivery, facsimile or other available means at the option of the Independent Fiduciary, of written notice of such request for termination; provided that if, due to circumstances beyond the control of MassMutual, the redemption cannot be executed within one business day, MassMutual shall have one additional business day to complete such redemption.

#### Written Comments

In response to the proposed exemption, the Department received one comment letter submitted by MassMutual (hereinafter, the applicant). In the letter, the applicant requested a change with respect to the retroactive portions of the exemption (sections I and III) relating to certain time-frames in which MassMutual is required to make the requests to an Independent Fiduciary. Specifically, section I(f) requires that MassMutual make certain requests to an Independent Fiduciary for the advance approval of an in-kind transfer for retroactive relief, and section III(d) requires that MassMutual make certain requests to an such fiduciary for the advance approval of certain fees and/or services provided by MassMutual. In this regard, both sections provide that each such approval:

"may be presumed notwithstanding that MassMutual does not receive any response from a Client Plan pursuant to MassMutual's two written requests (one by certified mail) for such approval, provided that the first such request occurs at least 90 days before the in-kind transfer and the second such request occurs *within 45 days thereafter*." (emphasis added)

The applicant requests that, with respect to the time-frame described above, the first written request occur at least 45 days before the in-kind transfer and the second written request occur at least 30 days before the in-kind transfer. The applicant represents that such time-frame has ensured that adequate and timely notice was given to an Independent Fiduciary with respect to any in-kind transfer and any change in fees/services described in the exemption. The Department has determined that it is appropriate to modify paragraph section I(f) and section III(d) as requested and has revised the exemption accordingly.

Additionally, MassMutual requested a modification with respect to the manner in which a prospectus for each Fund may be delivered. Such modification affects section I(e), section II(d), section III(g), and section IV(f) (which require, among other things, that condition (e) of section I, condition (d) of section II, and condition (g) of section III must be met) of the exemption. In this regard, the applicant requests that the delivery of a prospectus pursuant to the affected sections of the exemption may occur in one of two ways: (1) MassMutual may automatically deliver a prospectus to an Independent Fiduciary in hard copy format; or (2) MassMutual may notify an Independent Fiduciary that a hard copy format of the prospectus is available

upon request or an electronic copy format of the prospectus is available by accessing MassMutual's internet website. The applicant represents the notification and delivery arrangements described above are sufficient to ensure that an Independent Fiduciary is able to obtain a prospectus in a timely manner. The Department has agreed to this request by the applicant and, accordingly, has revised the exemption.

After giving full consideration to the entire record, including the written comment noted above, the Department has decided to grant the exemption.

For further information regarding the comments and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11026) 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 Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

*For Further Information Contact:* Christopher Motta of the Department, telephone (202) 693-8544 (This is not a toll-free number).

#### **Wyndham International, Inc., Employee Savings & Retirement Plan (the Plan), Located in Dallas, Texas**

[Prohibited Transaction Exemption 2002-29; Exemption Application No. D-10912]

#### **Exemption**

The restrictions of sections 406(a), 406(b)(2), and 407(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 past acquisition, holding, and exercise by the Plan of certain stock purchase rights (the Rights),<sup>2</sup> which were issued by Wyndham International, Inc. (Wyndham) to all shareholders of record, as of September 30, 1999, of certain Wyndham common stock (the Common Stock) pursuant to a rights offering (the Rights Offering), provided that the following conditions were satisfied:

(a) The Plan's acquisition and holding of the Rights in connection with the Rights Offering occurred as a result of an independent act of Wyndham as a corporate entity;

<sup>2</sup> The applicant states that the Rights do not constitute "qualifying employer securities" within the meaning of section 407(d)(5) of the Act.

(b) All holders of the Common Stock, including the Plan, were treated in a like manner with respect to all aspects of the Rights Offering; and

(c) All decisions regarding the disposition or exercise of the Rights were made by the individual Plan participants whose accounts in the Plan received the Rights, in accordance with Plan provisions for the individually directed investment of such accounts.

**Effective Date:** This exemption is effective for the period from November 9, 1999 to December 8, 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 proposed exemption published on March 18, 2002 at 67 FR 12062.

**For Further Information Contact:** Ms. Karin Weng of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**EquiLend Holdings LLC (EquiLend),  
Located in New York, New York**

[Prohibited Transaction Exemption 2002-30;  
Exemption Application No. D-11026]

**Exemption**

**Section I. Sale of EquiLend Products to Plans**

The restrictions of section 406(a)(1)(A) and (D) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply, effective March 29, 2002, to the sale or licensing of certain data and/or analytical tools to an employee benefit plan by EquiLend, a party in interest with respect to such plan.

This exemption is subject to the following conditions:

(a) The terms of any such sale or licensing are at least as favorable to the plan as the terms generally available in an arm's-length transaction involving an unrelated party;

(b) Any data sold/licensed to the plan will be limited to:

(1) Current and historical data related to transactions proposed or occurring on EquiLend's electronic securities lending platform (the Platform) or,

(2) Data derived from current and historical data using statistical or computational techniques; and

(c) Each analytical tool sold/licensed to the plan will be an objective statistical or computational tool designed to permit the evaluation of securities lending activities.

**Section II. Use of Platform by Owner Lending Agent/Sale of EquiLend Products to Plans Represented by Owner Lending Agent**

The restrictions of sections 406(a) and 406(b) of the Act, section 8477(c)(2) of FERSA, and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply, effective March 29, 2002, to: (1) The participation in the Platform by an equity owner of EquiLend (an Equity Owner), in its capacity as a securities lending agent for a plan (an Owner Lending Agent); and (2) the sale or licensing of certain data and/or analytical tools by EquiLend to a plan for which an Equity Owner acts as a securities lending agent.

This exemption is subject to the following conditions:

(a) In the case of participation in the Platform on behalf of a plan, to the extent an applicable exemption is required, the securities lending transactions conform to the provisions of Prohibited Transaction Class Exemption (PTE) 81-6 (46 FR 7527 (Jan. 23, 1981)), PTE 82-63 (46 FR 14804 (Apr. 6, 1982)), and/or any applicable individual exemption;

(b) None of the fees imposed by EquiLend for securities lending transactions conducted through the use of the Platform at the direction of an Owner Lending Agent will be charged to a plan;

(c) Each securities lender and securities borrower participating in a securities lending transaction through EquiLend will be notified by EquiLend as to its responsibilities with respect to compliance, as applicable, with the Act, the Code, and FERSA. This requirement may be met by including such notification in the participation, subscription or other user agreement required to be executed by each participant in EquiLend;

(d) EquiLend will not act as a principal in any securities lending transaction involving plan assets;

(e) Each Owner Lending Agent will provide prior written notice to its plan clients of its intention to participate in EquiLend;

(f) (1) Except as otherwise provided in paragraph (i), the arrangement pursuant to which the Owner Lending Agent utilizes the services of EquiLend on behalf of a plan for securities lending:

(A) Is subject to the prior written authorization of an independent fiduciary (an "authorizing fiduciary") as defined in paragraph (b) of section III). For purposes of subparagraph (f)(1), the requirement that the authorizing

fiduciary be independent shall not apply in the case of an Equity Owner Plan;

(B) May be terminated by the authorizing fiduciary, without penalty to the plan, within the lesser of: (i) The time negotiated for such notice of termination by the plan and the Owner Lending Agent, or (ii) five business days. Notwithstanding the foregoing, the requirement for prior written authorization will be deemed satisfied in the case of any plan for which the authorizing fiduciary has previously provided written authorization to the Owner Lending Agent pursuant to PTE 82-63, unless such authorizing fiduciary objects to participation in the Platform in writing to the Owner Lending Agent within 30 days following disclosure of the information described in paragraphs (e) and (g) of this section to such authorizing fiduciary; and

(2) Except as otherwise provided in paragraph (i), each purchase or license of a securities lending-related product from EquiLend on behalf of a plan by an Owner Lending Agent:

(A) Is subject to the prior written authorization of an authorizing fiduciary. For purposes of subparagraph (f)(2), the requirement for prior written authorization shall not apply to any purchase or licensing of an EquiLend securities lending-related product by an Equity Owner Plan if the fee or cost associated with such purchase or licensing is not paid by the Equity Owner Plan; and

(B) May be terminated by the authorizing fiduciary within (i) the time negotiated for such notice of termination by the plan and the Owner Lending Agent or (ii) five business days, whichever is lesser, in either case without penalty to the plan, provided that, such authorizing fiduciary shall be deemed to have given the necessary authorization in satisfaction of this paragraph (f)(2) with respect to each specific product purchased or licensed pursuant thereto unless such authorizing fiduciary objects to the Owner Lending Agent within 15 days after the delivery of information regarding such specific product to the authorizing fiduciary in accordance with paragraph (g) of this exemption;

(g) The authorization described in paragraph (f) of this section shall not be deemed to have been made unless the Owner Lending Agent has furnished the authorizing fiduciary with any reasonably available information that the Owner Lending Agent reasonably believes to be necessary for the authorizing fiduciary to determine whether such authorization should be made, and any other reasonably



available information regarding the matter that the authorizing fiduciary may reasonably request. This includes, but is not limited to: (1) A statement that the Equity Owner, as securities lending agent, has a financial interest in the successful operation of EquiLend, and (2) a statement, provided on an annual basis, that the authorizing fiduciary may terminate the arrangement(s) described in (f) above at any time;

(h) Any purchase or licensing of data and/or analytical tools with respect to securities lending activities by a plan pursuant to this section complies with the relevant conditions of section I and will be authorized in advance by an authorizing fiduciary in accordance with the applicable procedures of paragraphs (f), (g) and (i);

(i) (Special Rule for Commingled Investment Funds) In the case of a pooled separate account maintained by an insurance company qualified to do business in a state or a common or collective trust fund maintained by a bank or trust company supervised by a state or federal agency (Commingled Investment Fund), the requirements of paragraph (f) of this section shall not apply, provided that—

(1) The information described in paragraph (g) (including information with respect to any material change in the arrangement) of this section and a description of the operation of the Platform (including a description of the fee structure paid by securities lenders and borrowers), shall be furnished by the Owner Lending Agent to the authorizing fiduciary (described in paragraph (b) of section III) with respect to each plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of any such arrangement or material changes thereto, or, not less than 15 days prior to the purchase or license of any specific securities lending-related product, and, where requested, upon the reasonable request of the authorizing fiduciary. For purposes of this subparagraph, the requirement that the authorizing fiduciary be independent shall not apply in the case of an Equity Owner Plan;

(2) In the event any such authorizing fiduciary notifies the Owner Lending Agent that it objects to participation in the Platform, or to the purchase or license of any EquiLend securities lending-related tool or product, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account or fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly

manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement or purchase or license, but any existing arrangement need not be discontinued by reason of a plan electing to withdraw; and

(3) In the case of a plan whose assets are proposed to be invested in the pooled account or fund subsequent to the implementation of the arrangements and which has not authorized the arrangements in the manner described in paragraphs (i)(1) and (i)(2), the plan's investment in the account or fund shall be authorized in the manner described in paragraph (f)(1)(A) and (f)(2)(A);

(j) The Equity Owner, together with its affiliates (as defined in paragraph (a) of section III), does not own at the time of the execution of a securities lending transaction on behalf of a plan by the Equity Owner (i.e., in its capacity as Owner Lending Agent) through EquiLend or at the time of the purchase, or commencement of licensing, of data and/or analytical tools by the plan, more than 20% of:

(1) If EquiLend is a corporation, including a limited liability company taxable as a corporation, the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of EquiLend, or

(2) If EquiLend is a partnership, including a limited liability company taxable as a partnership, the capital interest or the profits interest of EquiLend;

(k) Any information, authorization, or termination of authorization may be provided by mail or electronically; and

(l) No Equity Owner Plan, as defined in section III(e) below, will participate in the Platform, other than through a Commingled Investment Fund in which the aggregate investment of all Equity Owner Plans at the time of the transaction constitutes less than 20% of the total assets of such fund.

Notwithstanding the foregoing, this prohibition shall not apply to the participation by an Equity Owner Plan as of the date that the aggregate loan balance of all securities lending transactions entered into through EquiLend by all participants outstanding on such date (excluding transactions entered into on behalf of Equity Owner Plans) is equal to or greater than \$10 billion; provided that if such aggregate loan balance is later determined to be less than \$10 billion, no additional participation by an Equity

Owner Plan (other than through a Commingled Investment Fund) shall occur until such time as the \$10 billion threshold amount is again met.

### Section III. Definitions

For purposes of this exemption:

(a) An "affiliate" of another person means:

(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, partner, employee, 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 paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(b) The term "authorizing fiduciary" means, with respect to an Owner Lending Agent, a plan fiduciary who is independent of such Owner Lending Agent. In this regard, an authorizing fiduciary will not be considered independent of an Owner Lending Agent if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Owner Lending Agent; or

(2) Such fiduciary directly or indirectly receives any compensation or other consideration from the Owner Lending Agent or an affiliate for his or her own personal account in connection with any securities lending transaction described herein; provided that Commingled Investment Funds and Equity Owner Plans maintained by such Owner Lending Agent or an affiliate will not be deemed affiliates of such Owner Lending Agent for purposes of this subparagraph (2).

For purposes of Section II, no Equity Owner or any affiliate may be an authorizing fiduciary except in the case of an Equity Owner Plan.

Notwithstanding the foregoing, the requirements for consent by an authorizing fiduciary with respect to participation in the Platform, and the annual right of such fiduciary to terminate such participation, shall be deemed met to the extent that the Owner Lending Agent's proposed utilization of the services of EquiLend on behalf of a plan for securities lending has been approved by an order of a United States district court.

(c) The term "Owner Lending Agent" means an Equity Owner in its capacity



as a fiduciary of a plan acting as securities lending agent in connection with the loan of plan assets that are securities.

(d) The term "Equity Owner" means an entity that either directly or through an affiliate owns an equity ownership interest in EquiLend.

(e) The term "Equity Owner Plan" means an employee benefit plan, as defined under section 3(3) of the Act, which is established or maintained by an Equity Owner of EquiLend, as defined in section III(d) above, as an employer of employees covered by such plan, or by its affiliate.

(f) The terms "employee benefit plan" and/or "plan" means:

(1) An "employee benefit plan" within the meaning of section 3(3) of the Act subject to Part 4 of Subtitle B of Title I of the Act,

(2) A "plan" (within the meaning of section 4975(e)(1) of the Code) subject to section 4975 of the Code, or

(3) The Federal Thrift Savings Fund.

#### Written Comments

The Department received one comment letter submitted by EquiLend Holdings LLC (hereinafter, the applicant) with respect to the proposed exemption. In the letter, the applicant requested that several revisions be made to section II, section III, and the Summary of Facts and Representations of the exemption, as proposed. In addition, the applicant requested that the Department clarify whether a specific transaction fell within the scope of the exemption.

1. *Section II.* With respect to this section of the proposed exemption, EquiLend requested that:

A. The phrase "to the extent applicable the procedures regarding the securities lending activities", as such phrase appears in section II(a), be replaced with "to the extent an applicable exemption is required, the securities lending transactions";

B. The phrase "a plan of an Equity Owner (Equity Owner Plan)", as such phrase appears in section II(f)(1)(A), be replaced with "Equity Owner Plan"; and

C. The sentence "This requirement may be met by including such notification in the participation, subscription or other user agreement required to be executed by each participant in EquiLend." be added at the end of section II(c).

The applicant states that the proposed revisions described above provide clarity and/or consistency to the exemption. The Department has determined that it is appropriate to modify the proposed exemption in the

manner requested by the applicant and, accordingly, has revised section II of the final exemption.

2. *Section III.* With respect to this section of the proposed exemption, EquiLend requested that:

A. The definition of the term "authorizing fiduciary", as contained in section III(b) of the proposed exemption, be modified by—

(i) Deleting the phrase "unrelated to" from the first sentence of section III(b);

(ii) Adding the phrase "provided that Commingled Investment Funds and Equity Owner Plans maintained by such Owner Lending Agent or an affiliate will not be deemed affiliates of such Owner Lending Agent for purposes of this subparagraph (2)" at the end of section III(b)(2); and

(iii) Adding the phrase "except in the case of an Equity Owner Plan" to the end of the second to the last sentence of section III(b).

B. The definition of the term "Owner Lending Agent", as contained in section III(c) of the proposed exemption, be amended by adding the following italicized language—

*"The term Owner Lending Agent means an Equity Owner in its capacity as a fiduciary of a plan acting as securities lending agent in connection with loans of plan assets that are securities."*

The applicant states that the proposed revisions described above brings clarity and consistency to the exemption. Specifically, the applicant represents that the modification described in (i) of this paragraph is being requested to ensure that the first sentence of section III(b) is consistent with the rest of section III(b) as well as with section II(f)(1)(A) of the exemption. In addition, the applicant states that the modification described in (ii) of this paragraph is being requested in order to clarify that certain transactions would not inadvertently result in a plan fiduciary being unable to prospectively authorize the use of EquiLend. As an example, the applicant states that a bank borrowing securities (through EquiLend) from, and providing cash collateral to, a collective trust fund managed by an Equity Owner would customarily receive a rebate from the collective trust fund on earnings generated by such collateral. According to the applicant, the rebate of earnings on the collateral received by the bank may affect the ability of the bank under the exemption to prospectively authorize the use of EquiLend by an Equity Owner (as Owner Lending Agent) to lend securities held by the bank's own plan since section III(b) of the proposed exemption requires that a plan fiduciary be

"independent" of the Owner Lending Agent. Under that definition, a fiduciary is not considered independent of an Owner Lending Agent if such fiduciary receives any compensation from the Owner Lending Agent or an affiliate for his or her own personal account in connection with any securities lending transaction described in the exemption. The applicant states that the proposed modification as it applies to Commingled Investment Funds and Equity Owner Plans is consistent with the intent of the exemption.

The Department has determined that it is appropriate to modify the proposed exemption in the manner requested by the applicant and, accordingly, has revised the final exemption.

3. *Summary of Facts and Representations.* With respect to this section of the proposed exemption, the applicant stated that in October 2001, EquiLend LLC changed its name to EquiLend Holdings LLC and, in November 2001, The Chase Manhattan Bank merged with Morgan Guaranty Trust Company of New York with the resulting bank being named JP Morgan Chase Bank. In addition, the applicant further requested that the Department clarify that:

A. The term "members", as such term appears throughout the Summary of Facts and Representations, refers to the entities that participate in EquiLend and not merely to the entities that have an ownership interest in EquiLend; and

B. The prohibition with respect to participation in EquiLend by an Equity Owner Plan, as discussed in Paragraph 5(E) of the Summary, is inapplicable to the extent that the aggregate loan balance of all securities lending transactions entered into through EquiLend by all participants (other than on behalf of the Equity Owner Plans) is equal to or greater than \$10 billion.

The applicant also sought the addition of the following as a footnote at the end of Paragraph 7—

However, the applicant requests that such authorizing fiduciary be deemed to have given the required authorization unless such authorizing fiduciary objects in writing to the purchase or licensing of a specific product to the Owner Lending Agent within 15 days after the disclosure of the information described above. In addition, such requirement for prior written authorization shall not apply to any such purchase or licensing by an Equity Owner Plan if the fee or cost associated with such purchase or licensing is not paid by the Equity Owner Plan.

The purpose of the proposed clarifications and addition described above, the applicant states, is to update and provide consistency to the

exemption. The Department has determined that it is appropriate to clarify and modify the exemption in the manner requested by the applicant and, accordingly, has revised the final exemption.

4. *Scope of Exemption.* The applicant states that it is possible that a lending agent, upon its appointment by an Equity Owner, may seek to use EquiLend on behalf of an Equity Owner Plan and/or a plan unrelated to an Equity Owner. The applicant inquires whether, in this situation, such arrangement falls within the scope of the exemption. If not, the applicant inquires further whether the arrangement described above constitutes a prohibited transaction for which additional exemptive relief is necessary.

It is the view of the Department that the use of EquiLend by a lending agent appointed by an Equity Owner is outside the scope of the relief provided by this exemption. In this regard, the Department notes that the exemption does not extend relief to the participation in EquiLend's electronic platform by a lending agent appointed by an Equity Owner. Rather, with respect to such participation, the exemption provides relief solely to an Owner Lending Agent (see section II).

The Department notes that any determination as to whether the arrangement described above constitutes a prohibited transaction is inherently factual in nature. In this regard, the Department notes that a violation of section 406 of ERISA would occur if the decision of a lending agent appointed by an Equity Owner to use EquiLend on behalf of a plan is part of an agreement, arrangement, or understanding in which a fiduciary caused plan assets to be used in a manner designed to benefit a party in interest or if the lending agent has an interest in the transaction which affects his judgment as a fiduciary.

After giving full consideration to the entire record, including the written comment submitted by the applicant, the Department has decided to grant the exemption.

For further information regarding the comments and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11026) 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 Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200

Constitution Avenue, NW., Washington, DC 20210.

*For Further Information Contact:* Christopher Motta of the Department, telephone (202)693-8544 (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 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) This exemption is 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 this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 3rd day of June, 2002.

**Ivan Strasfeld,**

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

[FR Doc. 02-14222 Filed 6-5-02; 8:45 am]

**BILLING CODE 4510-29-P**

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (02-071)]

#### NASA Advisory Council, Biological and Physical Research Committee, Physical Science Advisory Subcommittee; Meeting

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

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Biological and Physical Research Committee, Physical Science Advisory Subcommittee.

**DATES:** Wednesday, June 19, 2002, from 8 a.m. to 5 p.m..

**ADDRESSES:** NASA Headquarters, Room MIC-5 (5H46), 300 E Street, SW, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Dr. Brad Carpenter, Code UG, National Aeronautics and Space Administration, Washington, DC 20546, 202-358-0826.

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

- Introduction
- Program Issues and Status
- OBPR Plans
- Concepts for New Initiatives
- Proposed PSAS Activities 2002-2003
- Discussion and Summary
- Writing Assignments

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: May 30, 2002.

**Sylvia K. Kraemer,**  
*Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.*

[FR Doc. 02-14122 Filed 6-5-02; 8:45 am]

**BILLING CODE 7510-01-P**

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (02-072)]

#### NASA Advisory Council, Biological and Physical Research Advisory Committee Meeting, NASA-NIH Advisory Subcommittee and Life Sciences Advisory Subcommittee; Joint Meeting

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

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Biological and Physical Research Advisory Committee, NASA-NIH Advisory Subcommittee