

**DEPARTMENT OF LABOR****Pension and Welfare Benefits  
Administration**

[Prohibited Transaction Exemption 97-60;  
Exemption Application No. D-10319]

**Grant of Individual Exemptions; TCW Group, Inc., Trust Company of the West, TCW Funds Management, Inc., TCW Galileo Funds, (Collectively; TCW)**

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

**ACTION:** Grant of individual exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

**Statutory Findings**

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

(a) The exemptions are administratively feasible;

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

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

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

[Prohibited Transaction Exemption 97-60;  
Exemption Application No. D-10319]

**Exemption***Section I. Covered Transactions*

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the acquisition or redemption of units (the Units) in the TCW Life Cycle Trusts (the Trusts, as defined in Section III) by individual account plans described in section 3(34) of the Act (the Plans), including Plans sponsored by TCW, in connection with such Plans' participation in the TCW Portfolio Solutions Program (the Program), 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 receipt of fees by TCW as a result of the provision of advice in connection with the investment by the Plans in the Trusts, a Money Market Fund, a Guaranteed Investment Contract (GIC) or similar investment vehicle, under the Program.

This 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.<sup>1</sup> With respect to the Plans sponsored by TCW, this condition will be deemed satisfied for

<sup>1</sup> In the case of a Plan sponsored by TCW, such fiduciary need not be independent of TCW.

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 end of the most recent plan 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 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 GIC or a similar investment vehicle that may or may not be affiliated with TCW.<sup>2</sup>

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 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;

<sup>2</sup>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.

(b) Upon request, a Participant will also receive a copy of the Funds' prospectus<sup>3</sup>; 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);

<sup>3</sup>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 participants and beneficiaries. See 29 C.F.R. 2550.404c-1(b)(2)(i)(A) and (b)(2)(i)(B)(2)(iv) and (v).

(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 business day; 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 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 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 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 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 responsibilities, experience and independence similar to those of Professor Jaffe. 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 and cash equivalents, minus the accrued expenses of a Trust.

**EFFECTIVE DATE:** This exemption is effective as of August 1, 1997, the date the notice of proposed exemption was published in the **Federal Register**.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption (the Notice) published on August 1, 1997 at 62 FR 41433.

### Written Comments

The Department received two written comments with respect to the Notice and no requests for a public hearing. The first comment was filed by TCW and generally requests clarifications and modifications to the Notice. Set forth below in paragraph 1 are the relevant points of the TCW comment.

The second comment was filed by a representative of the 401(k) Association. This comment generally raises issues about certain aspects of the Notice, and was subsequently sent by the Department to TCW for their response. Set forth below in paragraph 2 is a list of the issues raised by the commenter (the Commenter) together with the responses to those points by TCW.

### 1. Discussion of TCW's Comment

Section I of the Notice exempts, in relevant part, the provision of advice, and the receipt of fees as a result thereof, in connection with the investment by the Plans in the Trusts under the Program.

TCW states that the Notice makes clear in Condition J of Section II of the General Conditions and in the Summary of Facts and Representations (Summary) that, in addition to the Trusts, the Program will also make available non-Trust investment vehicles, *i.e.*, "a Money Market Fund, a Guaranteed Investment Contract (GIC) or a similar investment vehicle that may or may not be affiliated with TCW." While it is anticipated that the Program will normally produce a recommendation for a single Trust, there could be instances in which a non-Trust investment vehicle is recommended. TCW suggests that the last part of the second paragraph of Section I of the Notice be modified to take into account the potential investment by the Plans in the Trusts, a Money Market Fund, a Guaranteed Investment Contract (GIC) or a similar investment vehicle under the Program.

In addition, the Department has determined to modify the above-referenced language in Section I in order to clarify that relief from the prohibited transaction restrictions of section 406(b) of the Act is provided only for the receipt of fees by TCW as a result of the provision of advice by TCW to participants of plans who participate in the Program. Nothing contained in this exemption provides relief from the general standards of fiduciary conduct described in section 404 of the Act for the investment advice provided to participants. Thus, TCW remains fully responsible under the Act for its fiduciary actions. We also note that the plan fiduciary (usually the employer/sponsor) is responsible under the Act for the decision to retain TCW, as well as for periodically monitoring TCW's performance.

Therefore, the Department has modified the above language of Section I of the final exemption to read as follows:

"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 receipt of fees by TCW as a result of the provision of advice in connection with the investment by the Plans in the Trusts, a Money Market Fund, a Guaranteed

Investment Contract (GIC) or similar investment vehicle, under the Program."

TCW also suggests that a new sentence should be added at the end of section 13 (Section) of the Summary.

The new sentence should read:

"References to Trust or Trusts in this paragraph also encompass the other investment options available under the Program." The Department concurs with this comment.

2. TCW suggests that Condition C of Section II and Section 16(f) of the Summary be modified to provide that the amount of plan assets referred to in those provisions be measured, "\* \* \* as of the end of the most recent plan year."

The Department concurs with this comment and has modified Condition C of Section II of the final exemption.

3. TCW requests clarification regarding Condition L of Section II. Although Condition L of Section II is intended to preclude individuals who provide assistance to Participants from receiving compensation which is affected by the specific investments made by such Participants among the Trusts, such individuals 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.

4. TCW notes that Condition Q (1) of Section II should indicate more clearly when the net asset value is measured for the purpose of effecting redemption requests received after the close of regular trading on the NYSE when NYSE is closed the next day. TCW suggests that the last phrase in the third sentence in Condition Q(1) "\* \* \* except on weekends or holidays when the NYSE is closed" be deleted and that the word "business" be inserted between the words "next" and "day" such that the phrase reads, in relevant part, "\* \* \* the close of business of the next business day."

The Department concurs with this comment and has modified Condition Q (1) of Section II of the final exemption.

5. TCW also suggests that in the definition of "net asset value" contained in Paragraph H of Section III, the words "and cash equivalents" should be added in the third line after the word "cash", such that the definition reads as follows: "The term 'net asset value' of a Trust is defined to mean the fair market value of shares in the Funds and cash and cash equivalents, minus the accrued expenses of a Trust."

The same change should be made in the next-to-last sentence in Section 4 of the Summary such that the sentence reads as follows:

"The Trusts trade at the net asset value of the amalgam of the Funds in which they are invested, plus any cash and cash equivalents they hold."

The Department concurs with this comment and has modified Paragraph H of Section III of the final exemption.

6. TCW represents that Continental Asset Management Corp. referenced in Section 1 of the Summary is now named TCW Advisors Inc. and still remains an SEC registered advisor.

7. TCW suggests that to be consistent with footnote 6 of the Notice, the third sentence in Paragraph 2 of the Summary should begin with "It is anticipated that \* \* \*" such that the sentence should read:

"It is anticipated 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 Department concurs with this comment.

Additionally, TCW comments that to more accurately reflect the Worksheet process, the sixth and following sentences in Paragraph 2 of the Summary should read as follows:

"The Worksheets consist of a series of questions designed to assess the Participants' retirement needs and levels of risk tolerance, including his or her current Plan and non-Plan investments, anticipated future savings and retirement goals. Upon completion of the Worksheets, a Participant's response will be analyzed and each Participant will receive a written recommendation from TCW of an appropriate Trust (or other investment vehicle under the Program) for investment. Matching the Worksheet responses to projections of the risk and return characteristics of portfolios available under the Program will allow the selection of a portfolio consistent with that Participant's retirement needs and risk tolerance."

The Department concurs with this comment.

8. TCW suggests that to describe more accurately the quantitative annual report to be provided by TCW to the Plan Fiduciaries, the second sentence of the second paragraph in Paragraph 10 of the Summary should read as follows:

"The annual report will enable the Plan Fiduciaries to determine whether the Program has increased or maintained Plan participation, has increased or maintained the level of Participants' investment or deferrals under the Plan, or has achieved more appropriate asset allocation for the investment of the Plan Participants' accounts."

The Department concurs with this comment.

9. TCW also states that to make clear that approval by the Financial Expert is necessary for the creation of any Separate Trust, the word "only" should be inserted between the words "utilized" and "if" in the second sentence of subsection (b) of Paragraph 16 of the Summary such that the modified sentence reads as follows:

"A Separate Trust may be utilized only if the Financial Expert approves such modification."

The Department concurs with this comment.

## 2. Discussion of the Second Comment

### A. Independence of the Financial Expert

In this regard, the Commenter is concerned that TCW will have little or no control over the results of investment recommendations under the Program. Further, the Commenter suggests that Professor Jaffe, the Financial Expert, will be insufficiently involved in the Program due to the 5% overall limit on the amount of income derived from TCW. In addition, the Commenter questions whether the Financial expert will be assuming any personal responsibility for the provision of advice. In response, TCW maintains that TCW will *not* control the results of investment recommendation under the Program; rather, as stated throughout the Notice and as a specific condition in Section II of the Notice and this exemption, those recommendations will be based on responses to the worksheet questions developed and designed by the independent Experts.

As to Professor Jaffe, TCW responds that the 5% limit on his compensation is designed to ensure that he does not depend too heavily on TCW for compensation, but remains independent of TCW.

The Commenter further suggests that Professor Jaffe should not be permitted to be contractually indemnified by TCW. TCW responds by stating that if Professor Jaffe is so indemnified, it will not make him any less independent of TCW. To the contrary, a contractual indemnity would give him rights in dealing with TCW that he might otherwise lack. Also, the amount of indemnification offered to Professor Jaffe by TCW will not be dependent on the nature of the advice provided the Participant. Further, as TCW points out, the Department recognizes that even indemnities relating to breaches of statutory fiduciary duties are permissible under the Act, provided that they are not paid from plan assets, or do not attempt to induce a breach of fiduciary duty. (See 29 CFR section 2509.75-4). TCW also maintains that it

has every incentive to respect the professional independence of Professor Jaffe because he is central to the operation of the Program, and intends to structure any agreement with Professor Jaffe so as to ensure his independence.

The Commenter also raises similar questions regarding the independence of persons who will do computer programming in connection with the Program in as much as such programmers are hired by TCW. TCW notes that the Commenter has misunderstood the role of the programmers. The programmers will perform a ministerial function, *i.e.*, to handle the technical aspects of programming. The substantive aspects of the computer programs will be controlled by the Financial Expert and the Behavioral Expert. Therefore, TCW maintains that concerns about compensation or indemnification of the programmers is misplaced. In any event, TCW believes that preclusion of any indemnity of the programmers would be inappropriate for the same reasons expressed as to Professor Jaffe.

### b. The Fee Arrangements

A second concern of the Commenter appears to be fee arrangements associated with the Program. The Commenter appears to question the reasonableness of the fee arrangements and what the Commenter refers to as the 1% fee on a participant's account balance. TCW notes that there is no such fee; rather, the 1% figure refers to a cap that limits the amount of direct expenses payable from the Trusts for the services necessary to operate the Program. The only fees that TCW will receive are the normal fees charged for advisory services to the underlying Funds. These fees are paid from the Funds and would affect Participants investing in the Funds through the Program in exactly the same manner as any other investor in the Funds.

There will be no fees paid to TCW by the Trusts or by any Plan for advisory services or for any other services necessary for the operation of the Program. The Commenter apparently misinterpreted a reference in the Notice to a cap of 1% of a Trust's net asset value per annum on amounts payable by a Trust for services necessary to operate the Program. This cap is discussed in more detail in Section 19 of the Summary in the Notice. As Section 19 states, these expenses will include reimbursement to TCW for direct expense payments to third parties unaffiliated with TCW. As stated in the last paragraph of Section 18 of the Summary, to the extent that TCW itself receives reimbursement of any

expenses, it will be limited to reimbursement of "direct expenses" within the meaning of 29 CFR section 2550.408c-2.

In short, TCW will receive no fees in connection with the Program other than normal advisory fees in connection with the mutual funds. The 1% cap on direct expenses paid by the Trusts is a safeguard to ensure that the Trusts do not pay excessive expenses; it is not intended to, and would not, authorize any payment of fees to TCW from a Trust. TCW expressly states that the Plan Participants' accounts will not be charged fees by TCW in connection with the Program. Furthermore, Plan Participants will have complete discretion whether to invest in any Trusts and will be free to accept or reject any investment recommendations made in connection with the Program.

### c. Recommendations

To address his concerns, the Commenter recommends that the following six specific recommendations be adopted in any final grant of the exemption by the Department:

1. Require those individuals/entities that are providing the advisory-related services to assume the liability exposure for the services they are providing. Prohibit TCW or any other entity from indemnifying them.

2. Limit the compensation that is paid for this service to a maximum amount per participant, such as \$250.00.

3. Require each participant to decide whether he/she wants this additional service. The participant also should be able to discontinue the service at any time.

4. Require an independent audit by one of the major auditing firms at least annually of the process and the entities involved to certify that there is in fact independence.

5. Require the submission to DOL of a signed disclosure form for each employer that buys this service.

6. Require TCW to submit to DOL annually a confirmation that the disclosure conditions have been satisfied. This notice should include a list of all employers in the program, and it should be signed by the CEO of the TCW Group.

In response to these recommendations, TCW maintains the following.

The first recommendation regarding indemnity has been addressed above. TCW maintains that this recommendation is unnecessary and unreasonable.

The second and third recommendations appear to be based on the misunderstanding relating to the 1%

fee discussed above. TCW maintains that because there is no such fee, there is no reason to change its form or limit it. A Participant is, as noted above, already completely free to decide whether to begin or to discontinue investments under the Program.

The last three recommendations do not appear to be otherwise discussed in the comment letter. TCW's general response to these recommendations is that they will likely add unnecessary expense to the Program without any corresponding benefit. To the extent that these recommendations arise from the Commenter's misunderstanding of the fee arrangement and other aspects of the Program, they should be rejected by the Department on that basis.

Specifically, it is not clear to TCW exactly how an auditing firm would perform an audit to verify independence; as a practical matter, because the independence of the Experts is central to the Program and this exemption, TCW would have every incentive to ensure that independence is maintained. Similarly, if the Department wishes to audit the Program, or to monitor compliance with the conditions of the exemption, it will exercise its statutory powers under section 504 of the Act. Alternatively, the Department can access the relevant records pursuant to Condition V of Section II of the Notice and of this exemption. Imposing an additional requirement that the names of the plan sponsors who have selected the Program be submitted to the Department along with the signed disclosure forms may act as a deterrent to the plan sponsors' selection of the Program. Furthermore, TCW is fully committed to complying with the substantive disclosures requirement contained in the Notice and in this exemption because such a requirement will provide meaningful information to the Plan Participants and fiduciaries. TCW states that imposing additional requirements would be detrimental to the Program while offering no additional protection to the Participants.

The Department has considered the comments and the responses set forth by TCW and has determined that no modification of this exemption is necessary regarding the points raised by the Commenter. With respect to the recommendations of the Commenter, the Department notes that each exemption is subject to the explicit condition that the material facts and representations submitted in support of an application are true and accurate. The exemption application contains the representations of the applicant. Many such representations are reflected in the terms and conditions of the exemption.

These terms and conditions provide for the independence of the Experts and the disclosures to be provided by TCW. Thus, to the extent that TCW does not comply with the terms and conditions of the exemption, the exemption would be void.

After giving full consideration to the entire record, including the written comments, the Department has decided to grant the exemption subject to the modifications or clarifications described above. The two comment letters have been included as part of the public record of the exemption application. The complete exemption file is available for public inspection in the Public Disclosure Room of the Pension and Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210.

**FOR FURTHER INFORMATION CONTACT:**

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

**General Information**

The attention of interested persons is directed to the following:

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

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

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

the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 30th day of October, 1997.

**Ivan Strasfeld,**

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

[FR Doc. 97-29175 Filed 11-3-97; 8:45 am]

BILLING CODE 4510-29-P

**LEGAL SERVICES CORPORATION**

**Sunshine Act Meeting**

**Sunshine Act Meeting of the Board of Directors**

**CORRECTION:** As published on Oct. 28, 1997 (62 FR 55833), the agenda for the meeting scheduled for Nov. 15, 1997, is incorrect. The publication is corrected as follows:

9. Consider and act on the report of the Ad Hoc Committee on Performance Reviews of the President and Inspector General.

a. Consider and act on procedural matters, including personal performance plans for the President and the Inspector General, written submissions prior to interviews, and interview protocols.

Dated: October 31, 1997

**Victor M. Fortunato,**

*General Counsel.*

[FR Doc. 97-29280 Filed 10-31-97; 12:50 pm]

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**OFFICE OF MANAGEMENT AND BUDGET**

**Office of Federal Procurement Policy**

**Notice of Availability**

**AGENCY:** Office of Management and Budget, Office of Federal Procurement Policy.

**ACTION:** Notice of availability of the *Procurement Regulatory Activity Report, Number 14.*

**SUMMARY:** Subsections 25(g) (1) and (2) of the Office of Federal Procurement Policy (OFPP) Act, as amended by Pub. L. 100-679, codified at 41 U.S.C. 421(g), require the Administrator for Federal Procurement Policy to publish a report within six months after the date of