

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM), the Western Montana, Central Montana, Eastern Montana, and Dakotas Resource Advisory Councils will meet as indicated below.

DATES: All four RACs will meet jointly on October 29, 2003. The joint meeting will begin at 8 a.m. and will be held at the BLM Montana State Office, 5001 Southgate Drive, Billings, Montana. Topics to be discussed include Sustaining Working Landscapes and the National Sage-Grouse Habitat Conservation Strategy. A public comment period will be held from 1–2 p.m.

Three RACs will also hold individual meetings. The Central Montana RAC will meet at 5:30 p.m. on October 28, 2003, and will continue its meeting on October 30, 2003, at 8 a.m. at the BLM Montana State Office at 5001 Southgate Drive, Billings, Montana. It will discuss the Upper Missouri River Breaks National Monument Resource Management Plan (RMP), Montana/Dakotas Off-Highway Vehicle policy priority setting, and the Blackleaf Environmental Impact Statement (EIS). A public comment period will be held at 8 a.m. on October 30, 2003.

The Eastern Montana RAC will meet on October 30, 2003, at 8 a.m. at the BLM Montana State Office at 5001 Southgate Drive, Billings, Montana. Among its items of discussion will be coal bed natural gas development in the Powder River Basin. Its public comment period will be at 11:30 a.m.

The Western Montana RAC will meet on October 30, 2003, at 8 a.m. at the Hampton Inn, 5110 Southgate Drive, Billings, Montana. The public comment period will be at 11 a.m. Among the agenda items are the Butte RMP and an update on the Limestone Hills Training Area EIS. The public comment period will be at 11:30 a.m.

SUPPLEMENTARY INFORMATION: The 15-member Councils advise the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Montana and the Dakotas. All meetings are open to the public. The public may present written comments to the Councils. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments

may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT:

Mary Apple, State RAC Coordinator, at the BLM Montana State Office, 5001 Southgate Drive, Billings, MT 59101, at 406–896–5258.

Dated: September 23, 2003.

A. Jerry Meredith,

Acting State Director, Montana State Office.

[FR Doc. 03–24480 Filed 9–26–03; 8:45 am]

BILLING CODE 4310–\$\$–P

DEPARTMENT OF LABOR

[Prohibited Transaction Exemption 2003–24]

Deutsche Bank AG and Its Affiliates; and JPMorgan Chase Bank and Its Affiliates (Collectively, the Applicants)

AGENCY: Department of Labor.

ACTION: Notice of technical correction.

On August 14, 2003, the Department of Labor (the Department) published in the **Federal Register** (68 FR 48637) an individual exemption which permits the purchase of any securities by an asset management affiliate of the Applicants (the Asset Manager), on behalf of employee benefit plans (Client Plans), including Client Plans investing in a pooled fund, for which the Asset Manager acts as a fiduciary, from any person other than the Asset Manager or an Affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such securities, where any broker-dealer affiliate of the Applicants is a manager or member of such syndicate (*i.e.*, “affiliated underwriter transaction” or “AUT”), and/or where an affiliated trustee serves as trustee of a trust that issued the securities (whether or not debt securities) or serves as indenture trustee of securities that are debt securities (*i.e.*, an “affiliated trustee transaction” or “ATT”).

Section I(n)(5) of the exemption requires explicit notification to an Independent Fiduciary that the authorization to engage in the covered transaction may be terminated, without penalty (*see* the third column on 68 FR 48639). The eighth line therein should read as follows:

“* * * on no more than five days’ notice by * * *” [emphasis added]

FOR FURTHER INFORMATION CONTACT: Mr. Gary Lefkowitz of the Department, telephone (202) 693–8546.

Signed at Washington DC this 24th day of September, 2003.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Employee Benefits Security Administration.

[FR Doc. 03–24593 Filed 9–26–03; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11167]

Notice of Proposed Exemption for Certain Transactions Involving Aetna Life Insurance Company (Aetna) and UBS Realty Investors LLC (UBS Realty) Located in Hartford, CT

AGENCY: Department of Labor.

ACTION: Notice of proposed exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1986 (the Code). The proposed exemption would exempt certain transactions that may occur as a result of the sharing of real estate investments among various Accounts maintained by Aetna, including the Aetna general account and the general accounts of Aetna’s affiliates which are insurance companies licensed to do business in at least one state (collectively, the General Account), and the ERISA-Covered Accounts with respect to which both Aetna and UBS Realty are fiduciaries. Aetna and UBS Realty (pursuant to the arrangement described herein) are primarily responsible for the acquisition, management and disposition of the assets allocated to the ERISA-Covered Accounts. Aetna has hired UBS Realty as a discretionary sub-adviser for the ERISA-Covered Accounts maintained by Aetna. UBS Realty will perform such services for the Accounts as of the transition effective date (expected to be October 1, 2003). However, Aetna will retain fiduciary authority over the ERISA-Covered Accounts after such date.

DATES: Written comments and requests for a public hearing must be received by the Department on or before November 28, 2003.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent of the Office of Exemption Determinations, Employee

Benefits Security Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D-11167 (Aetna and UBS Realty). The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

SUPPLEMENTARY INFORMATION: Notice is hereby given of the 2 pendency before the Department of an application for exemption from the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and from 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. The proposed exemption was requested in an application filed by Aetna and UBS Realty pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Summary of Facts and Representations

1. Aetna is an insurance company organized under the laws of Connecticut. Among the many insurance products and financial services Aetna offers are funding, asset management and other services for thousands of employee benefit plans subject to the provisions of Title I of the Act. Historically, Aetna had been significantly involved in managing real estate investments (both real estate mortgage loans and real estate equity interests) held both in its general account for its own benefit as well as in various accounts for the benefit of its investment clients. In connection with this real estate management business, Aetna obtained an exemption—Prohibited Transaction Exemption 91-10 (“PTE 91-10”) ¹—from the Department in 1991 that provided exemptive relief for certain transactions involving the real estate investments in such accounts. For the reasons set forth below, Aetna and UBS Realty have jointly requested that this exemptive relief be modified to reflect certain changed circumstances. If the proposed exemption is granted, PTE 91-10 shall be superseded and replaced by the restated prohibited transaction exemption set forth in this notice.

2. Aetna effectively disposed of a substantial portion of its third-party institutional real estate advisory

business a number of years ago by selling that business to a newly-created entity owned by several of the employees in its institutional real estate group and certain private equity investors. This entity was subsequently purchased by UBS AG, a leading global financial services concern and the largest bank in Switzerland, and currently operates as UBS Realty, a wholly-owned indirect subsidiary of UBS AG. The former employees of Aetna’s institutional real estate group have (subject to normal turnover) continued to manage and operate the business that is now UBS Realty. (Aetna and UBS Realty are sometimes collectively referred to herein as the “Applicant.”)

3. UBS Realty is an independent organization that is part of one of the largest financial service organizations in the world. UBS Realty represents that it: (i) is a registered investment adviser under the Investment Advisers Act of 1940; (ii) meets the requirements of a “qualified professional asset manager” within the meaning of Prohibited Transaction Class Exemption 84-14; ² (iii) had net equity, as of December 31, 2002, of approximately \$37 million; and (iv) had total assets under management, as of September 30, 2002, of approximately \$9.3 billion, of which approximately \$5.7 billion was derived from Aetna, as described further below. Significantly, UBS Realty had approximately \$3.6 billion of U.S. commercial real estate assets under management as of September 30, 2002, that was independent of its relationship with Aetna. More generally, the entire UBS group of companies had approximately \$16.1 billion of real estate assets under management as of June 30, 2002, and approximately \$1.5 trillion of total assets under management as of August, 2002.

4. Aetna has retained, and until transitioned to UBS Realty (as described below) will continue to retain, discretionary authority and control over the management of the various real estate accounts maintained by Aetna, including those real estate accounts in which employee benefit plans participate (the “ERISA-Covered Accounts”) that are structured as pooled or single customer insurance company separate accounts (collectively, the “Client Accounts”). In connection with its exercise of this discretionary authority and control, Aetna has retained UBS Realty (including its predecessor) to provide non-discretionary advice, recommendations and related services regarding the

management of the Client Accounts. The Applicant represents that, consistent with the provisions of PTE 91-10, until day-to-day discretionary management responsibility is transitioned to UBS Realty, all of the Client Accounts have continued to be “managed” by Aetna, and the various decisions covered by the exemptions contained in PTE 91-10 have continued to be made by Aetna.

5. It is now anticipated that the day-to-day discretionary management authority with respect to the Accounts will be delegated to UBS Realty, with the approval of the investors having an interest in the Client Accounts. Aetna, however, will continue to manage the real estate assets in its general account and in the general accounts of one or more of its affiliated insurance companies (collectively, the “General Account” and together with the Client Accounts, the “Accounts”). The receipt of the requisite investor approval is expected in the near future with an anticipated effective date of such delegation on or about October 1, 2003. On and after the effective date of the transition (the “Transition Effective Date”), the Client Accounts will be managed by UBS Realty on a discretionary basis, subject to the investment guidelines applicable to the particular Client Account and the ultimate oversight of Aetna. Accordingly, after the Transition Effective Date, many of the decisions covered by the exemptions contained in PTE 91-10 will be made by UBS Realty rather than by Aetna.

The Client Accounts will nevertheless continue to be maintained by Aetna as insurance company separate accounts holding assets owned by Aetna that, in effect, “fund” Aetna’s obligations to the holders of the annuity contracts that relate to the Client Accounts. Moreover, as discussed above, UBS’s day-to-day management authority will be undertaken pursuant to an investment advisory agreement with Aetna that, among other things, includes UBS Realty’s agreement to operate the Client Accounts in accordance with the Act and UBS Realty’s acknowledgement of its fiduciary status to the extent that the assets of the Client Accounts are “plan assets” subject to the Act. Finally, Aetna will monitor UBS Realty’s performance of its responsibilities and retains the right to terminate its delegation to UBS Realty as a result of default by UBS Realty under the investment advisory agreement or if Aetna determines that such action is required to comply with its fiduciary obligations.

6. UBS Realty’s general real estate investment strategy is set by its senior

¹ See 56 FR 3273 (January 29, 1991).

² See 49 FR 9494 (March 13, 1984).

management. Within these pre-determined parameters, its real estate acquisitions and underwriting professionals seek quality real estate investments for its various accounts. These potential equity investments are evaluated through a team approach. An acquisition specialist heads the team, which includes an asset manager, an attorney, an accountant, an engineer, an economic researcher, and a risk management specialist. Each member of the team must sign off on the investment before it is presented for approval to UBS Realty's Investment Committee. The Investment Committee, which consists of the senior management of UBS Realty, including the chief executive officer, all portfolio managers, the head of acquisitions, asset management, valuation, legal, and the chief financial officer, as well as the asset management region head, must approve all acquisitions in excess of \$2,000,000 and sales in excess of \$5,000,000. Approval of the investment transaction requires a concurrence of a majority of the members of the Investment Committee voting, and the portfolio manager for the account. In any event, either the chief executive officer or the head of U.S. operations must approve each transaction. Aetna maintains its own committee process to review investment actions taken by the UBS Realty Investment Committee.

7. The Accounts, including the ERISA-Covered Accounts and the General Account, continue to participate in the sharing of certain real estate investments pursuant to PTE 91-10. As of the Transition Effective Date, those shared real estate investments involving the General Account (which were entered into before the Transition Effective date) will continue to be held by both the ERISA-Covered Accounts and the General Account. Accordingly, exemptive relief is requested with respect to those continuing shared investments. After the Transition Effective Date, the General Account will not share in any new real estate investments made by UBS Realty on behalf of the Client Accounts.

8. UBS Realty represents that it has procedures in place that provide a system of fair and equitable allocation of investments to the Accounts. Aetna and UBS Realty do not share investment opportunities with each other. Each Account has written predetermined investment guidelines (such as product mix and geographic diversification standards) which are generally in place over extended periods. However, they may be modified by the Account's portfolio manager if appropriate, in conjunction with the contractholder, if

applicable. An investment whose size or other characteristics qualify it for only one Account will be allocated to that Account. An investment whose size and other characteristics qualify it for allocation to more than one Account will be allocated based on a "rotation" system. Under this procedure, investments are allocated to the account that has not received an allocation for the longest period of time. Investments of a size exceeding eligible Account capacities may be shared.

9. UBS Realty will seek to make investments in real estate on a shared basis for those Client Accounts that it manages, in the same manner that Aetna made such shared investments pursuant to PTE 91-10. UBS Realty will continue to manage the shared investments in real estate for Client Accounts in the same manner that Aetna managed such investments pursuant to PTE 91-10. UBS Realty represents that an inherent advantage of shared investments in real estate is the opportunity to enhance the diversity of investments available to the Client Accounts and their participating plans. By investing on a shared basis, the Client Accounts can obtain the advantage of interests in a larger number of high quality properties, regardless of cost. Further, shared investments frequently result in substantial savings associated with administrative and start-up costs.

10. The Applicant frequently structures investments as partnerships, in which a third party (usually a real estate developer) participates in a partnership. It may then allocate the interest in such partnership to more than one Account. The Applicant states that partnership investments typically involve several particular features (by virtue of the terms and conditions of their partnership agreements) that may, in the case of shared investments, result in possible violations of section 406(a) or (b) of the Act. Therefore, an exemption for such partnerships is necessary.

11. During the course of holding a real estate investment, certain situations may arise that require a decision to be made with regard to the management or disposition of the investment. For example, there may be a need for additional contributions of operating capital, or there may be an offer to purchase the investment by a third party or a joint venture partner. When these investments are shared among more than one of the Accounts, a potential for conflict arises since the same decision may not be in the best interest of each Account. Therefore, the Applicant has submitted a framework of proposed safeguards to protect the interests of any

participating ERISA-Covered Account in the resolution of potential or actual conflicts.

12. Each plan contractholder participating in an ERISA-Covered Account that shares or proposes to share real estate investments has been or will be furnished with a written description of the transactions that may occur involving such investments that might raise questions under the conflict of interest prohibitions of the Act with respect to the Applicant's involvement in such transactions and that are the subject of PTE 91-10 or this proposed exemption. This description will discuss the reasons why such conflicts of interest may be present (*i.e.*, because the General Account has been participating in the investment and may benefit from the transaction³ or because the interests of the various Accounts participating in the investment may be adverse to each other at certain times with respect to the transaction). The description will also disclose the principles and procedures to be used to resolve anticipated impasses, as will be outlined below. In addition, each contractholder in an ERISA-Covered Account that currently shares investments has received a copy of PTE 91-10, and will receive a copy of this exemption, if granted.

13. With respect to new contractholders in an ERISA-Covered Account that currently participates in the sharing of investments, each such new contractholder will be provided with the above mentioned written description, a copy of the notice of pendency and a copy of the exemption, if granted, before the contractholder begins to participate in the ERISA-Covered Account. With respect to contractholders who are already in an ERISA-Covered Account that does not currently share investments but that proposes to participate in the sharing of investments in the future, each such contractholder will be provided with the description outlined above, a copy of the notice of pendency and a copy of the exemption, if granted, before the ERISA-Covered Account begins to participate in the sharing of investments.

14. Withdrawals from pooled, open-end Accounts are made, at the written request of the contractholder, at market value, subject to the availability of cash. The Applicant is not obligated to liquidate investments to meet withdrawal requests. If cash available

³ As noted in Paragraph 7 above, the General Account will not share in any new real estate investments made by UBS Realty on behalf of the Client Accounts after the Transition Effective Date.

for withdrawals is insufficient to meet all the withdrawal requests on any valuation date, available cash is paid to each withdrawing contractholder on a pro rata basis. With respect to pooled closed-end Accounts, the actual cash flow, including amounts received from the sale of investments, is generally paid out to all contractholders on a pro rata basis until all assets of the Account have been liquidated. Prior to liquidation of the Account, contractholders have the right, subject to the Applicant's agreement which cannot be unreasonably withheld, to sell their interests in the Account. For single customer Accounts, the contractholder with respect to wholly-owned properties can cause the Applicant to liquidate the investment or transfer it to a successor investment manager.

15. An independent fiduciary or independent fiduciary committee must be appointed to act on behalf of each ERISA-Covered Account participating in the sharing of investments with respect to certain transactions and decisions contemplated by the proposed exemption. The independent fiduciary, acting on behalf of the ERISA-Covered Account, shall have the responsibility and authority to approve or reject recommendations made by the Applicant regarding the allocation of shared real estate investments to the ERISA-Covered Account and recommendations concerning subsequent transactions that are the subject of this proposed exemption. The independent fiduciary must be informed of the procedures set forth in the proposed exemption for the resolution of anticipated impasses prior to an acceptance by the fiduciary of the appointment. The Applicant shall provide the independent fiduciary with the information and materials necessary for the independent fiduciary to make an informed decision on behalf of the ERISA-Covered Account. No allocation or transaction that is the subject of the proposed exemption will be undertaken prior to the rendering of such informed decision by the independent fiduciary. The independent fiduciary shall also review on an as-needed basis, but not less than twice annually, the shared real estate investments in the ERISA-Covered Account's portfolio to determine whether the holding of such shared real estate investments continues to be in the best interest of the ERISA-Covered Account.⁴

⁴ For example, in the case of an investment shared by the General Account and an ERISA-Covered Account, if the independent fiduciary of the ERISA-Covered Account determined, after its review of the Account's shared investment portfolio and financial information relating thereto, that the

16. The independent fiduciary must be unrelated to Aetna and UBS Realty as well as any of their respective affiliates. The independent fiduciary may not be, or consist of, any officer, director or employee of either Aetna or UBS Realty, or be affiliated in any way with either Aetna or UBS Realty or any of their respective affiliates. The independent fiduciary must be either: (1) A business organization that has at least five (5) years of experience with respect to commercial real estate investments; (2) a committee comprised of one or more individuals who each have at least five (5) years of experience with respect to commercial real estate investments; or (3) the sponsor (or its designee) of a plan or plans that is the sole participant in an ERISA-Covered Account. An organization or individual may not serve as an independent fiduciary for an ERISA-Covered Account for any fiscal year if the gross income (other than fixed, non-discretionary retirement income and cost of living increases thereon) received by such organization or individual (or any partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder) from either Aetna or UBS Realty and their respective affiliates for that fiscal year exceeds five (5) percent of such person's annual gross income in the aggregate from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the five (5) percent limitation shall be applied with reference to the fiscal year in which such organization or individual serves as an independent fiduciary. The income limitation will include services rendered to the Accounts as independent fiduciary under any prohibited transaction exemptions granted by the Department. In addition, no organization or individual who is an independent fiduciary, and no partnership or corporation of which such organization or individual is an officer, director or ten percent or more partner or shareholder, may: (i) Acquire any

ERISA-Covered Account's interest in the shared investment should be disposed of, UBS Realty would be required to carry out the decision of the independent fiduciary. If the portfolio manager of the General Account agreed that its interest in the shared investment should also be disposed of, then the entire shared investment would be sold. If the portfolio manager of the General Account did not agree that its interest in the shared investment should be sold, UBS Realty would first try to sell only the ERISA-Covered Account's interest in the shared investment. However, to the extent that it is not feasible or possible to sell the ERISA-Covered Account's interest alone, the entire shared investment would be sold notwithstanding the non-acquiescence of the General Account.

property from, sell any property to, or borrow any funds from, either Aetna or UBS Realty or any of their respective affiliates, or any Account managed by either Aetna or UBS Realty or any of their respective affiliates, during the period that such organization or individual serves as an independent fiduciary and continuing for a period of six (6) months after such organization or individual ceases to be an independent fiduciary; or (ii) negotiate any such transaction during the period that such organization or individual serves as independent fiduciary. A sponsor (or its designee) of a plan participating in an ERISA-Covered Account may not serve as independent fiduciary with respect to any pooled ERISA-Covered Account. A business organization or committee member may not serve as an independent fiduciary of more than one ERISA-Covered Account.

17. In the case of a single customer ERISA-Covered Account, if the plan sponsor or its designee decides not to act as the independent fiduciary, the independent fiduciary or independent fiduciary committee will be selected initially by either Aetna or UBS Realty. The independent fiduciary must be approved by the plan sponsor or another plan fiduciary prior to the commencement of its fiduciary responsibilities on behalf of the ERISA-Covered Account. In the case of a closed-end pooled ERISA-Covered Account, the appropriate plan fiduciary of each participating plan will be required to approve the initial selection of the independent fiduciary proposed by either Aetna or UBS Realty prior to the commencement of its fiduciary responsibilities on behalf of the ERISA-Covered Account. In the case of an open-end pooled ERISA-Covered Account, the independent fiduciary or the independent fiduciary committee will be selected initially by either Aetna or UBS Realty. The Applicant represents that because these Client Accounts often include a significant number of plan contractholders, the independent fiduciary will not be approved initially by plan contractholders. The selection of the independent fiduciary, however, must be approved by a majority of the contractholders in such a Client Account within twelve (12) months after the selection has been made.

18. For both single customer and pooled ERISA-Covered Accounts, prior to the making of any decision to approve the selection of an independent fiduciary, plan contractholders must be furnished appropriate biographical information pertaining to the independent fiduciary or members of the independent fiduciary committee.

This biography must set forth the background and qualifications of the fiduciary (or fiduciaries) to serve in that capacity. In the case of any biographical information furnished after the date of this proposed exemption, the information must also disclose the total amount of compensation received by the fiduciary (or each member of a fiduciary committee) from either Aetna or UBS Realty or any of their respective affiliates during the preceding year, including pension or other deferred compensation paid to fiduciaries who may be former employees of either Aetna or UBS Realty or any of their respective affiliates, and compensation for any business services performed by the fiduciary or any affiliate for either Aetna or UBS Realty or any of their respective affiliates. The disclosure relating to compensation must be updated annually thereafter. Subsequent disclosures must also include the amount of fees and expenses paid for independent fiduciary services. The plans will be able to use this information to determine whether to approve the initial selection of the fiduciary committee and whether to continue such approval each year thereafter.⁵

19. Once an independent fiduciary is appointed, the independent fiduciary will continue to serve subject to an annual nomination by the Applicant and vote by each of the plans participating in the ERISA-Covered Account. An independent fiduciary may be removed by a majority vote of the ERISA-Covered Account's contractholders. The Applicant will not have the authority to remove an independent fiduciary during the term of that independent fiduciary. If a vacancy occurs by virtue of the death, resignation or removal of an independent fiduciary, a replacement independent fiduciary will be nominated by either Aetna or UBS Realty and approved by a majority vote of the ERISA-Covered Account's contractholders. Possible replacements may also be nominated by any of the ERISA-Covered Account's contractholders.

20. The independent fiduciary will normally be compensated by the ERISA-Covered Account. However, upon advance notice to the independent fiduciary and the ERISA-Covered Account's contractholders, the Applicant (or the Plan Sponsor in the

case of a Single Customer Account) may pay such fees itself. The Applicant will indemnify any independent fiduciary or members of an independent fiduciary committee with respect to any action or threatened action to which such person is made a party by reason of his or her service as an independent fiduciary. Indemnification will be provided as permitted under the laws of the State of Connecticut and subject to the requirement that such person acted in good faith and in a manner reasonably believed to be solely in the interests of the participants and beneficiaries of the plans participating in the ERISA-Covered Account.

21. The independent fiduciary will record in writing all decisions that are made in such capacity. In addition to the decisions of such independent fiduciary, the rationale and support thereof must also be set forth in writing and maintained by the Applicant pursuant to the recordkeeping requirements outlined in the General Conditions below. An independent fiduciary committee will be required to make its decisions on the basis of a two-thirds majority.

22. The independent fiduciary of each ERISA-Covered Account is required to approve any recommendation by UBS Realty, acting on behalf of the ERISA-Covered Accounts, involving a shared investment. Situations may arise where a conflict of interest may develop and the independent fiduciaries of the ERISA-Covered Accounts may not agree on what the appropriate course of action should be for a proposed transaction. In such cases, UBS Realty, acting on behalf of the ERISA-Covered Accounts, will make recommendations, which may be outlined as alternatives, to the independent fiduciaries regarding the proposed transaction. If an alternative course of action is not found that is acceptable, and the independent fiduciaries of such ERISA-Covered Accounts are in effect stalemated, a procedure has been developed by the Applicant to ensure that a decision can be made.

23. This stalemate procedure is designed to provide a result that is the same as would be followed in comparable situations where unrelated parties to a transaction were dealing at arm's length. This means that the action that will be taken in such cases is the one that does not require an ERISA-Covered Account to invest new money and will not change the terms of an existing agreement or the existing relationship between the Client Accounts. For example, in the case of a proposed modification to a debt investment shared by two ERISA-

Covered Accounts, if the independent fiduciaries cannot agree on such modification, no modification will be made. Rather, the terms of the loan agreement, as originally stated, will be carried out. Or, in the case of a partnership interest shared by two ERISA-Covered Accounts, the exercise of a buy-sell provision in the partnership agreement by a co-partner will require the two ERISA-Covered Accounts that share the interest in the partnership to either sell their partnership interest to the co-partner at a stated price, as determined by the partnership agreement, or buy the co-partner's interest at the stated price. If the independent fiduciaries cannot agree on the action to be taken, and no alternative course of action is found to be acceptable, the ERISA-Covered Accounts will be required to sell their interest to the co-partner. This action would be taken because the other (purchase) option would require the expenditure of additional funds by an objecting ERISA-Covered Account.

In addition, situations may arise where an ERISA-Covered Account and a non-ERISA-Covered Client Account wish to pursue different courses of action. In such situations the decision on behalf of the non-ERISA-Covered Client Account will be made by persons independent of Aetna, UBS Realty and any of their respective affiliates.⁶

Specific Transactions

I. Direct Real Estate Investments

(a) Transfers Between Accounts

24. Following the initial sharing of investments, it may be in the best interests of the Accounts participating in the investment for one Account to sell its interest to the other(s). Such a situation may arise, for example, when one Account experiences a need for liquidity in order to satisfy the cash needs of the plans participating in the Account, while for the other Account(s) the investment remains appropriate. One possible means of reconciling this situation is for the "selling" Account to sell its interest in the shared investment to the remaining participating Account(s) or to another Account(s) at current fair market value. Such sales may not, however, be appropriate in all circumstances. An inter-Account transfer will only be permitted when it is determined to be in the best interests of each Account that would be involved

⁵The Applicant represents that the contractholders in its single customer and pooled closed-end real estate Client Accounts are knowledgeable and sophisticated investors who fully understand the operation of the ERISA-Covered Accounts.

⁶In this regard, the Applicant represents that persons independent of Aetna, UBS Realty and any of their respective affiliates will make the decisions on behalf of non-ERISA-Covered Client Accounts pursuant to Section I(e)(2) and Sections II (b)(2) and (c)(2) (d)(2) of the proposed exemption.

in the transaction. Where two or more Accounts are involved in such a transfer, the transfer would also be subject to the approval of the Connecticut Insurance Department. In addition, the Applicant has determined that no such transfers will be permitted between the General Account and an ERISA-Covered Account. Because the Applicant would be acting on behalf of both the "buying" and "selling" Accounts in such an inter-Account transfer, the transfer might be deemed to constitute a prohibited transaction under section 406 of the Act. Accordingly, exemptive relief is requested herein for the sale or transfer of an interest in a shared real estate investment by one ERISA-Covered Account to another Client Account of which either Aetna or UBS Realty is a fiduciary. Such transfers would have to be at fair market value and approved by the independent fiduciary for each ERISA-Covered Account involved in the transfer. See Section I(a).

(b) Joint Sales of Property

25. In situations involving shared real estate investments, an opportunity may arise to sell the entire investment to a third party, and it may be determined that the sale is desirable for all of the participating Accounts. When the General Account is participating in the investment, and the sale is therefore determined to be in the best interests of the General Account (in addition to being in the interests of the other Account(s)), the sale might be deemed to constitute a prohibited transaction under section 406 of the Act and section 4975 of the Code.⁷ Similarly, the Applicant may be acting on behalf of two ERISA-Covered Accounts or an ERISA-Covered Account and a non-ERISA-Covered Account other than the General Account. Accordingly, exemptive relief is requested for these joint sales. The sales would have to be approved by the independent fiduciary for each ERISA-Covered Account involved in the sale. See Section I(b).

(c) Additional Capital Contributions

26. On occasion, commercial real estate investments require infusions of additional capital in order to fulfill the investment expectations of the property. For example, developmental real estate investments sometimes require additional capital in order to complete the construction of the property. In addition, the cash flow to improve or operate completed buildings may also

result in the need for additional capital. Such additional capital is frequently provided by the owners of the property. In the case of a property that is owned entirely on behalf of the Accounts, it is contemplated that needed additional capital will ordinarily be contributed in connection with the investment in the form of an equity capital contribution made by each participating Account in an amount equal to such Account's existing percentage equity interest in the shared investment;⁸ that is, in the first instance, each Account would be afforded the opportunity to contribute additional capital on a fully proportionate basis. In the case of ERISA-Covered Accounts, all decisions regarding the making of additional capital contributions must be approved by the independent fiduciary for the ERISA-Covered Account. The making of an additional capital contribution could be deemed to involve a prohibited transaction under section 406 of the Act. If one or more participating Accounts in a shared investment is unable to provide its share of the needed additional capital, various alternatives may be appropriate, including having the other Account(s) make a disproportionate contribution. For example, where the General Account and an ERISA-Covered Account participate in a shared investment and the need for additional capital arises, it might be determined for liquidity reasons or other factors involving the ERISA-Covered Account that the additional contribution should not be made by that ERISA-Covered Account. As a result, the additional equity capital may be provided entirely by the General Account with the further consequence that the General Account would thereafter have a larger interest in the investment and, therefore, a larger share in the appreciation and income to be derived from the property.⁹ Such an adjustment in ownership interests might be deemed to constitute a prohibited (indirect sales) transaction under section 406 of the Act. In addition, these situations could also occur where two ERISA-Covered Accounts or an ERISA-Covered Account and a non-ERISA-Covered Client Account are involved.

⁸ In any case where the General Account participates in a shared investment with one or more ERISA-Covered Accounts and a call for additional capital is made, the General Account will always contribute at least its pro rata share of such capital.

⁹ In the case of shared real estate investments owned entirely by Aetna, if an Account contributes capital equaling less than its pro rata interest in the investment (or makes no contribution at all), that Account's equity interest will be re-adjusted and reduced based on the change in the fair market value of the property caused by the infusion of new capital.

Accordingly, the Applicant is requesting exemptive relief that would permit the contribution of additional equity capital for a shared investment by Accounts participating in the investment. Any decision made or action taken by an ERISA-Covered Account (*i.e.*, the contribution of either no additional capital, the ERISA-Covered Account's pro rata share of additional capital, less than or more than the ERISA-Covered Account's pro rata share, etc.) must be approved by such independent fiduciary. See Section I(c).

(d) Lending of Funds To Meet Additional Capital Requirements

27. If the General Account and an ERISA-Covered Account participate in a shared investment that experiences the need for additional capital, and it is determined that the ERISA-Covered Account does not have sufficient funds available to meet the call for additional capital, the General Account might be willing and able to loan the required funds to the ERISA-Covered Account. Prior to any loan being made, it must be approved by the independent fiduciary for the ERISA-Covered Account. Such loan will be unsecured and non-recourse, will bear interest at a rate that will not exceed the prevailing interest rate on 90-day Treasury Bills, will not be callable at any time by the General Account, and will be prepayable at any time without penalty at the discretion of the independent fiduciary of the ERISA-Covered Account. See Section I(d).

(e) Shared Debt Investments

28. The Applicant occasionally makes real estate investments consisting of interim construction loans or medium or long-term mortgage loans on a property. In some instances, the Applicant may have the opportunity to obtain an equity ownership interest in the underlying real property upon maturity of the debt or at the election of the Applicant. It is possible that shared real estate debt investments might raise questions under section 406 of the Act in essentially two situations: (1) A material modification in the terms of a loan agreement, or (2) a default on a loan. From time to time, the terms of outstanding real estate loans need to be modified to take into account new developments. Such modifications may commonly include extensions of the terms of the loan, revised interest rates, revised repayment schedules, changes in covenants or warranties to permit, for example, additional financing to be provided by others, and the provision of additional financing to the borrower by the Applicant. These situations require a decision on behalf of the lender as to

⁷ The Department notes that all future references to the provisions of the Act shall be deemed to include the parallel provisions of the Code.

whether it would be in its own interest to make the modifications in question. Similarly, when a borrower commits an act of default under a loan agreement, the lender must determine, in its own interest, what action, if any, it wishes to take. Such action might involve foreclosure on the loan, a restructuring of the loan arrangement, or, in some cases as appropriate, no action at all. When a debt investment is shared among Accounts, a decision must be made on behalf of each Account with respect to the action to be taken when a loan modification or loan default situation occurs. In some cases, moreover, it is conceivable that different actions might be desired by different Accounts. Normally, however, only one unified course of action is possible in the situation. Since UBS Realty manages each of the Client Accounts (while the General Account is managed by Aetna), the action the Applicant decides to take for the particular Accounts may raise questions under section 406 of the Act. Accordingly, exemptive relief is being requested that will permit the Applicant on behalf of the Accounts to take appropriate action with respect to the modification of the material terms of a loan, or with respect to a default situation when the loan is a shared investment involving one or more ERISA-Covered Accounts, or with respect to the acquisition of additional debt. Each such action would require approval of the independent fiduciary for each ERISA-Covered Account and the Applicant or the client for each non-ERISA-Covered Client Account. If there is an agreement among the independent fiduciaries and the non-ERISA-Covered Client Accounts as to the course of action to follow with regard to a proposed loan modification, or an adjustment in the rights upon default, such modification or adjustment will be implemented. If, upon full discussion of the matter, no course of action can be agreed upon by the independent fiduciaries and the non-ERISA-Covered Client Accounts, no modification of the terms of the loan or adjustment in the rights upon default would be made. The terms of the loan agreement as originally stated would be carried out. With respect to shared debt investments involving ERISA-Covered Accounts and non-ERISA-Covered Client Accounts, decisions on behalf of the non-ERISA-Covered Accounts will be made by persons independent of Aetna, UBS Realty and any of their respective affiliates. See Section I(e).

II. Partnership Investments

29. Many real estate investments are structured as partnership arrangements

(rather than 100 percent ownership interest in property) in which the Applicant and another party, such as a real estate developer or manager, participate as co-partners. Generally, the Applicant's co-partner acts as managing partner of the joint venture. The Applicant, in turn, may allocate its interest in the partnership to more than one Account. Partnership investments typically involve several particular features by virtue of the terms and conditions of the partnership agreements that may, when the partnership interest is shared, result in possible violations of section 406 of the Act.

(a) Additional Capital Contributions to Joint Ventures

30. As in the case of investments made entirely by Aetna, partnership real estate investments sometimes require additional operating capital. Typically, the partnership agreements entered into by Aetna and many other real estate investors provide for a capital call by the general partner of the partnership to be made to each partner and that each partner provide the needed capital on a pro rata basis either in the form of an equity contribution or a loan to the partnership. If one partner refuses to contribute its pro rata equity share of the capital call, the other partner(s) may contribute additional capital to cover the short-fall and thereby "squeeze down" the interest in the venture of the non-contributing partner.¹⁰ Alternatively, if sufficient additional capital is not provided by the partners, other financing may be sought or the partnership may be liquidated. In the case of a capital call where Aetna's partnership interest is shared by two or more Accounts, a determination must be made on behalf of each Account participating in the shared investment with respect to whether it is appropriate for the Account to provide its proportionate share of additional capital requested by the partnership. The

¹⁰ In the case of a call for additional capital involving a typical partnership arrangement entered into between parties dealing at arm's-length, the partnership agreement may commonly provide that the equity interest of any non-contributing partner be re-adjusted, or "squeezed down," on a capital interest basis. This involves re-adjusting the equity interests of the partners solely on the basis of the percentage of total capital contributed without taking into account any appreciation on the underlying property. This "capital interest" adjustment can substantially diminish the equity interest of the non-contributing partner in the actual current market value of the underlying property. Thus, this type of re-adjustment is intended to provide an incentive to all partners to make their proportionate capital contributions so that improvements can be made and the operation of a property continued without burdening the other partners.

general rule that the Applicant will follow is that each Account will be given the opportunity to provide its pro rata share of the capital call, but for some Accounts it may be determined to be appropriate to provide less than a full share or no additional capital at all. In such cases, the interest of the Account would be reduced proportionately on a fair market basis. In the case of ERISA-Covered Accounts, all decisions regarding the making of additional capital contributions must be approved by the independent fiduciary for the ERISA-Covered Account. In addition to situations where some Accounts participating in the ownership of Aetna's partnership interest may not be in a position to provide their share of a capital call, other situations may arise where a partner is unable to make its additional capital contributions. Both of these situations may result in prohibited transactions under section 406 of the Act. See Section II(a).

31. *Aetna Shortfall.* In situations where the General Account and an ERISA-Covered Account are sharing an investment in a partnership, the General Account and an ERISA-Covered Account may experience a capital call from the general partner of the partnership for either an additional equity or debt contribution. If it is determined that the ERISA-Covered Account does not have sufficient funds available to meet its contribution requirement,¹¹ the General Account may make an additional equity contribution to the partnership to cover the ERISA-Covered Account's shortfall. However, in any case where the General Account contributes an ERISA-Covered Account's shortfall, the ERISA-Covered Account's share of the partnership interest will be readjusted and reduced based upon the change in the fair market value of the partnership interest held by Aetna which is caused by the infusion of new capital, thus recognizing any appreciation in the investment. There is no "capital basis squeeze down" effect under these circumstances as there might be under the partnership agreement should Aetna (in its role as a partner) fail to meet a

¹¹ In any case where the General Account and one or more ERISA-Covered Accounts share Aetna's interest in a partnership, the General Account will always make a capital contribution that is at least equivalent proportionately to the highest capital contribution made by an ERISA-Covered Account (but not higher than the General Account's pro rata share of the required additional capital except, as described in paragraph 30, in the event of a co-venturer shortfall). Thus, as between the Accounts, the General Account will never be the cause of a capital contribution shortfall by Aetna that would result in a capital basis squeeze down by a partner.

call for additional capital. See Section II(a)(1).

Additionally, the General Account may make a loan to the ERISA-Covered Account to enable the ERISA-Covered Account to make its required pro rata capital contribution. Accordingly, subject to the conditions of the proposed exemption, this proposed exemption would provide relief for loans of this type. Prior to any loan being made, it would have to be approved by the independent fiduciary for the ERISA-Covered Account. Such loan will be unsecured and non-recourse, will bear interest at a rate that will not exceed the prevailing interest rate on 90-day Treasury Bills, will not be callable at any time by the General Account, and will be prepayable at any time without penalty at the discretion of the independent fiduciary of the ERISA-Covered Account. In this way, the needed capital may be provided without causing a "squeeze down" in the equity interest of the participating ERISA-Covered Account. A similar situation may arise where two ERISA-Covered Accounts, or an ERISA-Covered Account and a non-ERISA-Covered Client Account participate in a partnership investment. If one Client Account is unable or unwilling to provide its proportionate share of a capital call, the other Client Account may be interested in making up the shortfall. This might be accomplished by means of an equity contribution with a resulting re-adjustment on a current fair market value basis in the equity ownership interests of the participating Client Accounts. Thus, any of these disproportionate contribution situations between Client Accounts might result in a violation of section 406(b)(2) of the Act. Subject to the generally applicable conditions of this proposed exemption, Section II(a)(3) provides limited relief for these disproportionate contributions.

32. *Co-Partner Shortfall.* In some cases, Aetna's partner in a partnership investment may be unable to meet its additional capital obligation, and the Applicant may deem it advisable for some or all of the participating Accounts to contribute capital in excess of their pro rata share in the partnership in order to finance the operation of the property (and thereby squeeze down the equity interest of the partner).¹² The Applicant is requesting exemptive relief that would permit additional capital

contributions to be made by participating Accounts on a non-proportionate basis if the need arises. Any instance involving the infusion of additional capital to a partnership will be considered by the independent fiduciary for each ERISA-Covered Account participating in the investment and any action to be taken by the Account must be approved by the independent fiduciary. These actions might include contributing a pro rata share of additional equity capital (including a capital contribution that squeezes down the interest of a partner on the basis provided in the partnership agreement), contributing more or less than a pro rata share, or contributing no additional capital. See Section II(a)(4).

(b) Third Party Purchase of Partnership Properties

33. Under the terms of certain partnership agreements entered into by Aetna and other real estate investors, if an offer is received from a third party to purchase the assets of the partnership, and one partner (irrespective of the percentage ownership interest of the partner) wishes to accept the offer, the other partner must either (1) also accept the offer, or (2) buy out the first partner's interest at the portion of the offer price that is proportionate to the first partner's share of the partnership. For example, if Aetna on behalf of the Accounts and a real estate developer are partners in a property and an offer is received from another person to acquire the entire property that the developer wants to accept, the Applicant on behalf of the Accounts would be obligated either to sell its interest also to the third party or to buy out the interest of the developer at the portion of the price offered by the third party proportionate to the developer's share of the partnership. When the Applicant's interest in a real estate partnership is shared by two or more Accounts, it is likely that the same decision will be appropriate for each Account in any third-party purchase situation. See Sections I(b) and II(b)(1). It is also possible, however, that it might be in the interests of some Accounts to reject the offer and buy-out the partner, while other Accounts might not have the funds to do so or, for some other reason, would elect to sell to the third party. The partnership agreements typically require, however, that Aetna on behalf of the Accounts provide its co-partner with a buy or sell reply. Thus, in making a buy or sell decision in any of these cases involving an ERISA-Covered Account, the Applicant might be deemed to be acting in violation of

section 406 of the Act. Further, in order to resolve situations where the same reply is not appropriate for all participating Accounts, various alternatives may be adopted. For example, the Account(s) that wishes to continue owning the property may be willing and able itself to buy-out not only the co-partner, but also the other participating Account(s) that wishes to accept the third party offer to sell. The General Account, however, will not participate in the buy-out of another Account(s). Or, one Account may itself be willing and able to buy-out the co-partner while the other Account chooses to continue holding its original interest in the property. Alternatively, all of the Accounts may choose to participate in the buy-out, but on a basis that is not in proportion to their existing ownership interests. When an ERISA-Covered Account is involved, such potentially desirable alternatives may also raise questions under section 406 of the Act (whether or not the General Account is a participant in the investment). Accordingly, the Applicant is requesting exemptive relief that would permit the Applicant to respond to third-party property purchase offers as appropriate under the circumstances. Such a response might involve acceptance of the offer on behalf of all participating Accounts, a buy-out of a partner by some or all of the participating Accounts on a pro rata or non-pro rata basis, or a buy-out of the interest of one participating Account (and of the co-partner) by other participating Accounts. Any action by any ERISA-Covered Account in these situations will be required to be approved by the independent fiduciary for the Account. Further, in any case involving the sharing of a partnership interest between the General Account and an ERISA-Covered Account, the Applicant has determined that the action taken by the General Account in such third-party purchase offer situations will not be inconsistent with the action approved for the ERISA-Covered Account by the independent fiduciary for such Account. For example, where the Applicant recommends that a third-party purchase offer be accepted and the independent fiduciary nevertheless determines that the interest of the co-partner should be bought out, both Accounts will buy out the interest of the co-partner on a proportionate basis, unless a disproportionate buy-out is agreeable to both the Applicant and the independent fiduciary. However, where an offer to sell is acceptable to the co-partner (and the Applicant has the option of selling

¹² In any case involving a shared partnership interest held by the General Account and an ERISA-Covered Account, if it is determined that the ERISA-Covered Account will contribute its pro rata share of extra capital the General Account would also contribute at least its pro rata share of such capital.

to the third party or buying out the co-partner) and it is determined that the General Account is willing and able alone to buy out the co-partner's interest, the independent fiduciary may elect that the ERISA-Covered Account retain its existing ownership interest. In such case, the General Account may buy out the co-partner pursuant to Section II(b)(1). In any case in which more than one ERISA-Covered Account participates in a shared partnership investment and there is a lack of agreement among the independent fiduciaries with respect to whether to accept a "sell" offer or to buy-out a co-partner, the Applicant, as indicated above, must nevertheless provide a unified response to the co-partner on behalf of all participating Accounts. Accordingly, in these instances, all participating Accounts will be required to accept the "sell" offer, unless the Account or Accounts that prefer the buy-out can buy-out both the co-partner's and the "selling" Account's interest, or unless one Account elects to retain its original ownership interest while the other Account(s) alone buys out the co-partner's interest. The Applicant represents that this action is preferred because the purchase option would require the expenditure of additional funds by an objecting Account.¹³ See Section II(b).

(c) Rights of First Refusal in Partnership Agreements

34. Under the terms of certain partnership agreements entered into by Aetna and other real estate investors, if a partner wishes to sell its interest in the partnership to a third party, the other partner must be given the opportunity to exercise a right of first refusal to purchase the first partner's interest at the price offered by the third party. For example, if Aetna and a real estate developer are joint venture partners and the developer decided to sell its interest to a third party, Aetna would have the right to purchase the developer's interest at the price offered by the third party. In the case of shared real estate partnerships, the decision by the Applicant on behalf of the Accounts with respect to whether or not to exercise a right of first refusal might raise questions under section 406 of the Act since each Account participating in

the investment might be affected differently by such decision. Because, under the terms of the partnership agreement, only one option (exercise or not exercise) may be chosen by the Applicant on behalf of the Accounts, exemptive relief is being requested that would permit the Applicant to exercise or not exercise a right of first refusal as may be appropriate under the circumstances. Any action taken on behalf of an ERISA-Covered Account regarding the exercise of such a right would have to be approved by the independent fiduciary. Further, under the requested exemption, if the General Account and an ERISA-Covered Account share a partnership investment, even though Aetna may initially decide on behalf of the General Account not to make a purchase under a right of first refusal option, the General Account will be required to participate in the purchase of the other partner's interest if the independent fiduciary determines that it is appropriate for the ERISA-Covered Account to participate in the exercise of the right of first refusal on at least a pro rata basis. If, however, two Client Accounts participate in a shared partnership interest and agreement cannot be reached on behalf of the Client Accounts on whether to exercise a right of first refusal, the right will not be exercised and the partner will be permitted to sell its interest to the third party, unless one Client Account decides to buy-out the partner alone. In this regard, it is conceivable that some participating Accounts may elect to take advantage of a right of first refusal opportunity and buy-out a co-partner without other participating Accounts taking part in the transaction. For example, in the case of a shared partnership investment involving the General Account (or any other Account) and an ERISA-Covered Account, if the co-partner wishes to accept an offer to sell its interest and the independent fiduciary of the ERISA-Covered Account decides not to have the Client Account participate in purchasing that partner's interest, the General Account (or other participating Account) would be free to make the purchase on its own. The exercise of a right of first refusal on such a disproportionate basis might also raise questions under section 406 of the Act for which exemptive relief may be needed. See Section II(c).

(d) Buy-Sell Provisions in Partnership Agreements

35. Certain partnership agreements entered into by Aetna may provide that one partner may demand that the other partner either sell its interest to the first partner at a price as determined by the

terms of the partnership agreement or buy out the interest of the first partner at such price. If the other partner refuses to exercise either option within a specified period, it must sell its interest to the first partner at the stated price. These "buy-sell" provisions are generally used to resolve serious difficulties or impasses in the operation of a partnership, but generally a partnership agreement permits the buy-sell provision to be exercised at any time. As in the situations discussed above, the decision by the Applicant on behalf of the Accounts to make a buy-sell offer, or its reaction to such an offer made by a co-partner, may affect various participating Accounts differently. Accordingly, any decision made by the Applicant in these cases involving ERISA-Covered Accounts might raise questions under section 406 of the Act. The Applicant is requesting exemptive relief that would permit the Applicant to make an appropriate decision under the circumstances on behalf of all participating Accounts to make a buy-sell offer to a co-partner or to react to a buy-sell offer from a co-partner. Any such decision must be approved by the independent fiduciary for each ERISA-Covered Account participating in the investment. Further, under the requested exemption, if the Applicant decides to exercise (*i.e.*, initiate) a buy-sell option with respect to the co-partner's interest and the independent fiduciary of a participating ERISA-Covered Account objects, the buy-sell option will not be exercised. Similarly, if the buy-sell option is initiated by the co-partner and there is a split among the independent fiduciaries of participating ERISA-Covered Accounts with respect to whether to buy or sell, all such Accounts will be required to sell, unless the Account(s) that wishes to buy-out the co-partner (or the co-partner and the other participating Account) can do so without the participation of the other Accounts. Also, where a buy-sell option is initiated by the co-partner and Aetna determines that the General Account should purchase the co-partner's interest, if the independent fiduciary of a participating ERISA-Covered Account determines that, as between "buy" or "sell", such Account's interest should be sold, Aetna's entire partnership interest will be sold unless the independent fiduciary agrees that it would be preferable for the ERISA-Covered Account to retain its share of the partnership interest and Aetna determines that the General Account is willing and able to purchase the entire interest of the co-partner. Any such disproportionate purchases may,

¹³ Similarly, in any case involving an ERISA-Covered Account and a non-ERISA-Covered Client Account, if there is a lack of agreement between the independent fiduciary and, for example, the trustees of a foreign or public plan (or the Applicant in the case of a discretionary non-ERISA-Covered Account), all participating Accounts will be required to accept the "sell" offer unless an alternative accommodation as described above is made.

however, also raise questions under section 406 of the Act. See Section II(d).

(e) Transactions With Partnership Party in Interest.

36. The Applicant represents that when the General Account holds a 50 percent or more interest in a partnership, the partnership itself may be deemed to be a party in interest under section 3(14)(G) of the Act. Thus, any subsequent transaction involving the partnership and an ERISA-Covered Account that is also participating in the partnership (e.g., an additional contribution of capital) may be deemed to be a transaction between the plans participating in such ERISA-Covered Account and a party in interest (the partnership itself) in violation of section 406. Also, as a result of the partnership becoming a party in interest under section 3(14)(G) of the Act, other partners in the partnership having a ten percent or more interest may be parties in interest under section 3(14)(I). Therefore, transactions such as buy-outs, sales of property, leases, etc., may occur that involve possible violations of section 406. Accordingly, the Applicant is requesting exemptive relief from the restrictions of section 406(a) of the Act, only, which would permit: (1) Any additional equity or debt capital contributions to a partnership by an ERISA-Covered Account that is participating in an interest in the partnership, where the partnership is a party in interest solely by reason of the General Account's ownership of a 50 percent or more interest in such partnership; (2) any material modification in the terms of, or action taken upon default with respect to, a loan to the partnership in which the ERISA-Covered Account has an interest as a lender; or (3) other transactions with the co-partners that arise in connection with the operation of the partnership. Any such action would be conditioned upon the approval of the independent fiduciary for the ERISA-Covered Account. In addition, the transactions would be conducted on a totally arm's-length basis, and the party in interest involved would have no power or authority to influence any of the transactions engaged in by the Applicant on behalf of any of the Accounts managed by the Applicant. See Section III.

Approvals and Disclosures Pursuant to PTE 91-10

1. Because the proposed exemption in this notice is a modification and replacement of an existing exemption (PTE 91-10), any approvals, appointments, disclosures and decisions

made or given pursuant to PTE 91-10 shall remain in full force and effect with respect to this replacement exemption. Accordingly, the Applicant is not required to seek or request any such additional approvals, appointments or decisions or make any additional disclosures (except as provided in paragraphs 12 and 13 hereof) by virtue of this proposed exemption. See Section IV(j).

Initial Proportionate Allocations

The Applicant has not requested exemptive relief for the initial allocation of shared real estate investments by Aetna among two or more Accounts, at least one of which is an ERISA-Covered Account, where each of the Accounts participating in a real estate investment participates in the debt and equity interests in the same relative proportions.

Accordingly, since it appears that the method by which the interests in the real estate investments are allocated to the Accounts does not result in per se prohibited transactions under the Act, the Department has not proposed exemptive relief with respect to the initial sharing of these investments.¹⁴

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include fiduciaries of employee benefit plans investing in ERISA-Covered Accounts that would be affected by the transition of Accounts from Aetna to UBS Realty. Because of the number of affected persons, the Department has determined that the only practical form of providing notice to interested persons is the distribution, by Aetna or UBS Realty, of the notice of proposed exemption, as published in the **Federal Register**, to the appropriate fiduciaries of each plan described above. The distribution will occur within 30 days of the publication of the notice of proposed exemption in the **Federal Register**. The information provided will include a notice to interested persons of their right to comment or request a public hearing, as described in 29 CFR 2570.43(b).

In addition, Aetna or UBS Realty will provide copies of the proposed exemption, upon request, to other interested persons, including plan fiduciaries that may invest in ERISA-Covered Accounts in the future during this period.

Written comments and/or requests of a hearing must be made within sixty

(60) days of the date of publication of this notice in the **Federal Register**.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and 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) The proposed exemption, if granted, will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) Before an exemption may be granted under section 408(a) of the Act and/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; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions 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.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

¹⁴ See preamble to the Proposed Exemption for Aetna, 55 FR 45671, at 45678 (October 30, 1990).

Proposed Exemption

Under section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B (55 FR 32836, August 10, 1990), the Department proposes to amend and replace Prohibited Transaction Exemption 91-10, 56 FR 3273 (January 29, 1991), with the following exemption.

Section I—Exemption for Certain Transactions Involving the Management of Investments Shared by Two or More Accounts

If the exemption is granted, as indicated below, the restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions if the conditions set forth in Section IV are met:

(a) *Transfers Between Accounts*—The restrictions of section 406(b)(2) of the Act shall not apply to the sale or transfer of an interest in a shared investment (including a shared partnership interest) between two or more Accounts (except the General Account), provided that each ERISA-Covered Account pays no more, or receives no less, than fair market value for its interest in a shared investment.

(b) *Joint Sales of Property*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale to a third party of the entire interest in a shared investment (including a shared partnership interest) by two or more Accounts, provided that each ERISA-Covered Account receives no less than fair market value for its interest in the shared investment.

(c) *Additional Capital Contributions*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply either to the making of a proportionate equity capital contribution by one or more of the Accounts to a shared investment; or to the making of a Disproportionate [as defined in Section V(e)] equity capital contribution (or the failure to make such additional contribution) by one or more of such Accounts which results in an adjustment in the equity ownership interests of the Accounts in the shared investment on the basis of the fair

market value of such interests subsequent to such contribution, provided that each ERISA-Covered Account is given an opportunity to make a proportionate contribution.

(d) *Lending of Funds*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the lending of funds from the General Account to an ERISA-Covered Account to enable the ERISA-Covered Account to make an additional proportionate contribution, provided that such loan—

(A) Is unsecured and non-recourse with respect to participating plans,

(B) Bears interest at a rate not to exceed the prevailing rate on 90-day Treasury Bills,

(C) Is not callable at any time by the General Account, and

(D) Is prepayable at any time without penalty.

(e) *Shared Debt Investments*—In the case of a debt investment that is shared between two or more Accounts, including one or more of the ERISA-Covered Accounts:

(1) The restrictions of sections 406(a) and 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 any material modification in the terms of the loan agreement resulting from a request by the borrower or any decision regarding the action to be taken, if any, on behalf of the Accounts in the event of a loan default by the borrower.

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by Aetna or UBS Realty on behalf of one or more ERISA-Covered Accounts: (A) Not to modify a loan agreement as requested by the borrower; or (B) to exercise any rights provided in the loan agreement in the event of a loan default by the borrower, even though the independent fiduciary for one of such Accounts has approved such modification or has not approved the exercise of such rights; and

(3) The restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply either to the proportionate acquisition of additional debt by one or more of the Accounts to a shared debt investment, or to the acquisition of Disproportionate additional debt (or the failure to acquire such additional debt) by one or more of

such Accounts which results in an adjustment in the amount of debt held by the Accounts in the shared investment provided that each ERISA-Covered Account is given an opportunity to acquire additional debt on a proportionate basis.

Section II—Exemption for Certain Transactions Involving the Management of Partnership Interests Shared by Two or More Accounts

If the exemption is granted, the restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions resulting from the sharing of an investment in a real estate partnership between two or more Accounts, if the conditions set forth in Section IV are met:

(a) *Additional Capital Contributions*—(1) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply either to the making of additional proportionate equity capital contributions by one or more Accounts participating in the partnership; or to the making of Disproportionate (as defined Section V(e)) equity capital contributions by one or more of such Accounts which results in an adjustment in the equity ownership interest of the Accounts in the shared partnership investment on the basis of the fair market value of such interests subsequent to such contributions; provided that each ERISA-Covered Account is given an opportunity to make a proportionate contribution.

(2) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the lending of funds from the General Account to an ERISA-Covered Account to enable the ERISA-Covered Account to make an additional proportionate capital contribution, provided that such loan—

(A) Is unsecured and non-recourse with respect to the participating plans,

(B) Bears interest at a rate not to exceed the prevailing rate on 90-day Treasury Bills,

(C) Is not callable at any time by the General Account, and

(D) Is prepayable at any time without penalty.

(3) The restrictions of section 406(b)(2) of the Act shall not apply to the making of Disproportionate

additional equity capital contributions (or the failure to make such additional contributions) to the partnership by Accounts other than the General Account which result in an adjustment in the equity ownership interests of the ERISA-Covered Accounts in the partnership on the basis of the fair market value of such partnership interests subsequent to such contributions, provided that each ERISA-Covered Account is given an opportunity to provide its proportionate share of the additional equity capital contributions; and

(4) In the event a co-partner fails to provide all or any part of its proportionate share of an additional equity capital contribution, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the making of Disproportionate additional equity capital contributions to the partnership by an Account up to the amount of such contribution not provided by the co-partner which result in an adjustment in the equity ownership interests of the Accounts in the partnership on the basis provided in the partnership agreement, provided that such ERISA-Covered Account is given an opportunity to participate in all additional equity capital contributions on a proportionate basis.

(b) *Third Party Purchase Offers*—(1) In the case of an offer by a third party to purchase any property owned by the partnership, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the acquisition by the Accounts, including one or more ERISA-Covered Account[s], on either a proportionate or Disproportionate basis of a co-partner's interest in the partnership in connection with a decision on behalf of such Accounts to reject such purchase offer, provided that each ERISA-Covered Account is first given an opportunity to participate in the acquisition on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any acceptance by Aetna or UBS Realty on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], of an offer by a third party to purchase a property owned by the partnership even though the independent fiduciary for one or more of such ERISA-Covered Account[s] has not approved the acceptance of the offer

where all of the Accounts (other than the General Account) participating in such investment are not in agreement on how to proceed with respect to such offer, provided that the declining Account[s] are first afforded the opportunity to buy out both the co-partner and "selling" Account's interests in the partnership.

(c) *Rights of First Refusal*—(1) In the case of the right to exercise a right of first refusal described in a partnership agreement to purchase a co-partner's interest in the partnership at the price offered for such interest by a third party, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the acquisition by such Accounts, including one or more ERISA-Covered Account[s], on either a proportionate or Disproportionate basis of a co-partner's interest in the partnership in connection with the exercise of such a right of first refusal, provided that each ERISA-Covered Account is first given an opportunity to participate on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by Aetna or UBS Realty on behalf of the ERISA-Covered Accounts not to exercise such a right of first refusal even though the independent fiduciary for one or more of such ERISA-Covered Accounts has approved the exercise of the right of first refusal where all of the Accounts participating in such investment (other than the General Account) are not in agreement on how to proceed with respect to such right of first refusal, provided that the Accounts that approved the exercise of the right of first refusal are offered the opportunity to buy-out the co-partner on their own.

(d) *Buy-Sell Options*—(1) In the case of the exercise of a buy-sell option set forth in the partnership agreement, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the acquisition by one or more of the Accounts on either a proportionate or Disproportionate basis of a co-partner's interest in the partnership in connection with the exercise of such a buy-sell option, provided that each ERISA-Covered Account is first given the opportunity to participate on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to

any decision by Aetna or UBS Realty on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], to sell the interest of such Accounts in the partnership to a co-partner even though the independent fiduciary for one or more of such ERISA-Covered Account[s] has not approved such sale where all of the Accounts participating in such investment (other than the General Account) are not in agreement on how to proceed with respect to the buy-sell option, provided that such disapproving Account is first afforded the opportunity to purchase the entire interest of the co-partner.

Section III—Exemption for Transactions Involving a Partnership or Persons Related to a Partnership

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, if the conditions in Section IV are met, to any additional equity or debt capital contributions to a partnership, or any transaction with the co-partner which arises in connection with the operation of the partnership, by an ERISA-Covered Account that is participating in an interest in the partnership, or to any material modification in the terms of, or action taken upon default with respect to, a loan to the partnership in which the ERISA-Covered Account has an interest as a lender, where the partnership is a party in interest solely by reason of the ownership on behalf of the General Account of a 50 percent or more interest in such joint venture.

Section IV—General Conditions

(a) The decision to participate in any ERISA-Covered Account that shares real estate investments must be made by plan fiduciaries who are totally unrelated to Aetna, UBS Realty and their respective affiliates. This condition shall not apply to plans covering employees of Aetna, UBS Realty or any of their respective affiliates.

(b) Each contractholder or prospective contractholder in an ERISA-Covered Account which shares or proposes to share real estate investments is provided with a written description of potential conflicts of interest that may result from the sharing, a copy of the notice of pendency, and a copy of the exemption if granted.

(c) An independent fiduciary must be appointed on behalf of each ERISA-Covered Account participating in the sharing of investments. The independent fiduciary shall be either:

(1) A business organization which has at least five years of experience with respect to commercial real estate investments,

(2) A committee comprised of one or more individuals who each have at least five years of experience with respect to commercial real estate investments, or

(3) The plan sponsor (or its designee) of a plan (or plans) that is the sole participant in an ERISA-Covered Account.

(d) The independent fiduciary or independent fiduciary committee member shall not be or consist of Aetna, UBS Realty or any of their respective affiliates.

(e) No organization or individual may serve as an independent fiduciary for an ERISA-Covered Account for any fiscal year if the gross income (other than fixed, non-discretionary retirement income and any cost of living increases thereon) received by such organization or individual (or any partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder) from Aetna, UBS Realty, any of their respective affiliates, and the ERISA-Covered Accounts for that fiscal year exceeds five percent of its or his annual gross income from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the five percent limitation shall be applied with reference to the fiscal year in which such organization or individual serves as an independent fiduciary. The income limitation will include income for services rendered to the Accounts as independent fiduciary under any prohibited transaction exemption(s) granted by the Department. However, such income limitation shall not include any income for services rendered to a Single Customer ERISA-Covered Account by an independent fiduciary selected by the Plan Sponsor to the extent determined by the Department in any subsequent prohibited transaction proceeding.

In addition, no organization or individual who is an independent fiduciary, and no partnership or corporation of which such organization or individual is an officer, director or ten percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from, Aetna, UBS Realty, any of their respective affiliates, or any Account managed by Aetna, UBS Realty or any of their respective affiliates, during the period that such organization or individual serves as an independent fiduciary and continuing for a period of six months after such organization or

individual ceases to be an independent fiduciary, or negotiate any such transaction during the period that such organization or individual serves as independent fiduciary.

(f) The independent fiduciary acting on behalf of an ERISA-Covered Account shall have the responsibility and authority to approve or reject recommendations made by Aetna, UBS Realty or any of their respective affiliates for each of the transactions in this proposed exemption. Aetna, UBS Realty and any of their respective affiliates shall involve the independent fiduciary in the consideration of contemplated transactions prior to the making of any decisions, and shall provide the independent fiduciary with whatever information may be necessary in making its determinations.

In addition, the independent fiduciary shall review on an as-needed basis, but not less than twice annually, the shared real estate investments in the ERISA-Covered Account to determine whether the shared real estate investments are held in the best interest of the ERISA-Covered Account.

(g) Neither UBS Realty nor any of its affiliates is a co-investor in the shared investment or partnership to which an exemption provided by Sections I, II or III above is being applied; provided, however, that this condition shall not preclude an employee benefit plan maintained by Aetna, UBS Realty or any of their affiliates from participating in an ERISA-Covered Account that is such a co-investor.

(h) Aetna or UBS Realty maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (i) of this Section to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Aetna, UBS Realty or any of their respective affiliates, the records are lost or destroyed prior to the end of the six-year period.

(i) Except as provided in paragraph (2) of this subsection (i) and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in subsection (h) 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 or the Internal Revenue Service,

(B) Any fiduciary of a plan participating in an ERISA-Covered Account who has authority to acquire or

dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an ERISA-Covered Account or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an ERISA-Covered Account, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this subsection (i) shall be authorized to examine trade secrets of Aetna, UBS Realty or any of their respective affiliates, or commercial or financial information which is privileged or confidential.

Section V—Definitions

For the purposes of this proposed exemption:

(a) An “affiliate” of Aetna or UBS Realty, respectively, includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Aetna or UBS Realty, respectively,

(2) Any officer, director or employee of Aetna, UBS Realty or any person described in section V(a)(1), and

(3) Any partnership in which Aetna or UBS Realty is a partner.

(b) An “Account” means any account maintained by Aetna and, except in the case of the General Account, managed by UBS Realty. The term “Account” includes the General Account, ERISA-Covered Accounts, Pooled Accounts and Single Customer Accounts, as well as combinations of accounts other than the General Account which are consolidated for investment management purposes as if they were a single account.

(c) The “General Account” means the general asset account of Aetna and any of its affiliates which are insurance companies licensed to do business in at least one State as defined in section 3(10) of the Act.

(d) An “ERISA-Covered Account” means any Account (other than the General Account) in which employee benefit plans subject to Title I or Title II of the Act participate.

(e) “Disproportionate” means not in proportion to an Account’s existing equity ownership interest in an investment, partnership or partnership interest in a debt.

(f) The “Transition Effective Date” is the effective date of the delegation by Aetna to UBS Realty of the management

of the Accounts, which has been designated as October 1, 2003.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective as of October 1, 2003, the Transition Effective Date.

The proposed exemption, if granted, will be subject to the express conditions that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions to be consummated pursuant to the exemption.

FOR FURTHER INFORMATION CONTACT: Brian J. Buyniski of the Department, telephone (202) 693-8545. (This is not a toll-free number.)

Signed at Washington, DC, this 24th day of September, 2003.

Ivan Strasfeld,

*Director of Exemption Determinations,
Employee Benefits Security Administration,
Department of Labor.*

[FR Doc. 03-24594 Filed 9-26-03; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D-11136, et al.]

Proposed Exemptions; The National Electrical Benefit Fund (the Plan)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

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

also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffitt.betty@dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

The National Electrical Benefit Fund (the Plan) Located in Rockville, Maryland

[Application No. D-11136].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of sections 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 October 17, 2002 to Bank of America, N.A. (the Bank) providing a guaranty of repayment for the benefit of the bondholders in the form of an Irrevocable Direct Draw Letter of Credit No. 3051512 (Letter of Credit) and the Partnership's subsequent reimbursement to the Bank of amounts advanced by the Bank pursuant to the Letter of Credit in connection with the investment by the Plan in Colma Apartment Associates, L.P. (the Partnership), provided that the following conditions are met:

(a) The Plan's investment in the Partnership is on terms no less favorable to the Plan than those which the Plan could obtain in arm's length transactions with unrelated parties;

(b) The decisions on behalf of the Plan to invest in the Partnership and consent to the terms of the reimbursement agreement in favor of the Bank are made by fiduciaries, which are not included among, and are independent of and unaffiliated with, the Bank;

(c) The investment in the Partnership represents no more than .5% of the total assets of the Plan; and

(d) The general partners of the Partnership are independent of the Plan and of the Bank of America.

(e) The Plan shall have no obligation to fund its capital contribution unless and until (i) all conditions imposed by the construction lender regarding disbursement to the Partnership of \$25,950,000 of the tax-exempt bond construction financing proceeds have been satisfied by the Partnership; and (ii) the Department grants the proposed exemption; and

(f) The Plan's capital contribution will be used solely for the purpose of reimbursing Bank of America for the draw on the Letter of Credit.

Effective Date of Exemption: The effective date of this exemption is October 17, 2002.