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General Wage Determination Publication

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Signed at Washington, DC this 25th day of July, 1997.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 97–20028 Filed 7–31–97; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10261, et al.]

Proposed Exemptions; McCrosky, Feldman, Cochrane & Brock, P.C.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

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

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

McCroskey, Feldman, Cochrane & Brock, P.C. Profit Sharing Plan and Trust (the Plan), Located in Muskegon, Michigan

[Application No. D–10261].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of 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 sections 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed cash sale (the Sale) by the Plan of certain improved real property located at 1440 and 1442 Peck Street in Muskegon, Michigan (the Muskegon Property) to the McCroskey Development Partnership (the Partnership), a party in interest with respect to the Plan; provided that the following conditions are satisfied:

(A) All terms and conditions of the Sale are no less favorable to the Plan than those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The Sale is a one-time transaction for cash in which the Plan incurs no expenses;

(C) The Plan receives a purchase price for the Muskegon Property which is no less than the greater of (1) the fair market value of the Muskegon Property established at the time of the sale by an independent qualified appraiser, or (2) $350,000;

(D) Within sixty days of the publication in the **Federal Register** of a notice granting this proposed exemption, if granted, McCroskey, Feldman, Cochrane & Brock, P.C. (the Employer) files Form 5330 with the Internal Revenue Service and pays the applicable excise taxes which are due with respect to the continuation of a lease of the Muskegon Property by the Plan to the Employer after September 27, 1989; and

(E) Within sixty days of the publication in the **Federal Register** of a notice granting this proposed exemption, if granted, the Employer's payment of rent to the Plan for the Muskegon Property from September 27, 1989 through the date of the Partnership's purchase of the Property from the Plan is reviewed by an independent fiduciary to determine whether such rent was at all times no less than the fair market rental value of the Muskegon Property, and, to the extent such rent is determined to have been less than the fair market rental value, the Employer pays the Plan the amount of such deficiency together with interest thereon at a rate determined by the independent fiduciary to be appropriate to compensate the Plan for lost income on such deficiency amount.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan with individual accounts for each of its participants. The Plan is sponsored by McCroskey, Feldman, Cochrane & Brock, P.C. (the Employer), a Michigan professional corporation operating a law firm located in Muskegon, Michigan. The Plan had approximately 38 participants and beneficiaries and total assets of approximately $6,209,646 as of December 31, 1996. The trustees of the Plan are J. Walter Brock and Gary T. Neal (the Trustees), each of whom is an employee and an 11.11 percent shareholder of the Employer.

2. On September 23, 1975, the Plan purchased three lots of real property (the Original Property) from a partnership called the Advocates, whose partners were the shareholders of the Employer. Two lots of the Original Property are adjacent lots located in Muskegon County, Michigan (the Muskegon Property) at 1440 Peck Street and 1442 Peck Street in Muskegon, MI. The Plan paid a purchase price of $250,000 for the lot at 1440 Peck Street and a purchase price of $25,000 for the adjacent lot at 1442 Peck Street. The remainder of the Original Property was a third lot, located in Calhoun County (the Calhoun Property) at 5906 Morgan Road in Battle Creek, Michigan, and the purchase price for this lot was $42,500. The Employer represents that the Plan's purchase of the Original Property from the Advocates met the requirements of section 408(e) of the Act, pertaining to the purchase of qualifying employer real property, and was therefore exempt from the prohibited transactions provisions of section 406 of the Act.[1]

3. Upon acquisition of the Original Property by the Plan, the Employer commenced to lease all three lots of the Original Property from the Plan for use as office locations for the Employer's law practice. The Employer represents that the Plan's leases of the Original Property to the Employer (the Original Leases) constituted leases of qualifying employer real property in satisfaction of the requirements of section 408(e) of the Act and were therefore exempt from the prohibitions of section 406 of the Act.[2]

The initial Original Lease was for a ten-year term and provided for rent at appraised rental values. Rent was set at $3,600 per month, as determined by the August 1975 appraisal, for a total of $43,228 per year. The lease was triple net, and also specified that rent was to be a fixed sum for the first five years, and that for the second five years, annual rent would be determined by appraisal, and would reflect any change in the rental value of the property. The Employer represents that its continued lease of the Original Property from the Plan subsequent to the second term of the Original Lease was pursuant to extensions of the Original Lease and that rentals of no less than the subject property's fair market rental value were paid to the Plan in accordance with appraisals conducted in 1988, 1993 and 1995.

On September 27, 1989, the Plan sold the Calhoun Property to an unrelated party, the United Association of Plumbers and Pipefitters Union Local 335 (the Union). The Employer represents that it was relocating its business to the Muskegon Property and was forced to abandon the Calhoun Property. The Employer represents that the Union is independent of and unrelated to the Employer and the Plan. Since the Plan sold the Calhoun Property to the Union, the Employer has continued to occupy the Muskegon Property and lease it from the Plan pursuant to extensions of the Original Lease. The Employer states that the two lots constituting the Muskegon Property are treated as one parcel for address and appraisal purposes, referred to as 1440 Peck Street, because the structural improvements on each lot are components of a single commercial structure which lies on parts of both lots. Hereinafter, references to the Muskegon Property are intended to include both 1440 and 1442 Peck Street.

4. In anticipation of upcoming increased Plan liquidity needs, and in recognition that the continuation of the Employer's use and lease of the Muskegon Property since the Plan's sale of the Calhoun Property has constituted a prohibited transaction under section 406 of the Act, the Trustees have determined to terminate the Plan's lease of the Muskegon Property to the Employer by causing the Plan to sell the Muskegon Property. A partnership comprised of shareholders of the Employer, the McCroskey Development Partnership (the Partnership), has expressed to the Trustees a willingness to purchase the Muskegon Property at its full fair market value, and the Trustees are now proposing to cause the Plan to sell the Muskegon Property to the Partnership for cash. The Trustees and the Employer are requesting an exemption to enable this sale transaction under the terms and conditions described herein.

5. If the exemption is granted, the Partnership will pay the Plan a cash purchase price for the Muskegon Property of no less than the fair market value of the Muskegon Property as of the date of the sale and in no event less than $350,000. The Muskegon Property was appraised as of April 11, 1995 by Stephen P. Nedeau, MAI, SRA (Nedeau), who determined that as of that date the Muskegon Property had a fair market value of $350,000. Commensurate with the sale transaction, the Trustees will cause the appraisal by Nedeau to be updated as of the sale date, and the purchase price will be cash in the amount of (a) the Muskegon Property's fair market value according to such updated appraisal, or (b) $350,000, whichever is greater. The Plan will pay no expenses related to the transaction.

6. The Department is not proposing exemptive relief for the continuation of the lease by the Employer of the Muskegon Property from the Plan (the Continued Lease) after September 27, 1989, the date on which the Plan sold the Calhoun Property. The Employer

[1] The Department expresses no opinion as to whether the Plan's purchase of the Original Property satisfied the conditions of section 408(e) of the Act.

[2] The Department expresses no opinion as to whether the Original Lease satisfied the conditions of section 408(e) of the Act.

recognizes that the Continued Lease has constituted a prohibited transaction under the Act and the Code for which no exemptive relief is proposed herein. Accordingly, the Employer represents that it will pay the excise taxes which are applicable under section 4975(a) of the Code by reason of such Continued Lease within sixty (60) days of the publication in the **Federal Register** of a notice granting the exemption proposed herein.

7. The Employer represents that the rentals paid to the Plan during the Continued Lease have provided the Plan with appropriate amounts of rent in accordance with updated appraisals of the Muskegon Property. However, because the amount of annual rent has remained constant under the Continued Lease, as an additional condition of this exemption, if granted, the Employer will cause a review of the rentals paid to the Plan and the Muskegon Property's fair market rental values during the Continued Lease by an independent Plan fiduciary in order to determine whether the Plan received rentals of no less than the fair market rental values of the Muskegon Property during the Continued Lease. The Employer represents that the independent fiduciary for this purpose will be either Nedeau, who performed the most recent appraisal of the Muskegon Property, or the trust department of FMB Lumberman's Bank in Muskegon, Michigan, which represents itself to be independent of the Employer. In the event such independent fiduciary determines that rent payments received by the Plan were less than the Muskegon Property's fair market rental value for any period during the Continued Lease, the Employer will pay the Plan the amount of any such deficiency with interest on such amount at a rate determined by the independent fiduciary to compensate the Plan appropriately for lost income.

8. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (1) The proposed sale will be a one-time cash transaction; (2) The Plan will experience no losses nor incur any expenses from the transaction; (3) The Plan will receive cash for the Muskegon Property in the amount of no less than the Muskegon Property's updated fair market value as of the sale date and in no event less than $350,000; and (4) The transaction will enable the termination of the ongoing Continued Lease of the Muskegon Property by the Plan to the Employer, which constitutes a prohibited transaction.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Willett of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

TCW Group, Inc., Trust Company of the West, TCW Funds Management, Inc., TCW Galileo Funds, Inc. (collectively; TCW), Located in Los Angeles, California

[Application No. D–10319]

Proposed Exemption

Section I. Covered Transactions

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[3] If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(l) (A) through (D) of the Code, shall not apply to the acquisition or redemption of units (the Units) in the TCW Life Cycle Trusts (the Trusts, as defined in Section III) established in connection with such Plans' participation in the TCW Portfolio Solutions Program (the Program) by individual account plans described in section 3(34) of the Act (the Plans), including Plans sponsored by TCW, and the acquisition or redemption of shares (the Shares) in the TCW Galileo Funds (the Funds, as defined in Section III) by the Trusts.

In addition, the restrictions of section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (E) and (F) of the Code, shall not apply to the provision of advice, and to the receipt of fees as a result thereof, in connection with the investment by the Plans in the Trusts under the Program.

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

Section II. General Conditions

A. The terms of each purchase or redemption of the Units in the Trusts are at least as favorable to an investing Plan as those obtainable in an arm's length transaction with an unrelated party.

B. The participation of a Plan in the Program will be expressly authorized in writing by a fiduciary of the Plan who is independent of TCW.[4] With respect to the Plans sponsored by TCW, this condition will be deemed satisfied for purposes of the purchase or redemption of Units in the Trusts, if the purchase and redemption of Shares in the Funds by the Trusts meets the conditions of Prohibited Transaction Exemption (PTE) 77–3 (42 FR 18743, April 8, 1977).

C. Participation in the Program will be limited to Plans which have a minimum of $5,000,000 in plan assets as of the most recent year.

D. No Plan will pay a fee or commission by reason of the acquisition or redemption of Units in the Trusts or Shares in the Funds.

E. The price paid or received by the Plans for the Units in the Trusts is the ''net asset value'' per Unit, at the time of the transaction. The Trusts will buy and sell shares in the Funds on the same basis as other shareholders.

F. The total fees paid to TCW and its affiliates by each Plan for the provision of services in connection with its investment in the Units of the Trusts under the Program does not exceed ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act. In this regard, the total amount paid by a Trust to TCW or unaffiliated third persons for services necessary to operate the Trusts, and for TCW to provide what may be considered investment advice, will not exceed 1% per annum of the average daily ''net asset value'' of the shares of the Funds and cash held by such Trust.

G. TCW will not receive any fees from the Plans whose participants (the Participants) receive recommendations concerning investment in a Trust, nor from the Trusts in which the Plans invest. Notwithstanding the foregoing, TCW will not be precluded from receiving: (i) fees from the Funds which are paid by other investors in the Funds, and which are permissible under the Investment Company Act of 1940, as amended (the 1940 Act); (ii) reimbursement for ''direct expenses'' within the meaning of 29 CFR 2550.408c–2 in connection with the operation of the Program; or (iii) reimbursement for direct expenses which TCW pays to unaffiliated third persons for goods and services provided to the Trusts and/or Plans under the Program.

H. Any investment advice given to the Participants by TCW under the Program will be based on the responses provided by the Participants to worksheet questions which are developed and designed by an independent financial

[3] For purposes of this proposed exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[4] In the case of a Plan sponsored by TCW, such fiduciary need not be independent of TCW.

expert (the Financial Expert, as defined in Section III (F)) and the independent behavioral expert (the Behavioral Expert as defined in Section III (G), collectively; the Experts).

I. Any investment advice given to the Participant will be implemented only at the express direction of the Participant.

J. Under the Program, TCW will give investment advice to the Participants that is limited to the Trusts, a Money Market Fund, a Guaranteed Investment Contact (GIC) or a similar investment vehicle that may or may not be affiliated with TCW.[5]

K. The compensation of neither Expert is affected by the decisions made by the participants and beneficiaries regarding investment of the assets of their accounts among the Trusts.

L. To the extent any assistance is provided by TCW, or unaffiliated third persons, to the Participants in completing the worksheets and questions designed by the Experts, such assistance is provided by individuals whose compensation is not affected by the investment by the participants and beneficiaries of the assets of their accounts among the Trusts.

M. With respect to its participation in the Program, an independent Plan fiduciary must receive, prior to the Plan's investment in any of the Trusts, complete and detailed written information regarding the Trusts and the Funds which will include, but may not be limited to:

(1) A description of the Program;

(2) The allocation of the Funds in each Trust specified by the Financial Expert, and the basis upon which the Funds in each Trust will be rebalanced so that the Funds' proportionate value in each Trust equals that specified by the Financial Expert;

(3) Upon request by the Plan Fiduciary, the current basis upon which the asset allocation of the Trusts was derived;

(4) Full disclosure of all the expenses charged to the Trusts, and how such expenses are allocated;

(5) Full disclosure of all the fees charged by the Funds, which may be accomplished by providing the current prospectus for each of the Funds comprising a Trust; and

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

N. (1) Prior to investing in a Trust, each Participant will receive full disclosures which will include, but may not be limited to:

(a) Disclosure regarding composition of the Trusts, and a description of the underlying Funds;

(b) Upon request, a Participant will also receive a copy of the Funds' prospectus;[6] and

(c) The Participant can meet with a facilitator familiar with the Program, or contact such a facilitator using a toll-free number.

(2) Subsequent to his participation in the Program, each Participant will receive the following disclosures which will include, but may not be limited to:

(a) Written confirmations of purchase and redemption transactions for each Participant within 10 days of each such transaction;

(b) Telephone access to the quotations of the Participant's account balance; and

(c) A periodic newsletter describing the Trusts' performance during the preceding period, market conditions and economic outlook and, if applicable, prospective changes in the asset allocation model and the reasons for the change.

O. Each Plan Fiduciary will receive the following written disclosures with respect to its ongoing participation in the Program which will include, but may not be limited to:

(1) A quantitative annual report which will include—

(a) Performance Summary for each Fund;

(b) Schedule of Investments for each Fund;

(c) Statements of Assets and Liabilities for each Fund;

(d) Statements of Operations for each Fund;

(e) Statements of Changes in Net Assets for each Fund;

(f) Notes to Financial Statements, which include but are not limited to, primary investment objective of each Fund;

(g) The performance and rate of return achieved for each Trust and the Funds in which the Trust is invested; and

(h) A breakdown of all expenses and fees at the Fund and Trust levels.

P. (1) Except as provided in Section II(P)(2) below, the independent Plan Fiduciary will receive, at least 30 days advance notice of any material change in the information described in Section II(M) (2) or (3) regarding the composition of the Trusts or the basis on which the Trusts' assets are rebalanced, and will receive at least 30 days advance notice of any material increase in expenses at the Trust level described in Section II(M)(4);

(2) The Financial Expert will have the sole responsibility for determining the materiality of any changes in the information in Section II(M) (2) or (3). TCW will determine the materiality of any changes described in Section II(M)(4) regarding the expenses charged to the Trusts. For any changes in the information in Section II(M) (2) or (3) which are not material, the independent Plan Fiduciaries will be notified within 10 days of such change. For any changes in the information in Section II(M)(4) which are not material the independent Plan Fiduciary will be notified at least quarterly. Independent Plan Fiduciaries will be afforded, at all times, a reasonable opportunity to terminate their Plans' participation in the Program as described in Section II(Q)(2) below; and

(3) Under extraordinary circumstances outside the control of TCW, the independent Plan Fiduciary may not be provided advance notice by TCW of material changes in the information listed in Section II(M) (2) or (3) regarding the composition of the Trusts or the basis on which the Trusts' assets are rebalanced. Under such circumstances, the Plan Fiduciaries will be notified within 10 days of any such change. The Financial Expert will determine whether the circumstance is extraordinary and if the change in the composition of the Trusts or in the basis for rebalancing is material.

Q. (1) The Units in the Trusts will be redeemed by TCW, at no charge. Redemption requests received in proper form prior to the close of trading on the New York Stock Exchange (NYSE) will be affected at the net asset value per Unit determined on that day. Redemption requests received after the close of regular trading on the NYSE will be effected at the net asset value at the close of business of the next day, except on weekends or holidays when the NYSE is closed; and

(2) The Plans can redeem their Units in the Trusts on five business days (or less) notice.

R. The Trusts permit participants and beneficiaries to purchase or redeem an interest in the Trust on any day that the shares of the Funds contained within the Trust can be purchased or redeemed. This paragraph (R) does not preclude any Plan from restricting such purchases and redemptions to a less frequent basis.

S. All transactions involving securities owned by the Funds will be executed through brokers in which TCW has no interest and who are unrelated to

[5] TCW will not receive any fees or other compensation with respect to recommendations regarding investments in an unrelated Money Market Fund, GIC or similar investment vehicle.

[6] TCW anticipates that most Plans which participate in the Program will comply with section 404(c) of the Act. Section 404(c) of the Act requires, in part, that specific disclosures be provided by the Plans to the participants and beneficiaries. See 29 CFR 2550.404c–1 (b)(2)(i)(A) and (b)(2)(i)(B)(2) (iv) and (v).

TCW. TCW will not receive any consideration from such brokers in connection with their selection, or for effecting or executing such transactions other than research which will benefit the shareholders of the Funds, including the Trusts. TCW brokerage practices will reasonably comply with the requirements of section 28(e) of the Securities and Exchange Act of 1934.

T. (1) The independent Fiduciaries of Plans participating in the Program will receive full written disclosure, in a statement separate from a Fund prospectus, of any proposed increases in the rates of advisory or other fees charged by TCW to the Funds for services (or of any material increase in expenses charged by TCW to the Funds or fees charged by TCW for internal accounting services for the Funds) at least 30 days prior to the effective date of such increase, accompanied by a termination form (the Termination Form, as described in (2) below) and shall receive full written disclosure in a Fund prospectus, or otherwise, of any such increases in the rate of fees charged by TCW to the Funds; and

(2) The Termination Form shall provide an election to terminate participation in the Program and shall contain instructions on the use of the form that includes the following information: (a) the authorization to participate in the Program is terminable at will by the Plan, without penalty to the Plan, upon receipt by TCW of written notice from the Plan; and (b) failure to return the Termination Form will result in the continued authorization of the Plan's participation in the Program, including investment in the Trusts.

U. TCW maintains, for a period of six years, the records necessary to enable the persons described in paragraph (V) of this Section II to determine whether the conditions of this exemption have been met, including a record of each recommendation made to the participants and beneficiaries, and their subsequent investment choices, except that—

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

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

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

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

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

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

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

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

Section III. Definitions

A. The term *Trust* or *Trusts* means a commingled trust or trusts which satisfy the requirements of IRS Revenue Ruling 81–100, 1981–1 C.B. 326 which invest exclusively in one or more of the portfolios of TCW Galileo Funds, Inc., cash or cash equivalents.

B. The term *Fund* or *Funds* means one or more of the portfolios of TCW Galileo Funds, Inc., an open-end investment company registered under the Investment Company Act of 1940, as amended (the 1940 Act).

C. The term *TCW* means the TCW Group, Inc., and any affiliates thereof as defined below in paragraph (D) of this Section III.

D. The term *affiliate* of a person includes:

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

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

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

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

F. The term *Financial Expert* means Professor Jeffrey F. Jaffe, Ph.D., or a successor Financial Expert. Less than 5 percent (5%) of Professor Jaffe's gross income, for federal income tax purposes, in his prior tax year, will be paid by TCW in the immediately subsequent tax year. If the Financial Expert has any income which is not included in the gross income (e.g., interest income which is exempt from federal income taxes), such income may be added to his gross income for his purpose. In the event TCW determines to replace Professor Jaffee or any of his successors, TCW will send a letter to the Department 60 days prior to such replacement. The letter will specify that the successor Financial Expert has responsibilities, experience and independence similar to those of Professor Jaffee. If the Department does not object to the successor, the new appointment will become effective on the 60th day after the Department receives such letter.

G. The term *Behavioral Expert* means Professor Shlomo Benartzi, or a successor Behavioral Expert. In the event TCW determines to replace Professor Benartzi or any of his successors, TCW will send a letter to the Department 60 days prior to such replacement. The letter will specify that the successor has responsibilities, experience and independence similar to that of Professor Benartzi. If the Department does not object to the successor, the new appointment will become effective on the 60th day after the Department receives such letter.

H. The term *net asset value* of a Trust is defined to mean the fair market value of shares in the Funds and cash, minus the accrued expenses of a Trust.

EFFECTIVE DATES: If granted, this exemption will be effective as of the date this notice of proposed exemption is published in the **Federal Register**.

Summary of the Facts and Representations

1. The TCW Group, Inc., is the holding company for a group of wholly-owned subsidiaries that provide a broad range of investment management services. Trust Company of the West is a trust company chartered by the State of California, and is one of the largest trust companies in the United States. TCW Funds Management, Inc., TCW Asset Management Company, and Continental Asset Management Corp., are investment advisors registered with the Securities and Exchange Commission under the Investment Advisors Act of 1940. TCW Group Inc. also contains other registered investment advisor entities. As of September 30, 1996, TCW Group, Inc. was owned 90% by employees and 10% by directors.

TCW is primarily in the business of providing investment management services. TCW manages pools of tax-exempt capital for pension and profit sharing funds, jointly trusteed retirement, health and welfare funds, public employee retirement funds, endowments and foundations. TCW also manages a number of mutual funds for retail investors, and manages assets for insurance companies, foreign investors, and high net worth individuals.

As of September 30, 1996, TCW had more than $50 billion in assets under management, representing over 1,200 institutional and private clients. As of the same date, TCW had a staff of more than 500 individuals, including over 200 investment and administrative professionals. This investment staff includes more than 50 portfolio managers/analysts, approximately 60 research personnel and 14 traders. TCW also employs more than 40 client relations professionals and more than 60 administrative professionals.

2. TCW intends to offer the Program entitled ''TCW Portfolio Solutions'' under which TCW will render investment advice to the Participants[7] in the Plans. Participation by Plans in the Program will be approved by Plan Fiduciaries who are independent of TCW. It is represented that virtually all of the Plans participating in the Program will be designed to comply with the provisions of section 404(c) of the Act. The Plans will be individual account plans described in section 3(34) of the Act. Once the Program is approved by the Plan Fiduciary, TCW will provide each Participant, who wants to receive a recommendation regarding investments, with a worksheet (Worksheet), in writing or electronically, as described below. The Worksheets consist of a series of questions, designed to assess the Participants' retirement needs and levels of risk tolerance. Upon completion of the Worksheets, a Participant's responses will be analyzed and each Participant will receive a written recommendation by TCW of an appropriate Life Cycle Trust (i.e. Trust) for investment. Initially, the Program will offer four separate commingled Trusts (more may be added in the future), and, if not otherwise available under a Plan, a separate Money Market Fund and a Guaranteed Investment Contract (GIC). At the request of the Plan, the Money Market Fund, the GIC, or a similar investment vehicle may or may not be affiliated with TCW.[8]

Each Trust is a group trust established pursuant to IRS Revenue Ruling 81–100, 1981–1 C.B. 326. Application will be made to the Internal Revenue Service (IRS) for a favorable determination as to the tax-exempt status of each Trust. TCW is the trustee of each Trust. Each Trust will invest exclusively, but in varying proportions, in the Funds which are the thirteen mutual funds (more funds may be added in the future) offered by TCW Galileo Funds, Inc., an open-end investment company.[9]

3. An independent Financial Expert will develop a methodology for assessing the Participants' retirement funding needs. An independent Behavioral Expert will develop a methodology for assessing the Participants' levels of loss aversion. A computer program will be designed by programmers unaffiliated with TCW which will incorporate the methodologies designed by the two Experts. Information from the Participant's Worksheet will be input into the computer program and will produce an investment recommendation presented by TCW to the Participant. This recommendation will result solely from the output of the computer program, and neither TCW nor any of its affiliates will be able to change or affect the output. The recommendation will reflect the methodology developed by the Financial Expert, except that the methodology developed by the Behavioral Expert may result in a more conservative recommendation for a Participant whose Worksheet responses reflect a high risk aversion level. The more conservative recommendation may result from the Participant's risk profile, which is developed through the responses to questions on the Worksheet regarding risk tolerance and will only be used to recommend the same or a more conservative Trust than would have been recommended if only questions regarding the financial requirements of the Participant were contained in the Worksheets. Under the Program, the Participant retains discretion and may disregard the recommendation of TCW and invest in another Trust or in the separate Money Market Fund or GIC offered under the Program.

The mix of the Funds in the Trusts will accommodate different investment strategies and risk tolerances. Each Trust will be designed to provide an asset allocation model (Asset Allocation Model) for four different profiles of Participants. The four profiles will be based on the Participants' financial objectives, time horizon, other savings (including amounts held in other plans), and risk tolerance. The independent Financial Expert will periodically adjust the Asset Allocation Models based on investment goals and risk tolerances assigned to each Asset Allocation Model, as well as any changes in the economy and market conditions. The Trusts range from aggressive (portfolios invest in equities) to conservative (portfolios invest in fixed income instruments). The Trusts may comprise some or all of the Plan's investment alternatives. As described in paragraph 19 below, TCW will incur expenses for operating the Program at the Trust level, such as, for example, expenses paid to third parties. TCW will receive only reimbursement of direct expenses for operating the Program. The structure of the Program is described in more detail below.

4. TCW Galileo Funds, Inc. (Galileo) is an open-end management investment company registered under the Investment Company Act of 1940, as amended (the 1940 Act).[10] Galileo currently offers shares in thirteen Funds. Galileo may create additional Funds, and such additional Funds may be considered for investment by the Trusts under the rebalancing of the Trusts to be performed periodically by the Financial Expert.[11] The Funds have a Registration Statement under the Securities Act of 1933, as amended (the 1933 Act) and the 1940 Act. The Registration Statement has been declared effective by the Securities and Exchange Commission (SEC) and is updated at least annually to assure

[7] For purposes of this proposed exemption, the term Participants includes participants and beneficiaries who have the power to direct the investments of their account balances.

[8] See Footnote 3, *supra.*

[9] Upon the request of a very large plan, TCW may construct an individual arrangement utilizing separate Trusts complying with the safeguards discussed herein.

[10] The applicant represents that Galileo is strictly regulated and its fees have to be approved by an independent Board of Directors. Specifically, section 15 of the 1940 Act contains certain procedures for the adoption and renewal of investment advisory contracts. This section 15 requires, among other things, that the terms of investment advisory agreements must be approved by a majority of directors, including a majority of the independent directors, cast in person at a meeting called for purpose of voting on such approval. Section 15(c) of the 1940 Act imposes a duty on the directors to request and evaluate, and the investment advisor to furnish, whatever information is necessary to evaluate the investment advisory agreement.

The standards regarding the approval of an investment advisory agreement are governed by section 36(b) of the 1940 Act, which provides that an investment advisor to a registered investment company has a fiduciary duty with respect to its receipt of compensation for services and other payments.

[11] It is the sole responsibility of the Financial Expert to determine whether to include an additional Fund as an investment under one or more of the Trusts.

compliance with the securities laws. The Funds are no-load mutual funds which trade at their respective net asset value. The Trusts trade at the net asset value of the amalgam of the Funds in which they are invested, plus any cash they hold. The Funds are available to institutional investors and individuals with a high net worth, and require a minimum initial investment of $250,000 and a minimum of $25,000 for additional investments.

5. Galileo has entered into a contract with TCW Funds Management, Inc. (the Adviser), pursuant to which Galileo has employed the Adviser to: manage the investment of its assets; administer its day-to-day operations; place purchase and sale orders of the Funds' securities; and manage Galileo's business affairs (subject to control by the Board of Directors of Galileo). Under the advisory agreement (the Advisory Agreement), the Funds pay the Adviser certain fees for the services rendered, facilities furnished, and the Funds' expenses paid by the Adviser. (See Table I). The Funds are entirely no-load, and do not charge fees to purchase or exchange shares. Also, the Funds do not charge any ongoing marketing expenses (i.e. fees pursuant to Rule 12b–1 under the 1940 Act).

6. The following Table I illustrates the expenses and fees incurred by the Funds' shareholders for the fiscal year ending October 31, 1996. The applicant represents that these fees and expenses are subject to change. Expenses are expressed as a percentage of each Fund's average net asset value.[12]

TABLE I.—SHAREHOLDER TRANSACTION EXPENSES FOR ALL PORTFOLIOS

Sales Load Imposed on Purchases	None.
Sales Load Imposed on Reinvested Dividends.	None.
Contingent Deferred Sales Load	None.
Redemption Fees	None.
Exchange Fees	None.

FUND NAME

Annual fund operating expenses	Money market	High yield	Core fixed income	Long term mortgage backed	Mortgage backed	Mid-cap growth	Convertible securities	Core equity	Small cap	Earnings momentum	Asia Pacific	Emerging markets	Latin America
Management fees	.21%	.75%	.40%	.50%	.50%	.93%	.62%	.75%	1.00%	1.00%	1.00%	1.00%	1.00%
Rule 12b–1 fees	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Other expenses	.19%	.15%	.36%	.18%	.19%	.27%	.33%	.07%	.14%	.43%	.44%	.41%	.44%
Total fund operating expenses	.40%	.90%	.76%	.68%	.69%	1.20%	.95%	.82%	1.14%	1.43%	1.44%	1.41%	1.44%

(1) None.

The independent Fiduciaries of Plans participating in the Program will receive full written disclosure, in a statement separate from a Fund prospectus, of any proposed increases in the rates of advisory or other fees charged by TCW to the Funds for services (or of any material increase in expenses charged by TCW to the Funds or fees charged by TCW for internal accounting services for the Funds) at least 30 days prior to the effective date of such increase, accompanied by a termination form (the Termination Form, as described below) and shall receive full written disclosure in a Fund prospectus, or otherwise, of any such increases in the rate of fees charged by TCW to the Funds.

The Termination Form shall provide an election to terminate participation in the Program and shall contain instructions on the use of the form that includes the following information: (a) The authorization to participate in the Program is terminable at will by the Plan, without penalty to the Plan, upon receipt by TCW of written notice from the Plan; and (b) failure to return the Termination Form will result in the continued authorization of the Plan's participation in the Program, including investment in the Trusts.

7. TCW will engage the Financial Expert to construct Asset Allocation Models for the Trusts, using generally accepted principles of modern portfolio theory. The Program also permits the creation of individualized Trusts whose asset class composition may be modified by the Plan's Independent Fiduciary. However, the Financial Expert has to approve such modification as being appropriate for that particular Trust. TCW represents that investment in such individualized Trusts will be limited to the Plan for which such a Trust was created.

Initially, the Financial Expert will be Professor Jeffrey Jaffe, Ph.D., who is currently on the faculty of the Wharton School. Mr. Jaffe received a Ph.D. in finance in 1973 from the University of Chicago's Graduate School of Business. He has been a frequent contributor to the Quarterly Economic Journal, the Journal of Finance, the Journal of Financial and Quantitative Analysis, and the Financial Analysts Journal. Mr. Jaffe is the Academic Director of several Wharton Executive Education Programs, which he also teaches. In the event that TCW determines to replace Professor Jaffe or any of his successors, TCW will send a letter to the Department 60 days prior to such replacement. The letter will specify that the successor Financial Expert has the responsibilities, experience and independence similar to those of Professor Jaffe. If the Department does not object to the Successor Financial Expert, the new appointment will become effective on the 60th day after the Department receives such letter.

Mr. Jaffe, as the Financial Expert, has no pre-existing relationship with TCW and its affiliates. Mr. Jaffe is independent from and is not under the control of TCW and its affiliates. The investment decisions made by the Participants will not affect the fees paid to the Financial Expert. Mr. Jaffe will receive compensation from TCW for serving as the Financial Expert. Less than 5% of Professor Jaffe's gross income, for federal income tax purposes, in his prior tax year, will be paid by TCW in the immediately subsequent tax year. If Professor Jaffe, as the Financial Expert, has any income which is not included in the gross income (e.g., interest income which is exempt from federal income taxes), such income may be added to his gross income for this purpose.

8. As stated above, the Asset Allocation Models will be developed and maintained by the Financial Expert and will be assigned specific investment goals and risk tolerances. Under each Asset Allocation Model, the Trusts will invest in specific Funds and will hold certain amounts of these Funds so as to be in compliance with the prescribed Asset Allocation Model. TCW may assist the Financial Expert by providing certain background information for the

[12] For the Convertible Securities Fund and Money Market Funds offered inside the Trusts, the Adviser has agreed to reduce its investment management fee. Alternatively, the Adviser will pay these Funds' operating expenses, so as to limit each respective Fund's total expenses to 0.95% and 0.40%, of its average net asset value until December 31, 1997.

development of the Asset Allocation Models. In this regard, TCW may supply the Financial Expert with algorithms, studies, analytics, research, models, papers and any other relevant materials. The Financial Expert may also seek the assistance of other entities in formulating the Asset Allocation Models. In all cases, however, the Financial Expert retains the sole control and discretion for the development and maintenance of the Asset Allocation Models.

The Trusts' holdings of the Funds will be periodically rebalanced by TCW to maintain compliance with specific Asset Allocation Models. However, the rebalancing procedures will not involve any discretion on the part of TCW or its affiliates. In this connection, the Financial Expert will develop a mechanical formula to rebalance the relative value of the Funds in each Trust on a pre-determined basis. The Financial Expert also will determine the timing of the rebalancing and may also periodically adjust the Asset Allocation Model.

9. TCW will also retain a behavioral expert (the Behavioral Expert) to formulate a risk profile for each Participant based on each Participant's risk tolerance. As described below, the Behavioral Expert is Schlomo Benartzi, a professor at UCLA's Anderson School of Management. Professor Benartzi received his Ph.D. in Behavioral Finance and Mental Accounting from Cornell University's Johnson School of Management. The Behavioral Expert is independent of and is not under common control of TCW and its affiliates. The fees paid to the Behavioral Expert by TCW for serving as the Behavioral Expert will not be affected by the investment decisions made by the Participants.

10. The Program will be made available to Plans which have a minimum of $5 million in assets. The Plan Fiduciaries will determine whether the Program is appropriate for their Plans. To assist the Plan Fiduciaries in making this determination, TCW will provide: a brochure describing the Program; a contract containing the terms and conditions of the Program which must be executed by the Plan Fiduciary before the Program is offered to the relevant Plan Participants; full disclosure concerning the composition of the Trusts and, upon request, the basis by which the Asset Allocation Model for each Trust was derived (TCW may require Plan Fiduciaries to keep such basis confidential, except as required by law); a reference guide/disclosure document providing detailed information as to how the Program works; the fees charged to the Funds; the expenses charged at the Trust level; and related information.

TCW will also provide the Plan Fiduciaries with a quantitative annual report, based on raw data supplied by the Plans. The annual report will enable the Plan Fiduciaries to determine whether the Program has increased or maintained Plan participation, or has achieved more appropriate asset allocation for the investment of the Plan Participants' accounts. Such report will disclose the extent to which the Plan Participants followed TCW's recommendations. The annual report will also include the performance and rate of return achieved for each Trust and the Funds in which it is invested, and will contain a breakdown of all expenses and fees at the Fund and Trust levels.

11. The applicants represent that the Program will assist Plan Fiduciaries in achieving increased Plan participation, and assisting Participants in attaining appropriate asset allocation for their individual accounts. In accordance with their responsibilities under Title I of the Act, the Plan Fiduciaries will review the Program before offering it under their Plans.[13]

12. Under the Program, TCW will provide each Plan Participant, in writing or otherwise, with Worksheets to elicit from the Participants their retirement funding needs and level of loss aversion. The Worksheets will consider each Participant's savings, liquidity needs, present and future marginal income tax brackets, other financial assets (e.g., amounts in other plans), personal assets, other funding sources (e.g., inheritance), and investment time horizon. The Worksheets will be developed by the Behavioral Expert and the Financial Expert. The risk profile, developed through the use of the Worksheets, will be used by TCW only to recommend to the Participants the same or a less aggressive Trust than it would have recommended if the risk profile had not been developed and was not considered. TCW will disclose to the Participants the reason for, and the effects of, the risk profile.

The Worksheets will be provided in different formats to accommodate all Participants. It is anticipated that the Worksheets will be provided in hard-copy with written instructions at employee meetings and general information meetings, through the Intranet (a secured access subset of the Internet), on computer terminals at the office of the Plan Fiduciary, on the Plan Fiduciary's page on the world-wide web, etc. If a computer-proficient Participant does not understand a question, he will be able to receive a detailed answer via the computer. The Participant can also meet with a facilitator familiar with the Program, or contact the facilitator by telephone using an 800 toll-free number. The facilitator may, if the Participant chooses, complete the Worksheets based on information furnished by or on behalf of the Participant. The compensation of such personnel will not be affected by particular Trust recommendations or the allocation of investments in the Trusts and/or Money Market Fund, Guaranteed Investment Contract or similar vehicle. However, such personnel may receive enhanced compensation based on the amount invested in the entire Program by all Participants, or by the Participants which they or their teams assist.

13. All the recommendations made by TCW to the Participants regarding specific Trusts, will be based solely from inputting the Participant information into the computer program which is designed using parameters provided by the Financial Expert and the Behavioral Expert. Any computer programmers who are retained to formulate such programs will have no affiliation with TCW. Neither TCW nor any of its affiliates will have any discretion regarding the output of the Program. Under the Program, the Participant retains discretion and may disregard the recommendation of TCW and invest in another Trust. Further, if the Participant does not complete the Worksheet, the Participant may elect which Trust to invest in. The Program imposes no limit on the frequency with which a Participant may change his investment election. However, Plan sponsors may impose other limits concerning frequency. The Program is designed to recommend a single Trust to the Plan Participants. However, if a Plan wishes to permit its Participants to invest in more than one Trust, TCW will modify the Program to permit such investments. However, only one Trust will be recommended by TCW.

[13] In this regard, the general standards of fiduciary conduct promulgated under the Act apply to the Plan Fiduciaries participation in the Program. Section 404 of the Act requires, among other things, that a fiduciary discharge his or her duties solely in the interest of the participants and beneficiaries and in a prudent fashion. Accordingly, the Plan Fiduciary must act prudently when deciding to enter the Program, and in considering the fees to be paid to TCW or third parties thereunder. The Department expects the Plan Fiduciary, prior to entering into the Program, to fully understand the operation of the Program and the compensation paid thereunder, following disclosure by TCW of all relevant information pertaining to the Program.

14. The applicant believes that short-term market volatility has influenced investors to ''buy high and sell low''. In this regard, DALBAR Financial Services, Inc., (DALBAR) prepared a study titled *Quantitative Analysis of Investor Behavior* which tracked investor cash flows in and out of mutual funds during the period January 1984 through September 1993.[14] The study concluded that the investors' tendency to bail out of equity and bond funds during dips in the market, and buy back during recoveries, hurt overall performance. Over the 10 year period studied, investors in equity funds which were advised by sales force personnel outperformed direct market investors by more than 20%.

The applicants represent that the Plans' Participants also fall prey to market volatility because they, as a group, are less sophisticated than individuals who invest on their own in mutual funds.

15. The Program is designed to correct this tendency of ''buying high, selling low''. First, Worksheets will analyze investor behavior of each Participant and determine the appropriate Trust for investment. Since each Trust is a portfolio containing varying percentages of different asset classes represented by its investments in the Funds, this design accounts for the fact that investment performance of different asset classes is imperfectly correlated, and should buffer short-term fluctuations in the portfolio's overall value.

16. The applicants request exemptive relief for the provision of investment advice to the Plans' Participants which may result in an investment by a Participant in a particular Trust.[15] In this regard, TCW generally receives higher net fees (and, potentially, higher net profits) if a Participant invests in the more aggressive Trusts. It is represented that the Program offers the following safeguards for the Plans and their Participants to address this potential conflict of interest. (a) An independent Financial Expert will construct, maintain and modify Asset Allocation Models of the Trusts. (b) A separate trust (Separate Trust) may be constructed by the Plan Fiduciary based on different weightings of the Funds. A Separate Trust may be utilized if the Financial Expert approves such modification. (c) The Financial Expert will develop, maintain, and if necessary, modify a basis for rebalancing each Trust. The rebalancing will maintain the prescribed asset allocation for each Trust also developed by the Financial Expert. Rebalancing will not involve any investment discretion by TCW or its affiliates. (d) The Funds are independently viable in the institutional market where the minimum investment is generally $250,000. (e) TCW will not receive any fees other than those charged by the Funds. However, TCW may receive reimbursement for direct expenses associated with operating the Program, including expenses it pays to third parties. (f) The Program only will be available to Plans which have a minimum of $5 million in plan assets. (g) TCW will provide a Plan Fiduciary with full written disclosure regarding the composition of the Trusts. Upon request, TCW will also provide the basis from which the asset allocations for each Trust were derived. The basis on which the Trusts' assets are rebalanced is developed, maintained, and if necessary, modified by the Financial Expert. TCW will fully disclose all amounts charged at the Fund levels by providing the Plan Fiduciaries with a copy of the Funds' prospectus. (h) TCW will also disclose to the Plan Fiduciary all the expenses charged to the Trusts prior to the Plan's investment in any of the Trusts. Such disclosures may be provided in a brochure, a contract executed by the Plan Fiduciary, or otherwise. (i) TCW will provide the Plan Fiduciary with a quantitative annual report which will enable the Plan Fiduciary to determine if the Program has attained its objectives. (j) Recommendation to a Participant will be based solely on that Participant's response in the Worksheets. TCW has no discretion to vary the recommendations which were based on the Participant's funding needs and behavioral profile as it relates to loss aversion. However, Participants may elect not to follow the recommendations rendered by TCW. (k) TCW will hire an independent Behavioral Expert to develop and formulate the risk profile. Such a risk profile will gauge whether a Participant will maintain the optimal Trust position if a large loss occurs. If the Participant is not likely to maintain the optimal position in the event of such a loss, a more conservative Trust will be recommended.

Prior to investing in a Trust, each Participant will receive full disclosure concerning the composition of the Trusts, and a description of the underlying Funds. Upon request, a Participant will also receive a copy of the Funds' prospectus.[16]

Subsequent to their participation in the Program, the Participants will be provided with written confirmations of the Participant's purchase and redemption transactions within 10 days of each such transaction. Also, quotations of the Participants' account balances will be available by telephone. Both the Participants and Plan Fiduciaries will receive a periodic newsletter describing the Trusts' performance during the preceding period, market conditions and economic outlook and, if applicable, prospective changes in the Asset Allocation Model and the reasons for change.

17. Furthermore, the Program provides the following safeguards with respect to the purchase and sale of Units in the Trusts. (a) The Plan Fiduciaries have the discretion to select and retain the Program for their Plans. (b) The Plans pay no more or receive no less for a Unit in the Trusts than the Plans would have paid or received in an arm's-length transaction with an unrelated party. (c) The Plans can redeem their Units in the Trusts on five business days (or less) notice. Redemption requests received in proper form prior to the close of trading on the NYSE will be affected at the net asset value per Unit determined on that day. Redemption requests received after the close of regular trading on the NYSE will be effected at the net asset value at the close of business of the next day, except on weekends or holidays when the NYSE is closed. (d) Except as provided below, the independent Plan Fiduciary will receive, at least 30 days advance notice of any material change in the information regarding the composition of the Trusts or the basis on which the Trusts' assets are rebalanced, and will receive at least 30 days advance notice of any material increase in expenses at the Trust level. The Financial Expert will have the sole responsibility for determining the materiality of any changes in the information regarding the composition of the Trusts or the basis on which the Trusts' assets are rebalanced. TCW will determine the materiality of any changes in expenses charged to the Trusts. For any immaterial changes in the information regarding the composition of the Trusts or the basis on which the Trusts' assets are

[14] An updated DALBAR study for the period September 1993 through June 1996, reached the same conclusion.

[15] The Department recently issued Interpretive Bulletin 96–1, 29 CFR 2509.96–1 (the IB), which encourages and facilitates the provision of investment education to participants and beneficiaries. The IB describes information which will not constitute investment advice. Therefore, a person will not become a fiduciary by providing such information. However, the applicants represent that their assistance to Plan Participants pursuant to the Program may be considered to be investment advice.

[16] See Footnote 4, *supra.*

rebalanced, the independent Plan Fiduciary will be notified within 10 days of such change. For any immaterial changes in the expenses charged to the Trusts, the independent Plan Fiduciary will be notified at least quarterly. Independent Plan Fiduciaries will be afforded, at all times, a reasonable opportunity to terminate their Plans' participation in the Program, as described in item (c) above. Under extraordinary circumstances outside the control of TCW, the independent Plan Fiduciary may not be provided advance notice by TCW of material changes regarding the composition of the Trusts or the basis on which the Trusts' assets are rebalanced. Under such circumstances, the Plan Fiduciaries will be notified within 10 days of any such change. The Financial Expert will determine whether the circumstance is extraordinary and if the change in the composition of the Trusts or in the basis for rebalancing is material. (e) The broker-dealers who effectuate and execute trades for the Funds, are engaged on a ''best execution'' [17] basis and are independent of TCW and its affiliates (Third Party Brokers). (f) The Plan pays no fee or commission by reason of the acquisition or redemption of Units in the Trusts.[18]

18. TCW will also offer the Program to Participants in the Plans sponsored by TCW. In this regard, TCW represents that the Plans sponsored by TCW will purchase or redeem Units in the Trusts which acquire Shares in the Funds.

The applicants represent that the purchase or redemption of Units in the Trusts may be prohibited. Therefore, the applicants request relief for the purchase or redemption of Units in the Trusts by Plans sponsored by TCW. Such request for relief, however, does not extend to the selection, acquisition or sale of shares in the Funds by the Trusts since the applicant represents that such transactions are afforded relief by Prohibited Transaction Class Exemption 77–3, 42 FR 18734 (April 8, 1977) (PTE 77–3).[19]

In this connection, neither the applicants nor any person in which they have an interest will provide services to the Trusts other than for reimbursement of ''direct expenses'' within the meaning of 29 CFR 2550.408c–2.

19. The applicants represent that the combined total amounts received by TCW and its affiliates for services performed for the Trusts under the Program will constitute no more than reasonable compensation within the meaning of 29 CFR 2550.408b–2(d) and 2250.408c–2. The only fees, other than direct expenses, that TCW will receive for such services are the fees charged by the Funds to all investors. There will be no separate fee at the Trust level for asset allocation services.

The Plans' Fiduciaries will receive full disclosure of the services that will be provided by or for the Trusts, and of the Trusts' expenses. These expenses will include, but will not be limited to, expenses for the Financial and Behavioral Experts and the development of the analytical and risk tolerance components of the Worksheets, expenses for printing and mailing reports, expenses for publishing a quarterly newsletter, expenses for computer programmers, and any other expense incurred by each Trust in the ordinary course of business. [20]

TCW represents that the combined total amount payable by a Trust for services necessary to operate the Program and for TCW to provide what may be considered investment advice, will not exceed 1% of the Trusts' net asset value per annum, calculated on the average daily value of a Plan's investment in the Trust. Additional services, which are not necessary for the operation of the Program (e.g., recordkeeping of amounts or units in the participants' individual accounts, preparation of account statements for participants, review of whether a Plan complies with section 404(c) of the Act) may be provided. However, these expenses will not be considered in determining whether the 1% limit is exceeded. Except for these additional services, all services provided will be necessary to operate the Program (i.e., the Program Services). All the Trusts will share the cost of the Program Services on a pro-rata basis, based on the amount of assets in each Trust. For example, a Trust with $10 million in assets will pay twice as much for Program Services as a Trust with $5 million in assets. Fees at the Fund level are separately determined and are not affected by the fees paid at the Trust level.

20. TCW will generally pay for direct expenses for services performed for the Trusts and seek reimbursement from the Plans. The applicants state that this could be a prohibited extension of credit between a plan and a party-in-interest pursuant to sections 406(a)(1)(B), 406(a)(1)(D) and 406(b)(2) of the Act. However, the applicants represent that these transactions are covered under Prohibited Transaction Class Exemption 80–26, 45 FR 28545 (April 29, 1980) (PTE 80–26) [21]. The applicants also represent that they will fully comply with the applicable conditions of PTE 80–26 when they pay such expenses on behalf of the Plans.

21. In summary, the applicant represents that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

A. The decision to participate in the Program will be made by a Plan Fiduciary of a Plan which has a minimum of $5,000,000 in plan assets;

B. Prior to making the decision to participate in the Program, the Plan Fiduciary will receive offering materials and disclosures concerning the Program's purpose, fees, structure, operation, and risks;

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[17] Best execution takes into account such factors as price (including the applicable dealer spread or commission, if any), size of the order, difficulty of execution and operating facilities of the firm involved. The applicants state that research, which will benefit all the shareholders in the Funds, including the Plans, may be provided by the Third Party Brokers.

[18] Pursuant to this condition, the applicants cannot pay or receive any sales fee or commission. However, this does not prevent third parties from paying or receiving fees or commissions.

[19] PTE 77–3 provides relief for the acquisition or sale of shares of a registered open-end investment company by an ''in-house'' employee benefit plan, that is, a plan covering only employees of the mutual fund, the fund's investment adviser, or principal underwriter or an affiliate of such persons.

The plan may not pay any investment management, investment advisory or similar fee to the fund adviser, underwriter or affiliate, except in the form of investment advisory fees paid by the fund under an investment advisory agreement. The plan also may not pay a sales commission in acquiring or selling the fund shares, and may only be charged a redemption fee under certain conditions. Any other dealings with the plan, must be on a basis no less favorable to the plan than such dealings with other fund shareholders. The Department expresses no opinion herein as to whether the conditions of PTE 77–3 will be met under the proposed transactions.

[20] The Department expresses no opinion as to whether the requirements of 29 CFR sections 2550.408b–2 and 2550.408c–2 would be met with respect to the reimbursement of TCW for the provision of the above-described services. The Department notes, however, that an expense would not be properly reimbursable to the extent it was incurred in connection with a service that was not otherwise exempt under sections 408(b)(2) and 408(c) of the Act and corresponding regulations. Thus, TCW must review each service to be provided to the Trust to determine whether such service is a ''necessary service'' for which reimbursement is lawful. See Department of Labor Advisory Opinion No. 93–06A, March 11, 1993.

[21] PTE 80–26 permits a party in interest to make interest free loans to a plan. The proceeds of the loan may be used only for (1) the payment of ordinary operating expenses of the plan, including the payment of benefits, in accordance with the terms of the plan, and periodic premiums under an insurance or annuity contract; or (2) a three day period, for a purpose incidental to the ordinary operation of the plan. In addition, the loan must be unsecured and not made by an employee benefit plan. The Department expresses no opinion as to the applicability of PTE 80–26 or whether the conditions of that exemption would be satisfied by the proposed transactions.

C. The Plan Fiduciary will receive an annual report which will enable him to monitor the Program's effectiveness;

D. The Asset Allocation Models of the Trusts and the rebalancing formula will be constructed by an independent Financial Expert;

E. A risk profile for each Participant will be formulated by an independent Behavioral Expert;

F. Investment recommendations made by TCW to the Participants will be based solely on their responses to the Worksheets (and data which may be supplied by the Plan or the Plan Fiduciary), and the independent Experts are responsible for formulating the questions for the Worksheets;

G. TCW will maintain a record of the recommendations made to the Participants, including the investment decisions made by the Participants;

H. Except for reimbursement of expenses for services provided to the Trusts, TCW will not receive any fees from the operation of the Program other than those attributable to the Funds;

I. (1) Prior to investing in a Trust, each Participant will receive full disclosures which will include, but will not be limited to:

(a) Disclosure regarding composition of the Trusts, and a description of the underlying Funds;

(b) Upon request, a Participant will also receive a copy of the Funds' prospectus;

(c) The Participant can meet with a facilitator familiar with the Program, or contact such a facilitator using a toll-free number.

(2) Subsequent to his participation in the Program, each Participant will receive the following disclosures which will include, but will not be limited to:

(a) Written confirmations of purchase and redemption transactions for each Participant within 10 days of each such transaction;

(b) Telephone access to the quotations of the Participant's account balance; and

(c) A periodic newsletter describing the Trusts' performance during the preceding period, market conditions and economic outlook and, if applicable, prospective changes in the asset allocation model and the reasons for the change; and

J. The Plans can redeem their Units in the Trusts on five business days (or less) notice.

Notice to Interested Persons

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

However, because the applicants have requested an effective date of the publication of the notice of proposed exemption in the **Federal Register**, the applicants represent that if a Plan invests in the Program within thirty (30) days of the publication of the proposed exemption in the **Federal Register**, the Plan Fiduciary of that Plan will be given a copy of the notice of proposed exemption as published in the **Federal Register** and a statement advising interested persons of their right to comment and request a hearing on the proposed exemption. Accordingly, that Plan Fiduciary and all interested persons will be entitled to comment or request a hearing on the proposed exemption within thirty (30) days of the Plan Fiduciary's receipt of the above materials.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan, U.S. Department of Labor, telephone (202) 219–8883. (This is not a toll-free number.)

Pension and Welfare Benefits Administration, Notice of Proposed Exemption for Certain Transactions Involving the UNUM Life Insurance Company of America (UNUM), Located in Portland, Maine

[Application No. D–10437]

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 UNUM, including the UNUM general account and the general accounts of UNUM's affiliates which are licensed to do business in at least one state (collectively, the General Account), and one or more separate accounts or investment advisory accounts in which one or more employee benefit plans sponsored by UNUM or its affiliates participate, or any combination thereof (the ERISA-Covered Accounts) with respect to which UNUM is a fiduciary. As an acknowledged investment manager and fiduciary, UNUM is primarily responsible for the acquisition, management and disposition of the assets allocated to the ERISA-Covered Accounts.

DATES: Written comments and requests for a public hearing must be received by the Department on or before September 30, 1997.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent of the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D–10437. The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW., Washington, DC 20210.

SUPPLEMENTARY INFORMATION: Notice is hereby given of the 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 UNUM 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. UNUM is a stock life insurance company organized under the laws of the State of Maine and subject to supervision and examination by the Insurance Commissioner of Maine. Among the variety of insurance products and services it offers, UNUM has long provided funding, deposit administration, asset management and other services for pension and profit sharing plans subject to the provisions of Title I of the Act. UNUM has substantial experience in managing real estate investments. Of the approximately $11.8 billion in total assets held by UNUM and its affiliates at the close of 1995, General Account assets included more than $261 million in equity interests in real property and more than $1.2 billion in mortgage loans.

UNUM is owned by a parent holding company, UNUM Corporation, a Delaware corporation, which is publicly

held and files reports with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

UNUM Corporation maintains the UNUM Employees Lifecycle Plan (the UNUM Plan), which is a defined benefit pension plan on behalf of its employees and those of certain of its subsidiaries. The UNUM Plan presently has 7,507 participants and holds more than $218 million in assets. Those assets are managed by UNUM under an Investment Management Agreement. The UNUM Plan comprises an ERISA-Covered Account which may share real estate investments under the exemption proposed herein. The applicant represents that currently the UNUM Plan would be the only employee benefit plan participating in an ERISA-Covered Account, but UNUM would like to have the flexibility to share real estate investments with additional separate accounts or investment advisory accounts in which other employee benefit plans maintained by UNUM or its affiliates participate. Accordingly, UNUM has requested that the exemption proposed herein extend to such other potential ERISA-Covered Accounts as well. The proposed exemption would apply to real estate investments shared by two or more ERISA-Covered Accounts, and would also apply to real estate investments shared by one or more ERISA-Covered Accounts and the General Account. The only employee benefit plans which will participate in the ERISA-Covered Accounts are plans maintained by UNUM and its affiliates.

2. The applicant represents that because there are relatively few potential investors for large scale investments such as office buildings, shopping centers, and industrial parks, the owner or developer of such real estate investments must offer a higher return in order to attract investors. In many cases, UNUM's real estate accounts would be precluded from acquiring these investments on an individual basis because such investments would require the commitment of a disproportionately large percentage of account assets to one or a few investments. The sharing of large or uniquely desirable real estate investments would permit the ERISA-Covered Accounts to participate in more attractive and profitable real estate investments while maintaining portfolio diversification.

3. The real estate investments which UNUM proposes to share may either take the form of a direct investment in real property or an interest in a joint venture partnership which holds title to, manages, and/or develops real property. No ERISA-Covered Account will participate in an investment for the purpose of enabling another Account to make an investment.

4. Real estate equity investment opportunities for the Accounts are originated by the Real Estate Equity Group (REEG), a department within UNUM's Investment Department (the Investment Division). Real estate equity investments are originated in accordance with general investment criteria developed by REEG and the senior management of the Investment Division. The specific investment criteria for each account must be approved by the board of directors of each affiliated insurance company participating in real estate investments and updated no less frequently than annually. With respect to the UNUM Plan (or any other ERISA–Covered Account), the investment strategy would be developed and reviewed periodically in consultation with the Plan trustees and the independent fiduciary (see below).

5. The strategy approved to date by the trustees of the UNUM Plan (the Trustees)[22] would limit its aggregate participations in real estate investments to 10% of Plan assets, with no more than 1.5% of Plan assets in any one property. The average amount invested in each property by the Plan is expected to be approximately $2.5 million. No leverage would be employed, i.e., no property would be debt financed. There would eventually be ten or twelve properties in the Plan's real estate portfolio, diversified among at least five cities or regions which are geographically dispersed. No more than 30% of the Plan's portfolio would be invested in any one city or region.

5. Allocations of investment opportunities among Accounts are based upon, among other things, the extent to which each Account's projected acquisition needs and investment objectives, established no less frequently than annually as part of the criteria for investment of the Account, have not been satisfied by other allocations. Under the exemption proposed herein, real estate investments meeting an Account's investment criteria could be shared by that Account and one or more other Accounts for which a share in the investment meets the criteria of such other Account(s) necessary to achieve economic, geographical and property class diversification within the limits on investment amounts imposed by the overall size and other holdings of the Account.

6. During the course of UNUM's holding of a real estate investment, certain situations may arise which 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 UNUM shares these investments among more than one Account, 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 request for exemption, with certain proposed safeguards designed to protect the interests of any participating ERISA-Covered Account in the resolution of potential or actual conflicts. Among the safeguards will be the appointment for each participating ERISA-Covered Account of a fiduciary independent of UNUM and its affiliates.

7. The independent fiduciary of any ERISA-Covered Account that proposes to share real estate investments will be furnished with a written description of the transactions that may occur involving such investments which might raise questions under the conflict of interest prohibitions of the Act with respect to UNUM's involvement in such transactions and which are the subject of this proposed exemption. This description must discuss the reasons why such conflicts of interest may be present (*i.e.*, because the General Account participates in the investment and may benefit from the transaction or because the interests of the various Accounts participating in the investment may be adverse with respect to each other). The description must also disclose the principles and procedures to be used to resolve any anticipated impasses, as will be outlined below. In addition, the independent fiduciary of any new ERISA-Covered Account that proposes to share investments following the issuance of a final exemption will be provided with the above-described written description and a copy of the exemption as granted, before beginning to participate in any shared investments.

8. The Trustees can request a change in the investment Policies and Objectives governing investment of its assets under the Investment Management Agreement which would preclude further shared real estate investments, and which could call for

[22] The Trustees comprise senior actuarial, financial, human resources and operating officers of UNUM, its parent holding company and its affiliates.

divestiture of existing participations in such investments on its behalf. Any other plan would be able to withdraw from an ERISA-Covered Account by providing notice to UNUM in accordance with the relevant contractual provisions.

9. The UNUM Plan, and any other ERISA-Covered Account, will only participate in the shared real estate equity investments with the approval of a fiduciary which is entirely independent of UNUM and its affiliates.

The independent fiduciary will be chosen by the Trustees, who will have reviewed information about the nominee's qualifications, and had an opportunity to meet with and question the nominee or its representatives prior to confirming the appointment. The nominee may be a firm, or a committee of individuals, possessing the necessary qualifications as outlined below.

10. UNUM will not have the authority to remove an independent fiduciary or a member of an independent fiduciary committee, except for cause. The term ''for cause'' means that there must be sufficient and reasonable grounds for removal and the reasons for removal must be related to the ability and fitness of an individual to perform his or her required duties under the proposed exemption. The definition of the term ''for cause'' must be clearly stated in specific terms in the contract by which the independent fiduciary is retained. If the organization acting as independent fiduciary is removed for cause by the Trustees, the procedure described above for the initial selection of an independent fiduciary shall apply to the replacement.

In the case of an individual member of a committee serving as an independent fiduciary, the committee member may also be removed for cause at any time upon the majority vote of the remaining members of the committee. If a vacancy occurs by virtue of the death, resignation or removal of a member of an independent fiduciary committee, replacement members of the committee will be appointed by a majority vote of remaining members of the committee. Possible replacements may be suggested by members of the committee, UNUM, the Trustees, or the appropriate fiduciary of any other participating plan. If an independent fiduciary is to be replaced, written records regarding the reason for such replacement as well as a description of the replacement independent fiduciary must be maintained by UNUM or its affiliate, and such records must be made available to the Department upon request. If the independent fiduciary is removed for cause, UNUM will explain the circumstances in writing to the Department.

11. Prior to the decision to approve the selection of an independent fiduciary initially selected by UNUM, the Trustees or other appropriate fiduciary on behalf of any other plan participating in shared real estate investments will be furnished with appropriate biographical information pertaining to the organization or committee members. This biography will set forth the background and qualifications of the organization or committee member to serve in the capacity of independent fiduciary. The information provided to the Trustees or other plan fiduciaries will include the total amount of compensation received by the organization (or committee member) from UNUM and its affiliates during the preceding year. This financial disclosure will be updated annually, and will include the amount of fees and expenses paid for independent fiduciary services.

12. To ensure that the organizations or committee members so selected are knowledgeable and qualified to serve as independent fiduciaries and are, in fact independent of UNUM, the following qualifications and restrictions will be met. The independent fiduciary must be unrelated to UNUM and its affiliates. The independent fiduciary may not be, or consist of, any officer, director or employee of UNUM, or be affiliated in any way with UNUM or any of its affiliates. (See definition of ''affiliate'' in Section V(a), below.) The independent fiduciary must be either (1) a business organization which has (or whose principals have) at least five years of experience with respect to commercial real estate investments, or (2) a committee composed of three to five individuals who each have at least five years of experience with respect to commercial real estate investments. The contract with the independent fiduciary must provide for a minimum initial term of not less than five (5) years.

No organization or committee member will be eligible to serve as an independent fiduciary for an ERISA-Covered Account for any taxable year if the gross income (excluding retirement income) 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 UNUM and its affiliates for that taxable 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. 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 property from, sell any property to, or borrow any funds from, UNUM or its affiliates, during the period that such organization or individual serves as an independent fiduciary and a period of six 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 business organization or committee member may not serve as an independent fiduciary of more than one ERISA-Covered Account.

13. The independent fiduciary will be compensated by the UNUM Plan or any other ERISA-Covered Account for which it acts as independent fiduciary. UNUM may 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 Maine and subject to the requirement that such person acted in good faith and in a manner he or she reasonably believed to be solely in the interests of the participants and beneficiaries of the plans participating in the Account.

14. The independent fiduciary of each ERISA-Covered Account will have the responsibility and authority to approve or reject recommendations made by UNUM for any transaction described in this notice of proposed exemption. The committee members and/or organization acting as independent fiduciary will be informed of the procedures set forth in the requested exemption for the resolution of anticipated impasses prior to his or its acceptance of the appointment. UNUM will involve the independent fiduciary in the consideration of contemplated transactions prior to the making of any decisions, and will provide the independent fiduciary with whatever information may be necessary in making its determinations. No transaction which is the subject of this proposed exemption will be undertaken prior to the rendering of an informed decision by the independent fiduciary. In addition, the independent fiduciary will

approve the initial allocation of a shared investment to an ERISA-Covered Account. In the case of transactions that involve the possible transfer of an interest in a real estate investment between the General Account and an ERISA-Covered Account, the independent fiduciary will not be limited to approving or rejecting the recommendations of UNUM, but will have full authority to negotiate the terms of the transfer (in accordance with the independent appraisal procedure described below) on behalf of the ERISA-Covered Account. The independent fiduciary of each ERISA-Covered Account will also review on an as-needed basis, but not less than twice annually, the entire portfolio of shared real estate investments in the ERISA-Covered Account to determine whether it is in the best interests of the ERISA-Covered Account to retain or sell such investments.

15. The independent fiduciary will prepare written records of its decisions and the reasons underlying those decisions, which may take the form of committee meeting minutes or letters to UNUM. UNUM will maintain these and all other written records required to be maintained by the Department and will make them available for inspection by authorized employees of the Department and the Internal Revenue Service, as well as the fiduciaries, contributing employers, and participants and beneficiaries of the plans participating in the proposed transactions.

16. In connection with the management of real estate shared investments, it is possible that UNUM, on behalf of the General Account, or the independent fiduciaries for ERISA-Covered Accounts participating in a shared investment, may develop different approaches as to whether or how long an investment should be held by an Account. Certain situations may also arise during the course of UNUM's holding of a shared real estate investment in which decisions will need to be made where it is not possible to obtain the agreement of UNUM and all of the independent fiduciaries involved. These situations may arise as a result of an action taken by a third party, or they may arise in connection with an action proposed by UNUM or the independent fiduciary for an ERISA-Covered Account. In such cases, UNUM will make recommendations to the independent fiduciaries regarding a proposed transaction. If a course of action cannot be found that is acceptable to each independent fiduciary, a stalemate procedure will be followed to ensure that a decision can be made. The applicant represents that the stalemate procedure is similar to procedures typically used to resolve disputes between co-venturers under real estate joint venture agreements and is therefore familiar to most real estate investors.

17. With respect to stalemates between two or more Accounts which share an investment, the stalemate procedure is designed to provide a result that is similar to what would occur in comparable situations where unrelated parties to a transaction were dealing at arm's length. This means that the action which will be taken in such cases is the one that does not require an Account: (1) to invest new money; (2) to change the terms of an existing agreement; or (3) to change the existing relationship between the Accounts. Joint venture agreements typically provide the opportunity for a co-venturer to buy out the interest of another co-venturer if they reach an impasse. If, for example, a third party wishes to buy out a joint venturer's interest in a property and the co-venturers disagree on whether to accept or reject the buy-out offer, the real estate joint venture agreement will typically allow one co-venturer to buy out the other at a specified price.

18. Where investments are shared by two or more ERISA-Covered Accounts, UNUM will make recommendations to the independent fiduciaries of each participating ERISA-Covered Account regarding investment management decisions that must be made for a real estate shared investment. For example, if the independent fiduciaries cannot agree on a UNUM recommendation, UNUM may offer alternate recommendations (possibly including partition and sale of undivided interests) in an attempt to facilitate agreement. If the independent fiduciaries still cannot agree, each ERISA-Covered Account will be offered the opportunity to buy out the other ERISA-Covered Account's interest on the basis of a specified price. The specified price may be based on the price offered by a third party, or, if no third party offer is received (or if the third party offer is unacceptable to either ERISA-Covered Account), the specified price will be the price established under the independent appraisal procedure described below. As in a buy-sell provision in a typical joint venture, the ERISA-Covered Account to which the offer is made will have the option to sell to the offering ERISA-Covered Account at the specified price, or to buy out the offering ERISA-Covered Account's interest at that price.

19. If the independent fiduciary for the ERISA-Covered Account which disagrees with UNUM's recommendation does not wish to make a buy-sell offer to the other ERISA-Covered Account, the other ERISA-Covered Account(s) may do so. If no ERISA-Covered Account chooses to exercise the buy-sell option, UNUM will take the action designed to preserve the status quo, i.e., the action designed to avoid expenditure of additional funds by the Accounts and avoid any change in existing arrangements or contractual relationships.

20. Where a real estate investment is shared by the General Account and one or more ERISA-Covered Accounts and a stalemate occurs between the General Account and an ERISA-Covered Account, UNUM may offer alternate recommendations to facilitate an agreement. If the Accounts still cannot reach agreement, each Account will be offered the opportunity to buy out the other Account's interest on the basis of a specified price, which will be established in accordance with the independent appraisal procedure described below, or will be the price offered by a third party. If none of the Accounts elects to make a buy-sell offer to the other Account, UNUM would be required to take the action selected by the independent fiduciary of the ERISA-Covered Account. Where the General Account wishes, e.g., to hold its interest and the independent fiduciary for the ERISA-Covered Account determines to sell its interest, the General Account will buy out the interest of the ERISA-Covered Account at the price offered by the third party, or, at the ERISA-Covered Account's option, at an independently determined price. Conversely, where the independent fiduciary for the ERISA-Covered Account determines to retain its interest while the General Account wants to sell its interest, the ERISA-Covered Account has the option of buying out the General Account, or, if the independent fiduciary chooses not to, the status quo will be maintained.

Specific Transactions

I. Direct Real Estate Investments

(a) Transfers Between Accounts

21. 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 in the transaction. The transfer would also be subject to the approval of the Insurance Departments of a number of states where UNUM is domiciled, including Maine, South Carolina and New York. Because UNUM would be acting on behalf of both the ''buying'' and ''selling'' Accounts (but not the General Account) in such an inter-Account transfer, the transfer might be deemed to constitute a prohibited transaction under section 406(b)(2) 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 Account of which UNUM 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.

Ordinarily, no transfer of an interest in a shared investment will be permitted between the General Account and an ERISA-Covered Account. The transfer of an interest in a shared investment between the General Account and an ERISA-Covered Account may be deemed to constitute a violation of sections 406(a)(1) (A) and (D) as well as sections 406(b) (1) and (2) of ERISA. As noted above, however, where a stalemate arises between the General Account and an ERISA-Covered Account, the transfer of such an interest would be permitted to resolve the conflict. Specific stalemate procedures have been developed for these situations. If, for example, a third party makes an offer to purchase the entire investment held by UNUM on behalf of the General Account and an ERISA-Covered Account, it is possible that the General Account would like to accept the offer and the independent fiduciary on behalf of the ERISA-Covered Account would like to reject the offer. In that event, UNUM may offer alternative recommendations to the independent fiduciary. If there is still no agreement, the independent fiduciary (as the party wishing to reject the offer) would be given the opportunity to buy-out the General Account's interest at a specified price. This price may be a proportionate share of the third party offer; or, if such price is unacceptable to the ERISA-Covered Account, a proportionate share of the price determined through the independent appraisal procedure described below. This procedure would give the ERISA-Covered Account an opportunity to retain its interest in the shared investment. If the ERISA-Covered Account does not choose to buy-out the General Account's interest, the General Account would be required to accede to the direction of the ERISA-Covered Account and would, therefore, reject the third party offer.

If, in the event of a third party purchase offer, the General Account wants to reject the offer but the independent fiduciary on behalf of the ERISA-Covered Account wants to accept the offer, the procedures described above would apply, except that the General Account (as the party wishing to reject the offer) would have the opportunity to buy-out the ERISA-Covered Account's interest at a proportionate share of the third party purchase offer, or, at the option of the independent fiduciary for the ERISA-Covered Account, at an independently determined price. This will permit the ERISA-Covered Account to sell its interest in a real estate investment, if it chooses to do so, at no less than the same price it would have received from a third party.

Even in the absence of a third party offer, UNUM may recommend the sale of a shared investment. If the independent fiduciary approves the recommendation, UNUM will arrange for the sale. If the independent fiduciary does not approve UNUM's recommendation, UNUM may offer alternative recommendations, possibly including partition and sale of divided interests. If, however, no agreement is reached, the independent fiduciary (as the party wishing to reject the recommendation) would be given the opportunity to buy-out the General Account's interest in accordance with the independent appraisal procedure described below. If there is no buy-out, UNUM would take the course of action consistent with the ERISA-Covered Account's determination and would, therefore, not sell the investment.

The independent fiduciary may also determine independently that a shared investment in an ERISA-Covered Account should be sold. If UNUM agrees with this recommendation, UNUM will arrange the sale. If UNUM, on behalf of the General Account, disagrees with the recommendation, UNUM will first attempt to sell the ERISA-Covered Account's interest to another Account other than the General Account. In this case, the sale price and other terms would have to be approved by the independent fiduciary for each ERISA-Covered Account. If the ERISA-Covered Account's interest cannot be sold to another Account, UNUM may offer alternative recommendations, possibly including partition and sale of the ERISA-Covered Account's interest to a third party. If no agreement is reached with respect to these options, the General Account (as the party opposed to the sale) would have the opportunity of buying out the ERISA-Covered Account's interest at a price established under independent appraisal procedures described below. If there is no buy-out and no agreement, UNUM will be required to take the course of action consistent with the ERISA-Covered Account's determination and will sell the entire investment.

Where an independent price for the transfer of an interest in a shared investment between the General Account and an ERISA-Covered Account is not established by an offer from an unrelated third party (or where the third party price is unacceptable to the ERISA-Covered Account), the stalemate procedure provides for the appointment of an independent appraiser. Under this procedure, UNUM and the independent fiduciary will each appoint an independent appraiser. These two appraisers will then choose a third appraiser. The panel of appraisers will each evaluate the entire investment, and the average of the three appraisals will be used to determine the proportional value of each shared investment interest. However, the General Account and the ERISA-Covered Account may agree that if one valuation is more than a specified percentage outside the range of the other two valuations, that valuation may be disregarded and the transfer price will be the average of the remaining two valuations. The applicant represents that this procedure, which is of the variety typically used in real estate joint venture agreements, provides adequate protection for the ERISA-Covered Account because the independent fiduciary is an equal participant in the appraisal process. See Section I(a).

(b) Joint Sales of Property

22. 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 for all of the participating Accounts that the sale is desirable. 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.[23]

Similarly, UNUM may be acting on behalf of two ERISA-Covered Accounts, in which case a prohibited transaction under section 406(b)(2) may be deemed to occur. 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. In accordance with UNUM's stalemate procedures, if the independent fiduciary for one ERISA-Covered Account wishes to sell its interest in a shared investment and the independent fiduciary for another ERISA-Covered Account does not want to sell, UNUM will attempt to negotiate a compromise, including the transfer of interests from one Account to the other. If no agreement can be reached, the status quo will be maintained and no sale will be made. See Section I(b).

(c) Additional Capital Contributions

23. 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 needed 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 by UNUM 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 [24]; 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 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 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.[25]

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 are involved.

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 (including the General Account). Any decision made or action taken by an ERISA-Covered Account (*i.e.*, the contribution of either no additional capital, the Account's pro rata share of additional capital, less than or more than the 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

24. 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. Prior to any loan being made, it would have to be approved by the independent fiduciary for the ERISA-Covered Account. See Section I(d).

II. Joint Venture Investments

25. Many real estate investments are structured as joint venture arrangements (rather than 100 percent ownership interest in property) in which UNUM and another party, such as a real estate developer or manager, participate as joint venturer partners (or co-venturers). Joint venture investments typically involve several particular features by virtue of the terms and conditions of the joint venture agreements that may, when UNUM's joint venture interest is shared, result in possible violations of section 406 of the Act.

(a) Additional Capital Contributions to Joint Ventures

26. As in the case of investments made entirely by UNUM, joint venture real estate investments sometimes require additional operating capital. Typically, a joint venture agreement will provide for a capital call by the general partner of the joint venture to be made to each joint venturer under which each venturer will be requested to provide the needed capital. Capital contributions are generally requested on a pro rata basis either in the form of an equity contribution or a loan to the joint venture. If one joint venturer refuses to contribute its pro rata equity share of the capital call, the other joint venturer(s) may contribute additional capital to cover the short-fall and thereby ''squeeze down'' the interest in the venture of the non-contributing joint venturer.[26]

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

[24] 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 make a capital contribution that is at least equivalent proportionately to the highest capital contribution made by an ERISA-Covered Account.

[25] In the case of shared real estate investments owned entirely by UNUM accounts, 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.

[26] In the case of a call for additional capital involving a typical joint venture arrangement entered into between parties dealing at arm's length, the joint venture agreement may commonly provide that the equity interest of any non-contributing venturer be re-adjusted, or ''squeezed down'', on a capital interest basis. This involves re-adjusting the equity interests of the venturers 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 venturer in the actual current market value of the underlying property. Thus, this type of re-adjustment is intended to provide an incentive to

Alternatively, if sufficient additional capital is not provided by the joint venturers, other financing may be sought, or the joint venture may be liquidated. In the case of a capital call where UNUM's joint venture 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 joint venture. The general rule that UNUM 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 Account. In addition to situations where some Accounts participating in the ownership of UNUM's joint venture interest may not be in a position to provide their share of a capital call, other situations may arise where the co-venturer is unable to make its additional capital contributions. Both of these situations may result in prohibited transactions under section 406 of the Act.

27. *UNUM Shortfall.* The General Account and an ERISA-Covered Account may experience a capital call from the general partner of the joint venture 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,[27] 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, Section II(a)(2) 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 addition, the General Account may make an additional equity contribution to the joint venture to cover the ERISA-Covered Account's shortfall. In that event, the equity interest of the ERISA-Covered Account will be ''squeezed down'' (relative to the equity interest of the General Account) on a fair market value basis. This option would avoid the capital basis squeeze-down of the ERISA-Covered Account's interest by the co-venturer. Such contribution would be made by the General Account only after the independent fiduciary for the ERISA-Covered Account is given an opportunity to make an additional contribution. See Section II(a)(3).

A similar situation may arise where two ERISA-Covered Accounts participate in a joint venture investment. If one Account is unable or unwilling to provide its proportionate share of a capital call, the other 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 Accounts. Thus, any of these disproportionate contribution situations between Accounts might result in a violation of section 406 of the Act. Subject to the generally applicable conditions of this proposed exemption, Section II(a)(3) provides relief for these disproportionate contributions.

28. Co-Venturer Shortfall. In some cases, UNUM's co-venturer in a joint venture investment may be unable to meet its additional capital obligation, and UNUM may deem it advisable for some or all of the participating Accounts to contribute capital in excess of the pro rata share of UNUM's Accounts in the joint venture in order to finance the operation of the property (and thereby squeeze down the equity interest of the co-venturer).[28] The applicant is requesting exemptive relief that would permit additional capital contributions to be made by participating Accounts (including the General Account) on a disproportionate basis if the need arises. Any instance involving the infusion of additional capital to a joint venture 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 co-venturer on the basis provided in the joint venture agreement), contributing more or less than a pro rata share, or contributing no additional capital. See Section II(a)(4).

(b) Third Party Purchases of Joint Venture Properties

29. Under the terms of typical joint venture agreements, if an offer is received from a third party to purchase the assets of the joint venture, and one joint venture partner (irrespective of the percentage ownership interest of the joint venture partner) wishes to accept the offer, the other joint venture 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 venture. For example, if UNUM on behalf of the Accounts and a real estate developer are joint venture partners in a property and an offer is received from another person to acquire the entire property that the developer wants to accept, UNUM 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 venture. When UNUM's interest in a real estate joint venture 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 developer, 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 joint venture agreements typically require, however, that UNUM on behalf of the Accounts provide the co-venturer with a unified buy or sell reply. Thus, in making a buy or sell decision in any of these cases involving an ERISA-Covered Account,

all venturers to make their proportionate capital contributions so that improvements can be made and the operation of a property continued without burdening the other venturers.

[27] In any case where the General Account and one or more ERISA-Covered Accounts share UNUM's interest in a joint venture, 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, up to its pro rata share of the additional capital call. Thus, the General Account will never be the cause as between the Accounts of a capital contribution shortfall by UNUM that would result in a capital basis squeeze down by a co-venturer.

[28] In any case involving a shared joint venture 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.

UNUM 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 to buy out not only the co-venturer, but also the other participating Account(s) that wishes to accept the third party offer to sell. Or, one Account may be willing and able to buy-out the co-venturer 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. Such alternatives, when an ERISA-Covered Account is involved, while all possibly desirable from case to case, 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 UNUM to respond to third-party 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 co-venturer 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-venturer) 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 in accordance with the stalemate procedure, as described below (see rep. 30, below).

30. In a case involving the sharing of a joint venture interest between two ERISA-Covered Accounts, if one ERISA-Covered Account wishes to buy out the co-venturer and the other ERISA-Covered Account is unable or unwilling to do so, the ERISA-Covered Account wishing to buy out the co-venturer would have the opportunity to do so if the other ERISA-Covered Account's interests can also be accommodated. This could be accomplished if, for example (1) the second ERISA-Covered Account wishes to sell its interest to the first ERISA-Covered Account (at a proportionate share of the price offered by the third party offeror) and the first ERISA-Covered Account agrees; or (2) the second ERISA-Covered Account wishes to continue holding its original interest. If, however, the second ERISA-Covered Account wishes to sell its interest and the first ERISA-Covered Account is unwilling or unable to buy it, both Accounts would be required to sell to the third party offeror in order to avoid the expenditure of additional funds by an unwilling Account.

If the General Account participates in a joint venture interest subject to a third party purchase offer, the stalemate procedure would provide the same alternatives, except that if the General Account wishes to accept the third party purchase offer and the ERISA-Covered Account wishes to buy out the co-venturer (and is unwilling or unable to buy out the General Account's interest), the General Account would be required to buy out the co-venturer with the ERISA-Covered Account. See Section II(b).

(c) Rights of First Refusal in Joint Venture Agreements

31. Under the terms of typical joint venture agreements, if a joint venture partner wishes to sell its interest in the venture to a third party, the other joint venture 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 UNUM and a real estate developer are joint venture partners and the developer decided to sell its interest to a third party, UNUM 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 joint ventures, the decision by UNUM 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 joint venture agreement, only one option (exercise or not exercise) may be chosen by UNUM on behalf of the Accounts, exemptive relief is being requested that would permit UNUM 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 joint venture investment, even though UNUM 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 joint venturer'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 Accounts other than the General Account participate in a joint venture and agreement cannot be reached on behalf of the Accounts on whether to exercise a right of first refusal, the right will not be exercised and the co-venturer will be permitted to sell its interest to the third party, unless one Account decides to buy-out the co-venturer 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-venturer without other participating Accounts taking part in the transaction. For example, in the case of a shared joint venture investment involving the General Account (or any other Account) and an ERISA-Covered Account, if the co-venturer wishes to accept an offer to sell its interest and the independent fiduciary of the ERISA-Covered Account decides not to have the account participate in purchasing the co-venturer'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 Joint Venture Agreements

32. Joint venture agreements entered into by UNUM typically provide that one joint venture partner may demand that the other partner either sell its interest to the first partner at a price determined by the terms of the joint venture agreement or buy out the interest of the first partner at such price. If the other joint venture 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 joint venture, but generally a joint venture agreement permits the buy-sell provision to be exercised at any time. As in the situations discussed above, the decision by UNUM on behalf of the Accounts to make a buy-sell offer, or its reaction to such an offer made by a co-venturer, may affect various participating Accounts differently. Accordingly, any decision made by UNUM 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 UNUM to make an appropriate decision under the

circumstances on behalf of all participating Accounts to make a buy-sell offer to a co-venturer or to react to a buy-sell offer from a co-venturer. Any such decision must be approved by the independent fiduciary for each ERISA-Covered Account participating in the investment.

33. In the event that UNUM recommends the initiation of the buy-sell option against the co-venturer, UNUM will exercise the option if the independent fiduciary on behalf of each participating ERISA-Covered Account approves the recommendation. If, in the case of a General Account/ERISA-Covered Account shared joint venture investment, the independent fiduciary does not agree with UNUM's recommendation, the independent fiduciary would be given the opportunity to buy out the General Account's interest at a price to be determined in accordance with the independent appraisal procedure described above. If the independent fiduciary declines to buy out the General Account's interest, the General Account would then have the opportunity to buy out the ERISA-Covered Account's interest, (provided the independent fiduciary for the ERISA-Covered Account approves of such sale), also in accordance with the independent appraisal procedure. If neither the General Account nor the ERISA-Covered Accounts buys out the other's interest in the joint venture investment, UNUM would take the course of action most consistent with the determination of the ERISA-Covered Account, and would, therefore, not exercise the buy-sell option.

In the event that the co-venturer initiates the buy-sell option with respect to a shared joint venture investment, UNUM must either sell its entire interest to the co-venturer or reject the offer and buy-out the co-venturer's interest at that price. If the participating Accounts agree upon the course of action to be taken, UNUM will then take the agreed action. If no agreement is reached, various alternatives may be considered. For example, in the case of a General Account/ERISA-Covered Account shared joint venture investment, if UNUM recommends rejection of the offer (and consequent purchase of the co-venturer's interest), but the independent fiduciary wants to accept the offer, the General Account would have the option to purchase the co-venturer's interest solely on behalf of the General Account. If the General Account chooses this option, the ERISA-Covered Account (which wished to accept the co-venturer's offer) would have the opportunity to sell its interest to the General Account, at a proportionate share of the price offered by the co-venturer, but would not be required to do so. However, if the General Account declines to purchase the ERISA-Covered Account's interest where the ERISA-Covered Account wishes to accept the buy-sell offer, the entire joint venture interest would be sold to the co-venturer. If the ERISA-Covered Account wishes to reject the buy-sell offer (and purchase the co-venturer's interest) and the General Account wishes to accept the offer, the General Account would be required to purchase its proportionate share of the co-venturer's interest, unless the independent fiduciary for the ERISA-Covered Account elects to purchase more than its proportionate share (including the entire co-venturer interest).

Where two or more ERISA-Covered Accounts share a joint venture investment, the stalemate procedure is similar, except that no ERISA-Covered Account would be required to purchase the interest of a co-venturer (and thus expend additional funds) against its wishes. See Section II(d).

(e) Transactions With Joint Venture Party in Interest

34. The applicant represents that when the General Account holds a 50 percent or more interest in a joint venture, the joint venture itself may be deemed to be a party in interest under section 3(14)(G) of the Act. Thus, any subsequent transaction involving the joint venture and an ERISA-Covered Account that is also participating in the venture (*e.g.*, an additional contribution of capital) may be deemed to be a transaction between the plans participating in an ERISA-Covered Account and a party in interest (the joint venture itself) in violation of section 406. Accordingly, the applicant is requesting exemptive relief from the restrictions of section 406(a) of the Act, only, which would permit any additional equity capital contributions to a joint venture by an ERISA-Covered Account which is participating in an interest in the joint venture, where the joint venture 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. Such action would be conditioned upon the approval of the independent fiduciary for the ERISA-Covered Account. See Section III.

Initial Allocations

The applicant, UNUM, has not requested exemptive relief for the initial allocation of shared equity real estate investments by UNUM among two or more Accounts, at least one of which is an ERISA-Covered Account. UNUM represents that neither the General Account nor any ERISA-Covered Account will incur any debt in connection with the initial allocation of the shared investment. In this regard, it is the view of the Department that the mere investment of assets of a plan on identical terms with a fiduciary's investment for his or her own account in the equity interests of a shared real estate investment would not, in itself, cause the fiduciary to have an interest in the transaction that may affect his or her best judgment as a fiduciary. Therefore, such an investment would not, in itself, violate section 406(b)(1) which prohibits a fiduciary from dealing with the assets of a plan in his or her own interest or for his or her account. In addition, such shared investment, pursuant to reasonable procedures established by the fiduciary, would not cause the fiduciary to act (or represent) a party whose interests are adverse to those of the plan. Therefore, such an investment would not, in itself, violate section 406(b)(2) which states that a fiduciary may not act in any capacity in a transaction involving the plan on behalf of a party whose interests are adverse to those of the plan.

With respect to section 406(a)(1)(D) of the Act which prohibits the transfer to, or use by or for the benefit of a party in interest (including a fiduciary) of the assets of a plan, it is the opinion of the Department that a party in interest does not violate that section merely because he or she derives some incidental benefit from a transaction involving plan assets. We are assuming, for purposes of this analysis, that the fiduciary does not rely upon and is not otherwise dependent upon the participation of plans in order to undertake its share of the investment.

Thus, with respect to the investment of plan assets in shared equity investments which are made simultaneously with investments by a fiduciary for its own account on identical terms, it is the view of the Department that any benefit that the fiduciary might derive from such investment under these circumstances is incidental and would not violate section 406(a)(1)(D) of the Act.

Notice to Interested Persons

Within 30 days of publication of this proposed exemption in the **Federal Register**, UNUM will provide the notice required under 29 CFR section 2570.43(b) by posting a copy of all materials to be required in that notice at business locations maintained by

UNUM and its affiliates at which participants in the UNUM Plan work. In addition, if any new ERISA-Covered Account proposes to participate in shared investments covered by the exemption proposed herein, the representatives of that Account will be provided with a copy of this proposed exemption and the final exemption before beginning to participate in any shared investments.

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.

Proposed Exemption

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

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*—(1) 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 joint venture 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.

(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 sale or transfer of an interest in a shared investment (including a shared joint venture interest) between ERISA-Covered Accounts and the General Account, provided that such transfer is made pursuant to stalemate procedures, described in this notice of proposed exemption, adopted by the independent fiduciary for the ERISA-Covered Account, and provided further that the 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 joint venture 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 pro rata 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 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 pro rata 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 pro rata 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.

Section II—Exemption for Certain Transactions Involving the Management of Joint Venture Interests Shared by Two or More Accounts Maintained by UNUM

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 joint venture 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 to the making of additional pro rata equity capital contributions by one or more Accounts participating in the joint venture.

(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 pro rata 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 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 [as defined in section V(e)] additional equity capital contributions (or the failure to make such additional contributions) in the joint venture by one or more Accounts which result in an adjustment in the equity ownership interests of the Accounts in the joint venture on the basis of the fair market value of such joint venture 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-venturer fails to provide all or any part of its pro rata 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 joint venture by the General Account and an ERISA-Covered Account up to the amount of such contribution not provided by the co-venturer which result in an adjustment in the equity ownership interests of the Accounts in the joint venture on the basis provided in the joint venture 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 joint venture, 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-venturer's interest in the joint venture 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 UNUM 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 joint venture even though the independent fiduciary for one (but not all) of such ERISA-Covered Account[s] has not approved the acceptance of the offer, provided that such declining ERISA-Covered Account[s] are first afforded the opportunity to buy out both the co-venturer and ''selling'' Account's interests in the joint venture.

(c) *Rights of First Refusal*—(1) In the case of the right to exercise a right of first refusal described in a joint venture agreement to purchase a co-venturer's interest in the joint venture 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-venturer's interest in the joint venture 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 UNUM on behalf of the Accounts not to exercise such a right of first refusal even though the independent fiduciary for one (but not all) of such ERISA-Covered Accounts has approved the exercise of the right of first refusal, provided that none of the ERISA-Covered Accounts that approved the exercise of the right of first refusal decides to buy-out the co-venturer on its own.

(d) *Buy-Sell Options*—(1) In the case of the exercise of a buy-sell option set forth in the joint venture 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-venturer's interest in the joint venture 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 UNUM on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], to sell the interest of such Accounts in the joint venture to a co-venturer even though the independent fiduciary for one (but not all) of such ERISA-Covered Account[s] has not approved such sale, provided that such disapproving ERISA-Covered Account is first afforded the opportunity to purchase the entire interest of the co-venturer.

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

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 capital contributions to a joint venture by an ERISA-Covered Account that is participating in an interest in the joint venture, where the joint venture 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) 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.

(b) 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, or

(2) A committee composed of three to five individuals who each have at least five years of experience with respect to commercial real estate investments.

(c) The independent fiduciary or independent fiduciary committee member shall not be or consist of UNUM or any of its affiliates.

(d) 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) 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 UNUM, its affiliates and the ERISA-Covered Accounts for that fiscal year exceeds five percent of its or his or her 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.

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, UNUM, its affiliates, or any Account maintained by UNUM or its 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.

(e) The independent fiduciary will approve the initial allocation of a shared investment to an ERISA-Covered Account. In addition, the independent fiduciary acting on behalf of an ERISA-Covered Account shall have the responsibility and authority to approve or reject recommendations made by UNUM or its affiliates for each of the transactions in this proposed exemption. In the case of a possible transfer or exchange of any interest in a shared investment between the General Account and an ERISA-Covered Account, the independent fiduciary shall also have full authority to negotiate the terms of the transfer. UNUM 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.

(f) UNUM maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (g) 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 UNUM or its affiliates, the records are lost or destroyed prior to the end of the six-year period.

(g)(1) Except as provided in paragraph (2) of this subsection (g) and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in subsection (f) 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 (g) shall be authorized to examine trade secrets of UNUM, any of its affiliates, or commercial or financial information which is privileged or confidential.

Section V—Definitions

For the purposes of this exemption:

(a) An *affiliate* of UNUM includes—

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

(2) Any officer, director or employee of UNUM or person described in section V(a)(1), and

(3) Any partnership in which UNUM is a partner.

(b) An *Account* means the General Account (including the general accounts of UNUM affiliates), any separate account of UNUM or its affiliate, or any investment advisory account, trust, limited partnership or other investment account or fund managed by UNUM.

(c) The *General Account* means the general asset account of UNUM 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) which consists solely of the UNUM Plan or other plans maintained by UNUM or its affiliates.

(e) *Disproportionate* means not in proportion to an Account's existing equity ownership interest in an investment, joint venture or joint venture interest.

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: Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section

401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC, this 25th day of July, 1996.

Ivan Strasfeld,

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

[FR Doc. 97–20243 Filed 7–31–97; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Combined Arts Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), as amended, notice is hereby given that a meeting of the Combined Arts Advisory Panel, Presenting Section (Heritage & Preservation/Education & Access/ Planning & Stabliziation/Creation & Presentation categories) to the National Council on the Arts will be held on August 20–22, 1997. The panel will meet from 9:00 a.m. to 5:30 p.m. on August 20, and from 9:00 a.m. to 5:00 p.m. on August 21–22 in Room 716 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW, Washington, D.C., 20506. A portion of this meeting, from 10:30 a.m. to 1:00 p.m. on August 22, will be open to the public for a policy discussion on guidelines, Leadership initiatives, Millennium, planning, and field needs and trends.

The remaining portions of this meeting, from 9:00 a.m. to 5:30 p.m. on August 20, and from 9:00 a.m. to 10:30 a.m. and 1:00 p.m. to 5:00 p.m. on August 22, are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of March 31, 1997, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

If you need special accomodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW, Washington, D.C. 20506, 202/682–5532, TYY/TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Committee Management Officer, National Endowment for the Arts, Washington, D.C. 20506, or call (202) 682–5691.

Dated: July 28, 1997.

Kathy Plowitz-Worden,

Panel Coordinator, Office of Guidelines and Panel Operations, National Endowment for the Arts.

[FR Doc. 97–20297 Filed 7–31–97; 8:45 am]

BILLING CODE 7537–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Combined Arts Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), as amended, notice is hereby given that a meeting of the Combined Arts Advisory Panel, Arts Education Section (Education & Access/ Planning & Stabilization/Creation & Presentation and Heritage & Preservation categories) to the National Council on the Arts will be held on August 11–15, 1997. The panel will meet from 9:00 a.m. to 6:00 p.m. on August 11, from 8:30 a.m. to 6:00 p.m. on August 12–14 and from 8:30 a.m. to 5:00 p.m. on Friday, August 15 in Room 714 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW, Washington, D.C., 20506. A portion of this meeting, from 2:00 p.m. to 4:00 p.m. on August 15, will be open to the public for a policy discussion on guidelines, Leadership Initiatives, Millennium, planning, and field needs and trends.

The remaining portions of this meeting, from 8:30 a.m. to 6:00 p.m. on August 11–14, and from 8:30 a.m. to 2:00 p.m. and 4:00 p.m. to 5:00 p.m. on August 15, are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of March 31, 1997, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Committee Management Officer, National Endowment for the Arts, Washington, D.C., 20506, or call 202/682–5691.

Dated: July 28, 1997.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 97–20298 Filed 7–31–97; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

Docket Nos. 50–295 and 50–304]

Commonwealth Edison Company; Zion Nuclear Power Station; Notice of Temporary Partial Closing of Local Public Document Room

Notice is hereby given that the Waukegan Public Library, Waukegan, Illinois, which serves as the Nuclear Regulatory Commission (NRC) local public document room (LPDR) for the Commonwealth Edison Company's Zion Generating Station, will undergo extensive building renovation beginning