

of the Fountain Square West Project. Fifth Third wishes to emphasize that no gross rents in excess of \$3 million are actually projected for any year during the initial term of the Fountain Square West Project. Fifth Third also points out that the issue of gross rents in excess of \$3 million is relevant because such rents would result in additional payments being made to the City of Cincinnati under the City Lease.

Thus, after giving full consideration to the entire record, including the written comment, the Department has made the aforementioned changes to the proposed exemption. In addition, the Department has decided to grant the exemption subject to the clarifications described above. The comment letter has been included as part of the public record of the exemption application. The complete application file, as well as all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

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

Orders Distributing Co., Inc. Profit Sharing Plan and 401(k) Retirement Savings Plan (the Plan) Located in Greenville, South Carolina

[Prohibited Transaction Exemption 97-21; Exemption Application No. D-10341]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the past sale by the Plan of certain units of limited partnership interests (the Units) to Orders Distributing Co., Inc. (the Employer), a party in interest with respect to the Plan, provided that the following conditions are satisfied: (1) The terms of the sale were at least as favorable to the Plan as those the Plan could have obtained in a comparable arm's length transaction with an unrelated party; (2) the sale was a one-time transaction for cash; (3) the Plan paid no commissions nor other expenses relating to the sale; (4) the Plan received an amount no less than the fair market value of the Units as of the date of the sale, as determined by an independent appraisal; and (5) within 30 days of publication in the **Federal Register** of the notice of the grant of this

exemption, the Employer makes an additional cash contribution to the Plan to make up for opportunity costs attributable to the Units.

EFFECTIVE DATE: The exemption is effective as of January 1, 1995.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 31, 1997 at 62 FR 4802.

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

General Information

The attention of interested persons is directed to the following:

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

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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application 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 3rd day of April, 1997.

Ivan Strasfeld,

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

[FR Doc. 97-8972 Filed 4-8-97; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10345, et al.]

Proposed Exemptions; Washington National Retirement Plan et al.

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

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing 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) number of the person making the comment or request, and (3) 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. 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, NW., Washington, DC 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, NW., Washington, DC 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (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.

Washington National Retirement Plan (the Plan), Located in Lincolnshire, IL

[Application No. D-10345]

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), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the cash sale by the Plan of five venture capital limited partnership interests (the Venture

Capital Funds) and a private placement bond issue (the Private Placement Bond Issue)¹ to Washington National Insurance Company (the Employer), a party in interest with respect to the Plan.

This proposed exemption is subject to the following conditions:

(a) All terms and conditions of the sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(b) The sale is a one-time transaction for cash.

(c) The fair market value of the Interests is determined by a qualified, independent appraiser.

(d) The Plan does not pay any commissions, costs or other expenses in connection with the sale.

(e) With respect to each Venture Capital Fund Interest, the Plan receives as consideration an amount that is no less than the greater of (1) its investment basis in such Interest or (2) the fair market value of the Interest on the date of the sale.

(f) With respect to the Private Placement Bond Issue, the Plan receives as consideration an amount that is no less than the greater of (1) the remaining principal balance of such Interest or (2) the fair market value of the Interest on the date of the sale.

Summary of Facts and Representations

1. The Plan is a defined benefit plan having total assets with an aggregate fair market value of \$22,925,300 as of June 30, 1996. As of September 11, 1996, the Plan had 964 participants. The trustees of the Plan (the Trustees) are Robert W. Patin, Thomas C. Scott and Thomas Pontarelli. The Trustees are charged with overseeing the investments and investment philosophy of the Plan. The Employer, an insurance company, maintains its principal place of business in Lincolnshire, Illinois.

2. Included among the assets of the Plan are Interests in five Venture Capital Funds and one Private Placement Bond Issue. The Interests, which represent approximately 6.2 percent of the Plan's total assets, were all purchased on behalf of the Plan by the then-existing Trustees during the 1970's and 1980's. In this regard, the Interests in the Venture Capital Funds were acquired by the Plan at the inception of the respective limited partnerships whereas the Interest in the Private Placement Bond Issue was acquired by the Plan directly from Merrill Lynch, Hubbard Inc., as underwriter. With the exception of the Employer (see Representation 4 below), it is represented that none of the general partners, limited partners or holders, in the case of the Private

Placement Bond Issue, is a party in interest with respect to the Plan.

The Interests are further described as follows:

(a) *The Narragansett First Fund (NFF)*, a Venture Capital Fund, is a Rhode Island limited partnership that was formed on December 17, 1982 primarily for the purpose of making investments in leveraged buyout transactions with the objective of capital appreciation. NFF has one general partner, Narragansett Management Partners (NMP), also a Rhode Island limited partnership and 35 limited partners consisting of corporations, partnerships and trusts. The total funding commitment for NFF was \$75.2 million. Of this amount, \$66.7 million was actually funded. Although NFF was scheduled to terminate on December 17, 1995, NMP temporarily deferred the liquidation of the assets of NFF. The partnership is now fully invested and is presently in a liquidation mode.

On December 15, 1982, the Plan entered into a subscription agreement to invest \$500,000 in NFF. As of March 31, 1996, the Plan had funded \$446,885 of the capital commitment representing a 0.67 percent interest in NFF. Since the inception of its investment in NFF, the Plan has received cash disbursements totaling \$1,369,523 leaving an investment basis of \$0.

(b) *TCW Special Placements Fund I (TCW I)*, a Venture Capital Fund, is a California limited partnership that was formed on March 12, 1985 for the purpose of allowing investors to pool their assets in order to provide financing to highly-leveraged companies for expansions, acquisitions, management buyouts and capital restructurings. TCW Capital, a California partnership serves as the general partner of TCW I. As general partner, TCW Capital makes all investment decisions and has exclusive responsibility for the management of TCW I. TCW I is fully invested and is expected to terminate in 1997.

On February 28, 1985, the Plan entered into a subscription agreement to fund \$500,000 to TCW I. As of March 31, 1996, the Plan had funded \$500,000 of this commitment. The total funding commitment for TCW I was \$105.6 million of which the full amount was funded. Therefore, the Plan's interest in TCW I is 0.47 percent. Since its investment in TCW I, the Plan has received cash disbursements totaling \$414,870 leaving an investment basis of \$85,130.

(c) *Narragansett Capital Partners—B (NCP-B)*, a Venture Capital Fund, was formed as a limited partnership in Providence, Rhode Island on January 14, 1987 for the purpose of investing in

¹The interests in the Venture Capital Funds and the Private Placement Bond Issue are collectively referred to herein as the Interests.

equity and equity-related securities in leveraged buyout transactions. The general partner of NCP-B is Narragansett Capital Associates, L.P. (NCA), a Rhode Island limited partnership. The total funding commitment for NCP-B was \$63.6 million of which \$50.5 million was actually funded. NCP-B is fully invested and is currently in an investment liquidation mode.

On December 16, 1986, the Plan entered into a subscription agreement to fund \$500,000 of NCP-B. As of March 31, 1996 the Plan had funded \$397,306 of this commitment. Therefore, the Plan's interest in NCP-B is 0.01 percent. Since its investment in NCP-B, the Plan has paid management fees totaling \$58,057 and has received cash disbursements totaling \$161,065. Therefore, the Plan's investment basis in NCP-B is \$294,298.

(d) *TCW Special Placement Fund II (TCW II)*, a Venture Capital Fund, is a California limited partnership that was formed on February 12, 1987 for the purpose of allowing investors to pool their assets in order to provide financing to highly-leveraged companies. TCW Capital serves as the general partner of TCW II. The total funding commitment for TCW II was \$335.3 million of which all such amount was actually funded. TCW II is fully invested and is expected to terminate in 1999.

On February 10, 1986, the Plan entered into a subscription agreement to fund \$500,000 of TCW II. As of March 31, 1996 the Plan had funded \$500,000 of this commitment. Therefore, the Plan's interest in TCW II is 0.15 percent. Since its investment in TCW II, the Plan has received disbursements totaling \$446,864 leaving an investment basis of \$53,136.

(e) *The Shansby Group (Shansby)*, a Venture Capital Fund, is a California limited partnership that was formed on November 3, 1987 for the purpose of making equity investments in established businesses in consumer industries. The general partner of Shansby is TSG Partners, a California limited partnership which has sole responsibility for the investment, management and custody of Shansby's assets. Shansby has a stated life of ten years and is currently in a liquidation mode. The total funding commitment for Shansby was \$31.3 million of which all \$31.3 million was actually funded. The partnership is fully funded and is presently in an investment liquidation mode.

On October 27, 1987, the Plan entered into a subscription agreement to fund \$500,000 of Shansby. As of March 31, 1996, the Plan had funded \$500,000 of this commitment. Therefore, the Plan's

interest in Shansby is 0.16 percent. Since its investment in Shansby, the Plan has received disbursements totaling \$476,643 leaving an investment basis of \$23,357.

(f) *Pennsylvania Mart Properties Secured Notes* constitute the Private Placement Bond Issue in which the Plan has invested. The issuer, Pennsylvania Mart Properties Corp. (PMP) is a special purpose corporation. PMP was formed in the mid-1970's to finance up to 100 percent of the cost of acquiring and constructing a distribution center near Morrisville, Pennsylvania. It was intended that the facility would be leased to the S.S. Kresge Company (Kresge) or a subsidiary for a 30 year term.²

To obtain funds necessary to acquire the property from Kresge and to complete construction, PMP sold secured notes to institutional investors. The Private Placement Bond Issue was issued in the aggregate principal amount of \$22 million and has a maturity date of 30 years or January 17, 2007. The Private Placement Bond Issue carries interest at the rate of 10.25 percent per annum and is secured by a first mortgage on the property and by an assignment of the lease.

The Plan initially purchased its Interest in the Private Placement Bond Issue for \$500,000 on December 2, 1976 from Merrill Lynch. At the time of the investment, the cost to complete the warehouse facility securing the Issue was \$18,900,000 or 21.25 percent less than the original cost estimate of \$24 million. Because the indenture for the Private Placement Bond Issue did not permit outstanding debt to exceed the final cost of the facility, PMP refunded 21.25 percent of the Issue, *pro rata*, to each investor on January 17, 1977. A total of \$106,250 in principal was returned to the Plan. On that same date, a revised secured note, having a face value of \$393,750, was given to the Plan. The applicant assumes that the Plan also received an accrued interest payment on January 17, 1977 in the amount of \$6,406. This accrued interest would represent 45 days of interest on the initial \$500,000 investment from December 2, 1976 to January 1, 1977.

Since the time of its original investment, the Plan has received interest income totaling \$723,831. As of January 17, 1997, the outstanding principal balance of the Plan's Interest in the Private Placement Bond Issue was \$267,035. Thus, the Plan's investment

basis in the Private Placement Bond Issue is \$0.

3. With the exception of NCP-B (as noted in Representation 2), the Plan has not been required to pay any management fees in connection with its ownership of the other Venture Capital Fund Interests. In this regard, all management fees paid by the Plan have been derived from capital contributions or have been withheld from distributions. The Plan has not paid any fees with respect to its Interest in the Private Placement Bond Issue. Other than management fees, the Plan has not been required to pay any servicing fees to any outside party to monitor or administer the Interests.

4. The Employer has also invested in four of the Venture Capital Funds. It is represented that the Employer acquired its Interests in these Funds contemporaneously with the Plan. In this regard, the Employer invested \$1,494,255 in NFF in return for a 0.02 percent interest, \$2 million in TCW I in return for a 0.02 percent interest, \$2 million in TCW II for a 0.01 percent interest and \$3 million in Shansby for a 0.10 percent interest. It is represented that the Employer has never invested in the Private Placement Bond Issue. In addition, the Employer also has invested \$1,587,397 in Narragansett Capital Partners—A, a parallel Fund of NCP-B.³

5. Each of the Venture Capital Funds is valued quarterly by an advisory committee which is comprised of representative limited partners from the respective Funds. It is represented that such committee members do not include the Employer or its principals. The Plan receives a quarterly statement from each committee summarizing the value of the Venture Capital Fund and the value of the Plan's Interest in a Venture Capital Fund. In this regard, as of March 31, 1996, the fair market values of the Plan's Interests in the Venture Capital Funds were reported as follows: \$49,094 in NFF; \$267,000 in TCW I; \$416,665 in NCP-B; \$123,000 in TCW II; and \$272,653 in Shansby. By letter dated January 27, 1997, Mr. Gregory Barber, who undertakes the specific duties of the general partner for NFF and NCP-B, stated that the quarterly valuations for these Venture Capital Funds represent the best estimate of the fair market value of the portfolio companies. Mr. Barber also noted that there were no sales or transfers of Interests in the Venture

² It is represented that K-Mart Corporation, an affiliate of Kresge is the actual lessee of the distribution center.

³ In this proposed exemption, the Department expresses no opinion on whether the acquisition and holding by the Plan and the Employer of their respective Interests in the Venture Capital Funds violated any provision of Part 4 of Title I of the Act.

Capital Funds resulting from arm's length transactions between unrelated parties during 1995 or 1996.

By letter dated February 7, 1997, Mr. Raymond Henze, Group Managing Director of TCW Capital, the general partner of TCW I and TCW II, outlined the principals and methods of valuation utilized by TCW Capital in valuing the net assets of these Venture Capital Funds. In this regard, Mr. Henze stated that—

(a) Non-publicly traded securities are initially valued at cost unless a change in the financial condition or operating results of the issuer or guarantor of such securities indicates that there has been a permanent impairment in the value of the investment. Such investments will not be valued in excess of cost. No change in valuation of debt securities is made for fluctuations in market interest rates.

(b) Marketable securities listed on a national securities exchange or marketable securities traded in the over-the-counter market for which there is a last sales price available are valued at the last sales price on the date of valuation. Other marketable securities traded in the over-the-counter market are valued at the closing bid price as reported by the National Quotations Bureau, Inc. or at a discount from the bid price if marketability is limited by the size of the holdings relative to trading volume. Securities not marketable due to investment letter restrictions but constituting part of the class of publicly-traded securities are valued at an appropriate discount from the public market price.

(c) The carrying value of investments in non-publicly traded securities and restricted marketable securities is based upon the written valuation by a nationally-recognized independent appraiser or investment banker. Historically, this has been Deloitte & Touche LLP.

In addition, Mr. Henze stated that during calendar year 1996, there were no transfers in TCW I.

Finally, in a letter dated January 28, 1997, Mr. Charles Esserman, General Partner of the Shansby Group stated that the value of the assets of the Shansby Group as shown in the quarterly financial statement is, in the opinion of the general partners a fair representation

of the fair market value of such assets as of such dates. In addition, Mr. Esserman stated that there have been no sales of interests in the Shansby Group during the last two years.

6. The Employer proposes to terminate the Plan and wishes to ensure that all of the Plan's assets can be efficiently liquidated at their fair market value. Because there is no ready market for any the of Venture Capital Funds, it is represented that the general partners of each Fund are under no obligation to assist in the sale or repurchase of the Interests. Since each of the Venture Capital Funds is in a liquidation mode, it is represented that even if a purchaser could be found, it is unlikely that the purchaser would be willing to pay fair market value for the Plan's Venture Capital Fund Interests.

7. Therefore, the Employer requests an administrative exemption from the Department in order to purchase the Plan's Interests in the Venture Capital Funds for the greater of: (a) the funded amount of the Plan's Interest in the Venture Capital Fund (i.e., the Plan's investment basis); or (b) the fair market value of the Venture Capital Fund Interests, on the quarterly statement for the most current statement available at the time of purchase. In each instance, the value attributed to the Venture Capital Interests will be reduced by any distributions received prior to such purchase. No fees or commissions will be paid by the Plan in connection with its sale of the Interests in the Venture Capital Funds. Any costs associated with determining the fair market value for these investments will be borne by the Employer.

8. In addition to acquiring the Interests in the Venture Capital Funds, the Employer requests administrative exemptive relief in order to purchase the Plan's Interest in the Private Placement Bond Issue. The proposed sales price for the Interest will be the greater of: (a) the independently-appraised fair market value; or (b) the remaining principal balance of such

Interest. No fees or commissions will be paid by the Plan in connection with the sale. Any cost associated with determining the fair market value of the Interest in the Private Placement Bond Issue will be borne by the Employer.

9. Because the Private Placement Bond Issue is not valued on a continuing basis, the Employer has retained the Allison-Williams Company of Minneapolis, Minnesota (Allison-Williams), an independent investment banking firm, to value this investment. Specifically, Mr. Michael A. Lingvall, Vice President of Allison-Williams, has determined the fair market value of the investment. Mr. Lingvall represents that he is completely unrelated to the Employer and its principals. He also states that he has three years experience in effecting private placement sales, valuation and trading and has over eight years experience in finance.

In an appraisal report dated August 20, 1996 and an addendum dated November 8, 1996, Mr. Lingvall has placed the market position for the Plan's Interest in the Private Placement Bond Issue at 92.06 (or \$249,203 based upon a principal balance of \$267,035). He indicates that this represents a spread of approximately 600 points over comparable Treasury bonds which he believes is an appropriate benchmark for pricing corporate private placements similar to the Interest. In determining the fair market value of the Interest, Mr. Lingvall represents that he considered such factors as the current Treasury bond yield environment, yield spread premiums on similar-term bond issues, current credit ratings, security, the size of the Plan's Interest and economic factors. In addition, Mr. Lingvall will update his appraisal of the Interest prior to the proposed sale.

10. Thus, based upon the appraisals, the Plan will sell the Interests in the Venture Capital Funds for their fair market values because, as the following table shows, these amounts exceed the Plan's investment basis for each Fund.

VC Fund	Cost	Distrib.	Adjusted basis	FMV
NFF	\$500,000	\$1,369,523	\$0	\$49,094
TCW I	500,000	414,870	85,130	267,000
NCP-B	*455,363	161,065	294,298	416,665
TCW II	500,000	446,864	53,136	123,000
Shansby	500,000	476,643	23,357	272,653
Totals	\$2,455,363	\$2,868,965	\$455,921	\$1,128,412

*Includes management fees totaling \$58,057.

Accordingly, the total sales price for the Interests in the Venture Capital Funds will be \$1,128,412.

With respect to the Private Placement Bond Issue, the Plan will sell its interest to the Employer for \$267,035. As noted

in Representation 9, this amount denotes the outstanding principal balance of such Interest and it exceeds

the Interest's fair market value of \$249,203.

Therefore, the aggregate sales price for the Venture Capital Fund Interests and the Interest in the Private Placement Bond Issue will be \$1,395,447 (\$1,128,412 + \$267,035).

11. In summary, it is represented that the proposed transaction will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) All terms and conditions of the sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party; (b) the sale will be a one-time transaction for cash; (c) the fair market value of the Interests has been determined by qualified, independent appraisers; (d) the Plan will not pay any commissions, costs or other expenses in connection with the sale; (e) with respect to each Venture Capital Fund Interest, the Plan will receive as consideration an amount that is no less than the greater of (1) its investment basis in such Interest or (2) the fair market value of the Interest on the date of the sale; and (f) with respect to the Private Placement Bond Issue, the Plan will receive as consideration an amount that is no less than the greater of (1) the remaining principal balance of such Interest or (2) the fair market value of the Interest on the date of the sale.

Notice to Interested Persons

Notice of the proposed exemption will be provided to interested persons within 10 days as of the date of publication of the notice of pendency in the **Federal Register**. Such notice will be provided to interested persons by first class or interoffice mail. The notice will include a copy of the notice of proposed exemption, as published in the **Federal Register**, as well as a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or to request a hearing. Comments and hearing requests with respect to the proposed exemption are due 40 days after the date of publication of the proposed exemption in the **Federal Register**.

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

The Kenzer Corporation Thrift Savings Plan and Trust (the Plan), Located in New York, New York

[Application No. D-10391]

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), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to (1) the proposed "restoration payment" (the Restoration Payment) to the Plan by The Kenzer Corporation (the Employer), in respect of certain defaulted notes (the Notes), and (2) the potential future receipt by the Employer of "recapture payments" (the Recapture Payments) from the Plan.

This proposed exemption is subject to the following conditions:

(1) The Restoration Payment covers the face amount of the Notes and accrued interest as of the date of default, plus lost opportunity costs attributable to the Notes since the date of default;

(2) Any Recapture Payments are restricted solely to the amounts, if any, recovered by the Plan with respect to the Notes in litigation or otherwise; and

(3) The Employer receives a favorable ruling from the Internal Revenue Service that the Restoration Payment does not constitute a "contribution" or other payment that will disqualify the Plan.

Summary of Facts and Representations

1. The Plan is a 401(k) plan sponsored by the Employer. The Employer, a New York corporation, provides executive search services to client businesses seeking to fill executive or management level positions and is headquartered in New York City. As of June 30, 1996, the Plan had total assets of approximately \$851,472.⁴ As of December 3, 1996, the Plan had approximately 50 participants and beneficiaries. The trustees of the Plan (the Trustees) are Robert Kenzer, Chairman of the Employer, and Eric Segal, President of the Employer.

2. Among the assets of the Plan are the Notes, which are promissory notes issued by Bennett Funding, Inc. or an affiliate thereof (collectively, Bennett). The Plan acquired the Notes beginning in approximately 1991. The Notes consist of four separately issued notes in the amounts of \$100,000, \$100,000, \$245,000, and \$200,000, respectively, for an aggregate face amount of \$645,000.

The applicant represents that the Trustees believed the Notes to be secure, safe investments. Documentation issued

to the Plan indicated that each Note was secured by (a) equipment owned by Bennett which Bennett was leasing to unrelated third parties; (b) an assignment of the income stream generated by such leases; and (c) a master insurance policy issued by one of two insurance companies, which guaranteed the income stream from the leases.

In view of the relatively high interest rates being offered on investments which the Trustees considered to be low-risk, the Notes, when due, would generally be "rolled over," with both the principal and accrued interest being reinvested in new Notes. As represented by Bennett, interest paid on each Note was deposited in a so-called "Insured Prime Conversion Account" (IPCA) until the maturity date, at which time the interest was added to the principal amount of the Note and reinvested in a new Note.

3. In February, 1996, Bennett announced that it was deferring interest payments then coming due on the Notes, which was in fact an act of default on the Notes. On April 2, 1996, Bennett filed a petition in the United States Bankruptcy Court for the Northern District of New York (Cases Nos. 96-61376 et seq), seeking reorganization under Chapter 11 of the Federal Bankruptcy Code.⁵ Richard M. Breeden, formerly Chairman of the Securities and Exchange Commission (S.E.C.), was appointed as bankruptcy trustee. Contemporaneously, the S.E.C. filed a suit against Bennett in the United States District Court for the Southern District of New York, charging numerous acts of fraud and violations of the Securities Act of 1933 and the Securities and Exchange Act of 1934.

It appears, among other things, that Bennett had begun, at one point, to "secure" the Notes with bogus leases of non-existent equipment on a wholesale basis. In other cases, Bennett pledged actual equipment as security for loans from institutional lenders and thereafter pledged the same equipment lease as further security both to the lenders and to public purchasers of the Notes. The money being raised with the newly issued Bennett Notes was apparently being used to pay off the interest due on older Bennett Notes, or being siphoned off into unrelated business ventures owned by members of the Bennett management. In addition, it was revealed that the Notes were not in any manner insured and that the IPCA

⁴This figure reflects the fair market value of the Plan's assets, valuing the Notes (plus accrued interest) at zero.

⁵The Department expresses no opinion herein as to whether the acquisition and holding of the Notes by the Plan violated any of the provisions of Part 4 of Title I in the Act.

appears to have been a commingled account whose assets were used by Bennett in an, as yet, unascertained fashion.

The result of these alleged fraudulent activities, finally, was a build-up of cash obligations which Bennett could no longer pay through the sale of new Notes. Bennett's liabilities exceed a billion dollars, and amounts due to unsecured creditors, among which Note holders are currently included, exceed \$800 million. The Employer has filed claims with the insurers whose certificates of insurance were issued to investors in the Notes. However, these insurers have taken the position that such certificates were bogus and that no insurance existed. The bankruptcy trustee has sued the insurers, alleging, among other things, complicity in Bennett's fraudulent scheme.

4. Whatever amount, if any, that the Plan is able to recover with respect to the Notes in litigation or otherwise, it is likely to suffer enormous losses. The Employer proposes, therefore, to make the Plan whole with a Restoration Payment covering the face amount of the Notes and accrued interest as of February 29, 1996, the end of the last month for which interest was credited in respect of the Notes (\$771,715), plus an amount for lost opportunity costs attributable to the Notes (approximately \$21,473, as of September 30, 1996) for the period from February 29, 1996 to the date immediately prior to the date that the Restoration Payment is deposited in the Plan.⁶ The Plan will refund the Restoration Payment to the Employer only to the extent of any amount that the Plan is able to recover from Bennett. The Employer is bearing all expenses of prosecuting the Plan's claims in respect of the Notes, including those relating to Bennett's bankruptcy proceedings, as well as the costs of this exemption application.

Effective as of January 1, 1997, the Plan was converted to a self-directed, individual account plan, administered by The Chase Manhattan Bank. Therefore, the Restoration Payment will be allocated to each participant account in proportion to its allocated share of the net asset value of the entire Plan portfolio. The Employer has requested a ruling from the Internal Revenue

⁶The Department notes the applicant's representation that the Plan's lost opportunity costs with respect to the \$771,715 will be calculated based upon an assumed rate of return equal to the interest rate paid on the Plan's money market investments for the period from February 29, 1996 to December 31, 1996, and thereafter, the interest rate paid on money market funds offered by the Plan to participants. (Effective as of January 1, 1997, the Plan permitted participants to direct the investment of their respective individual accounts).

Service that the Restoration Payment does not constitute a "contribution" or other payment that will disqualify the Plan.

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

(1) The Restoration Payment will enable the Plan to immediately recover the face amount of the Notes and accrued interest as of the date of default, plus lost opportunity costs attributable to the Notes since that date; (2) any Recapture Payments will be restricted solely to the amounts, if any, recovered by the Plan with respect to the Notes in litigation or otherwise; and (3) the Employer must receive a favorable ruling from the Internal Revenue Service that the Restoration Payment does not constitute a "contribution" or other payment that will disqualify the Plan.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons by personal delivery or by first-class mail within 15 days of the date of publication of this notice of pendency in the **Federal Register**. Such notice shall include a copy of this notice of pendency as published in the **Federal Register** and shall inform interested persons of their right to comment and/or request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 45 days of the date of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng 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 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, DC, this 3rd day of April, 1997.

Ivan Strasfeld,

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

April 3, 1997.

PREVIOUSLY ANNOUNCED TIME AND DATE: 10:00 a.m., Thursday, March 20, 1997.

PLACE: Room 6005, 6th Floor, 1730 K Street, N.W., Washington, D.C.

STATUS: Open.

CHANGES IN THE MEETING: The Commission postponed until April 23, 1997, oral argument on the following:

1. *Secretary of Labor v. Amax Coal Co.*, Docket No. LAKE 94-74.