

ending June 30, 2006, and is seeking input from interested members of the public. The Commission expects to make its data series available to the public in November 2006 in electronic format, posted on the Commission's Web site.

**FOR FURTHER INFORMATION CONTACT:** Timothy McCarty (202-205-3324, [timothy.mccarty@usitc.gov](mailto:timothy.mccarty@usitc.gov)) or Jonathan Coleman (202-205-3465, [jonathan.coleman@usitc.gov](mailto:jonathan.coleman@usitc.gov)), Agriculture and Fisheries Division, Office of Industries, U.S. International Trade Commission, 500 E Street, SW., Washington DC, 20436, for general information, or William Gearhart (202-205-3091, [william.gearhart@usitc.gov](mailto:william.gearhart@usitc.gov)), Office of the General Counsel, U.S. International Trade Commission, for information on legal aspects.

**SUPPLEMENTARY INFORMATION:**

*Background.*—Section 316 of the North American Free-Trade Agreement Implementation Act (NAFTA Implementation Act) (19 U.S.C. 3881) requires that the Commission monitor U.S. imports of fresh or chilled tomatoes (HTS heading 0702.00) and fresh or chilled peppers, other than chili peppers (HTS subheading 0709.60.00), until January 1, 2009, for purposes of expediting an investigation concerning provisional relief under section 202 of the Trade Act of 1974 or section 302 of the NAFTA Implementation Act. Section 316 does not require that the Commission publish reports on this monitoring activity or otherwise make the information available to the public. However, the Commission maintains current data files on tomatoes and peppers in order to conduct an expedited investigation should a request be received. In response to the monitoring requirement, the Commission instituted investigation No. 332-350, *Monitoring of U.S. Imports of Tomatoes* (59 FR 1763) and investigation No. 332-351, *Monitoring of U.S. Imports of Peppers* (59 FR 1762).

The Commission will make its reports available to the public in electronic format, and will maintain electronic copies of its reports on its Web site until one year after the monitoring requirement expires on January 1, 2009. The most recent Commission monitoring reports in this series were published in November 2005 and are available on the Commission's Web site.

*Written submissions.*—The Commission does not plan to hold a public hearing in connection with preparation of these reports. However, interested persons are invited to submit written statements containing data and other information concerning the

matters to be addressed in the reports. All submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436, and should be received no later than the close of business on August 31, 2006. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 of the rules requires that a signed original (or a copy designated as an original) and fourteen (14) copies of each document be filed. In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, [ftp://ftp.usitc.gov/pub/reports/electronic\\_filing\\_handbook.pdf](ftp://ftp.usitc.gov/pub/reports/electronic_filing_handbook.pdf)).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available in the Office of the Secretary to the Commission for inspection by interested parties.

The Commission will not publish such confidential business information in the monitoring reports it posts on its Web site in a manner that would reveal the operations of the firm supplying the information. However, the Commission may include such information in the report it sends to the President under section 202 of the Trade Act of 1974 or section 302 of the NAFTA Implementation Act, if it is required to conduct an investigation involving these products under either of these statutory authorities. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public

record for these investigations may be viewed on the Commission's electronic docket (EDIS-ON LINE) at <http://edis.usitc.gov>. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

By order of the Commission.

Issued: July 17, 2006.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

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**BILLING CODE 7020-02-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-11330, et al.]

#### Proposed Exemptions; The Young Men's Christian Association Retirement Fund-Retirement Plan (the Plan)

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed exemptions.

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

#### Written Comments and Hearing Requests

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

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

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

#### Notice to Interested Persons

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

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

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

The Young Men's Christian Association Retirement Fund-Retirement Plan, (the Plan) Located in New York, NY, [Application No. D-11330].

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) 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).

#### Transactions and Conditions

(a) If the proposed 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)(1)(A) through (D) of the Code, shall not apply, effective July 1, 2006, to:

(1) Any arrangement, agreement or understanding between The Young Men's Christian Association Retirement Fund-Retirement Plan (the Plan) and any participating employer whose employees are covered by the Plan, whereby the time is extended for the making of a contribution by such a participating employer to such Plan, if the following conditions are met:

(i) Prior to entering into such arrangement, agreement or understanding, the Plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution;

(ii) The terms of such arrangement, agreement or understanding are set forth in writing and are reasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the Plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding;

(iii) Such arrangement, agreement or understanding is entered into or renewed by the Plan in connection with the collection of such contribution and for the exclusive purpose of facilitating the collection of such contribution;

(iv) The Plan's procedures and the guidelines to be followed in undertaking to collect such contributions are described in a notice provided to all the employers participating in the Plan.

This notice details the Plan's standard operating guidelines for the collection of late employer contributions (the Notice). The Notice provided to all participating employers contains the methodology of the Plan that applies with respect to the determination to extend the time period for the making of such delinquent contribution or to permit such delinquent contribution to be made in periodic payments. New participating employers will receive the Notice within 30 days of signing the written participation agreement; and

(v) The extension of time does not apply to any failure of an employer to

timely remit participant contributions to the Plan.

(2) A determination by the Plan to consider a contribution due to the Plan from any participating employer any of whose employees are covered by the Plan as uncollectible and to terminate efforts to collect such contribution, if the following conditions are met:

(i) Prior to making such determination, the Plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution or any part thereof;

(ii) Such determination is set forth in writing and is reasonable and appropriate based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the Plan continued to attempt to collect such contribution or any part thereof;

(iii) The Notice provided to all participating employers, which is described in section (a)(1)(iv) above, must also contain the methodology used by the Plan with respect to the determination that the delinquent contribution is uncollectible and in deciding to terminate efforts to collect such contribution; and

(iv) The determination that the contribution is uncollectible and the decision to terminate efforts to collect such contribution do not apply to any failure of an employer to timely remit participant contributions to the Plan.

(b) If an employer any of whose employees are covered by the Plan enters into an arrangement, agreement or understanding with the Plan as described in subparagraph (a)(1) with respect to the payment of such contribution, or if the Plan makes a determination described in subparagraph (a)(2), such employer shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, except in the case of an arrangement, agreement or understanding described in subparagraph (a)(1), where the terms thereof are clearly unreasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the Plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding.

(c) The Plan maintains for a period of six years the records necessary to enable the persons described in paragraph (d)

below to determine whether the conditions of this exemption have been met, except that:

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

(2) No party in interest other than the Plan's fiduciaries shall be subject to the civil penalty that may be assessed under section 502(i) of ERISA 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 (d) below.

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

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service;

(ii) Any fiduciary of the Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any participating employer of the Plan; and

(iv) Any participant or beneficiary of the Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (d)(1)(ii), (iii) and (iv) above shall be authorized to examine commercial or financial information which is privileged or confidential, or records that are unrelated to the Plan.

**DATES:** *Effective Date:* This proposed exemption, if granted, will be effective as of July 1, 2006, the date of the beginning of the Plan year.

#### Summary of Facts and Representations

1. The Application for this proposed exemption was submitted on behalf of the Young Men's Christian Association Retirement Fund (the Sponsor or Fund) and the Plan it sponsors, The Young Men's Christian Association Retirement Fund—Retirement Plan (the Plan) with respect to the Plan's procedures for the collection of employer contributions from participating employers in the Plan for plan years commencing July 1, 2006 and thereafter. The Applicant states that no provision of the proposed exemption would extend to the failure of an employer to timely forward participant contributions to the Plan.

The Fund is the named fiduciary for the Plan and acts as trustee of the Plan.

The Applicant states that other ERISA fiduciaries include the senior officers of the Fund in their capacity as plan administrator. These executive officers are employees of the Fund, who may act as plan administrator, and they acknowledge fiduciary responsibility in that context. The Sponsor will bear the costs of the exemption application and notifying interested persons.

2. The Applicant states that the Plan is a multiple employer church money purchase pension plan under Code section 401(a). The Applicant further states that as of July 1, 2006, the Plan will be treated as having made an election under Code section 410(d) and, thus, will be an "electing" money purchase defined contribution church plan, subject to the applicable provisions of ERISA and the Code.<sup>1</sup> The Sponsor is a separately incorporated New York not-for-profit corporation, which was established in 1921 for the express purpose of providing retirement benefits to employees of Young Men's Christian Associations (YMCAs or employers) throughout the United States.

Since its founding, the Plan has provided retirement benefits to the employees of participating YMCAs. As of June 30, 2005, the Plan covered more than 75,000 participants, including over 8,600 retired participants and beneficiaries. The Plan's participating employers consist entirely of separately incorporated YMCAs throughout the United States. As of May 5, 2006, there were 967 corporate chartered YMCAs that operate 2,600 branches. As of June 30, 2005, the Plan had 920 participating employers, and in the last year, has received over \$168 million in plan contributions. As of June 30, 2005, the most recent available valuation date for the Plan, the aggregate fair market value of the Plan's assets was \$2,171,230,098, and as of June 30, 2005, the fair market value of the total assets that are attributable to the contributions to the Plan was approximately \$803,355,137. The fair market value of the total assets that are attributable to contributions made to the Plan in the three year period ending June 30, 2005 was \$480 million of which approximately \$400,000 represented delinquent employer contributions. The delinquent amounts represent less than one tenth of

1% of such contribution to the Retirement Plan.

3. The Applicant states that, under the Plan, a participant's benefit is based upon the sum of the contributions made by the participant and his employer, plus interest that is periodically credited as determined by the Board of Trustees of the Sponsor. According to the Applicant, pursuant to the terms of the Plan, participation by a YMCA employer in the Plan is voluntary but if a YMCA does participate, it is mandatory that the YMCA submit employer contributions to the Plan on behalf of all of its eligible employees, including employees located at the YMCA's various chapters (also known as branches). The Applicant represents that, pursuant to the Legislation, commencing with the plan year beginning on July 1, 2006, the Plan (but not any reserves held by the Sponsor with respect to such Plan or other assets held by the Sponsor) will be treated as having made an election under Code section 410(d). At that time, the Plan will be treated as an "electing" church plan subject to the applicable provisions of ERISA and the Code.

The Applicant notes that, pursuant to Sections 1.4 and 14.3 of the Plan, participating YMCA employers are required to sign a written participation agreement with the Board of Trustees of the Sponsor, pursuant to which the employer agrees to make participation in the Plan a condition of employment for all new employees and also agrees to enroll its eligible employees and make regular timely payments required by the Plan on behalf of its employees. In addition, each participating association agrees to permit auditors selected by the Sponsor's Board of Trustees to examine the books and records of the participating employer to determine whether the participating employer is participating in accordance with the provisions of the Plan.

4. The Applicant asserts that the Plan, like many other multiple employer plans, especially plans analogous in size, from time to time encounters participating employers who fail to make timely contributions to the Plan. This delinquency in the past has resulted from various reasons, including personnel changes at the participating YMCA which caused an administrative failure to make the contribution on time and failures relating to data collection issues at the participating employers. These delinquencies have been pursued through reasonable, diligent and systematic collection efforts by the Sponsor, which require that the employer make up the contributions with interest.

<sup>1</sup> The Applicant notes that pursuant to legislation passed by Congress and signed into law by President Bush on December 21, 2004 (Pub. L. 108-476) (Legislation), the Sponsor's status as a church pension fund (within the meaning of Code section 414(e)(3)(A)) and the Plan's status as a defined contribution money purchase church pension plan (within the meaning of Code section 414(e)) was confirmed.

The YMCA Retirement Fund Collection Procedure submitted by the Applicant in a June 28, 2006 correspondence to the Department provides that employer contributions are required to be transmitted by the YMCA employers to the Fund by the 15th business day of the month following the due date. On the 9th business day of the following month, the Fund sends an "urgent reminder" fax or email to the Plan Administrator of the participating employers who have not yet remitted their contributions. On the 12th business day, a second notice is sent to the employer's CFO and on the 14th business day, a third notice is sent to the employer's CEO. On the 16th day, the Fund sends a letter indicating contributions are delinquent to the employer's CFO and copies the CEO and the Chairman of the employer's Board of Trustees. At 2 months past due, a personal letter is sent to the CEO of the employer and at 3 months past due, a personal letter is sent to the CEO and the Chairman. At 4 months past due, the Fund sends a letter to each participant at the employer outlining the situation with copies to the CEO and the Chairman. At 5 months past due, the Fund sends a letter to the CEO and the Chairman detailing the IRS consequences for delinquent contributions and offering assistance in working out a payment schedule if the YMCA is experiencing "extreme financial hardship." At 6 to 8 months past due, there are continued efforts to encourage payments by the employer and a possible warning of expulsion from the Fund.

Delinquencies are reported monthly to the corporate offices of the YMCA of the U.S.A. and to the appropriate regional Network Consultants after the close of the month. Quarterly confirmations are sent to the CEO of each employer indicating whether contributions were made timely. The Fund's Finance Department periodically runs reports to track any employers that are delinquent and the Executive V.P. of the Fund maintains a "Past Due Contributions Report" on the status of each delinquent employer. The Fund's management may determine that yearly reminders or questionnaires regarding timely remittance of employer contributions should be sent to previously delinquent employers to encourage compliance. On occasion, the Fund's internal audit staff will conduct on-site reviews to access an employer's compliance.

5. The Plan will distribute a notice to the participating employers describing the Plan's procedures for the collection of late employer contributions and the

determination by the Plan that a delinquent contribution is uncollectible (the Notice).<sup>2</sup> New participating employers will receive the Notice within 30 days of signing the written participation agreement. The Notice will provide the participating employers with a detailed explanation of the steps used by the Plan to determine: the time period for the making of such delinquent contribution; whether to permit such delinquent contribution to be made in periodic payments; that the delinquent contribution is uncollectible; and whether to terminate efforts to collect such contribution.

6. The Applicant states that often the delinquency is a result of an administrative failure, and as a result of its diligent collection efforts, the contributions and interest, are made to the Plan. The Applicant notes, however, that in certain situations, the participating employer is not able to make the required contributions, for example, when the participating employer's solvency is in jeopardy or where there are other adverse financial conditions that exist. In such cases, the Sponsor still seeks full contributions from the participating employer, although often the Sponsor will agree to accept the required contributions over a longer period of time in installments until the solvency issues are resolved. In rare cases, the Sponsor decides to terminate further collection efforts based on the participating employer's insolvency coupled with the expense of continued collection efforts with respect to such participating employer. The Sponsor may, as it deems appropriate, expel a delinquent YMCA employer and preclude it from all future participation in the Plan or pursue civil action against a delinquent YMCA employer to collect contributions. The Applicant further states that, although the Sponsor seeks to prevent such delinquent payments through communication and the use of the audit function permitted by the Plan, given the size of the Plan, the number of participating employers, and the varying size of the workforces at the participating employers, it is likely that the Plan will face delinquent contributions in the future. This is even more significant given the amount of contributions the Plan receives.

The approximately 920 participating employers in the Plan vary in size and financial health, which can at times result in the delinquent payment of contributions to the Plan. The Plan,

<sup>2</sup> The Notice will be distributed in conjunction with the notice to interested persons that is required to be provided within 30 days after this proposed exemption is published in the **Federal Register**.

through diligent and systematic collection efforts, has been able to recover delinquent employer contributions, plus interest. By virtue of the Plan's efforts to collect delinquent payments, including extending the time by which participating employers must make such contributions, the Plan has benefited by increasing the total assets available to provide retirement benefits to its participants. By continuing such collection efforts, the participants and beneficiaries of the Plan will benefit through the receipt of the full amount of their promised plan benefits.

7. Once the Plan's Code section 410(d) election becomes effective, for the July 1, 2006 plan year and plan years thereafter, the Plan will be subject to the prohibited transaction provisions of section 406 of ERISA. Under ERISA sections 406(a)(1)(B) and 406(a)(1)(D), a fiduciary shall not cause a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect (i) lending of money or other extension of credit between the plan and a party in interest; or (ii) a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 4975 of the Code contains parallel prohibited transaction provisions. By allowing participating employers to make payments at a later date, over a longer period of time than prescribed by the Plan or in rare instances, ceasing collection efforts against a participating employer (where the costs of collection may far outweigh the amounts involved), the Plan may be viewed as extending credit from the Plan to the participating employer, (*i.e.*, a party in interest pursuant to ERISA section 3(14)(C)), or transferring plan assets to a participating employer in violation of ERISA sections 406(a)(1)(B) and 406(a)(1)(D) (and the related parallel prohibited transaction provisions under the Code).

The Applicant represents that the Sponsor, as a church pension fund sponsoring a multiple employer church pension plan under the Code, is a unique organization. However, in the context of multiple employer plans generally, the practice of delaying or extending the time for payment of employer contributions under the plan is not uncommon. Prohibited Transaction Class Exemption 76-1 (41 FR 12740, Mar. 26, 1976) (PTE 76-1) provides an exemption from ERISA sections 406(a) and 407(a) for multiple employer plans maintained pursuant to one or more collective bargaining agreements between an employee organization and more than one employer. The preamble to the proposed

class exemption recognizes that "multiemployer plans are often confronted with the problem of delinquency in participating employer contributions \* \* \* and at times one or more participating employers may be delinquent in making such contributions." 40 FR 23798 (Jun. 2, 1975). Further, the preamble notes, "[I]n the course of their collection efforts, multiemployer plans frequently delay or extend the time for payment of contributions pursuant to understandings, arrangements or agreements in circumstances where it appears that collection of the full amount due the plan would be jeopardized were the plan to attempt to force immediate full payment." *Id.*

8. The Applicant states that although PTE 76-1 was reserved for multiple employer plans<sup>3</sup> maintained pursuant to a collective bargaining agreement, such fact does not decrease the significance of the acknowledgement that multiple employer plans (regardless of the industry or whether it is pursuant to a collective bargaining agreement) face the same issues that were the basis for such class exemption. Any multiple employer plan, especially one that is similar in size to the Plan, would confront the issue of delinquent contributions and the need for reasonable and cost effective collection procedures.

The Department notes that the preamble to PTE 76-1 recognized that the delinquency problem existed in other contexts in responding to a comment received from an employer association, the sponsor of an employee benefit plan which was not collectively bargained, that had a significant number of unaffiliated employers contributing to the plan. The employer association stated that its plan had many of the same problems regarding delinquent employer contributions that are encountered by multiemployer plans and, therefore, PTE 76-1 should be made applicable to plans that are not collectively bargained. The Department responded that "because plans which are not collectively bargained are not jointly administered within the meaning of section 302(c)(5) of the LMRA, the circumstances and safeguards involved in the collection of delinquent employer contributions by such plans may be different from those involved in collectively bargained, jointly administered multiple employer plans." The Department further noted that the

"letter of comment did not contain sufficient information regarding this question and, therefore, the Department and the Service are not able at this time to grant a class exemption covering plans which are not collectively bargained." The Department, however, noted that the agencies are "prepared to consider applications for an exemption for transactions involving the collection of delinquent employer contributions by employee benefit plans which are not collectively bargained."

9. The Applicant asserts that the Plan requires employers to make contributions in order to provide participants and beneficiaries with retirement benefits. To the extent that an employer does not make such required contributions, delinquent contributions would directly and adversely affect the value of the account balances for the plan participants of that employer, which in turn could adversely affect the amount converted into a retirement annuity by the Sponsor for such participants. As a defined contribution plan, benefits are measured directly by the value of a participant's account balance, which account is credited with employer contributions. Failure to receive all required contributions will diminish a participant's account balance value and, thus, his or her retirement benefit amount and post-retirement financial security. Participants have a reasonable expectation that the full amount of their employer's contributions will be made on their behalf. The Sponsor's procedure for the recovery of delinquent contributions allows the participants' retirement benefit expectations to be realized.

Additionally, the Applicant states that the extended payment plan contributions are required under Plan procedures to include lost earnings (based upon the Plan's crediting interest rate) and thus, the Plan's procedures are designed to make the participants whole.

The Applicant notes that, because the proposed transaction is expected to be a recurring transaction between the Plan and the participating employers, the Plan has established specified written collection procedures, which create appropriate safeguards that should make it feasible for the Department to grant the requested exemption. The proposed transaction is in the interests of the Plan and its participants and beneficiaries since the ability of the Plan to collect employer contributions promotes the purpose of the Plan of providing retirement benefits to its participants and beneficiaries. Additionally, the ability of the Plan to delay or extend the

time for a participating employer to make its contributions to the Plan aides the Plan in helping a participating employer manage its retirement plan obligations when the participating employer is going through a difficult financial period or when it experiences personnel changes or administrative issues that prevent the employer from making its contributions on time.

The Applicant believes the proposed exemption will permit the Plan to facilitate employer participation, which, in turn, supports the provision of retirement benefits to all YMCA employees. The proposed transaction is protective of the rights of the Plan participants and its beneficiaries because the ability to collect delinquent employer contributions will result in increased assets for the Plan. The Applicant adds that the manner in which collection of such delinquent contributions is proposed to be carried out protects participants' and beneficiaries' interests.

10. In summary, the Applicant represents that the proposed transactions meet the requirements set forth in the proposed exemption in light of the Plan's adoption of procedures for the orderly collection of delinquent employer contributions that involve reasonable, diligent and systematic methods for the review of employer contribution accounts. Prior to the Plan entering into an alternative arrangement, agreement or understanding, the Plan uses reasonable, diligent and systematic efforts, as appropriate under the circumstances, to collect outstanding employer contributions. The terms of such arrangement or the Plan's determination to consider a contribution due to the Plan as uncollectible and to terminate efforts to collect such contribution, are in writing and are reasonable under the circumstances in light of the likelihood of collecting the contributions weighed against the expenses that would be incurred by continuing to attempt to collect the contributions through other means. Any arrangement by the Plan in connection with the collection of such contributions will be for the exclusive purposes of facilitating the collection of such contributions. The Plan's procedures and the general guidelines to be followed in undertaking to collect such contributions or in determining that the delinquent contribution is uncollectible and in deciding to terminate efforts to collect such contribution are described in a notice to be provided to all the participating employers in the Plan.

<sup>3</sup> As the Department noted in paragraph (5) of the General Information section of the preamble, this class exemption covers not only multiemployer plans, but also other multiple employer plans.

### Notice to Interested Persons

The notice to interested persons, along with the supplemental statement required by Department Regulation 2570.43(b)(2), will be provided by mailing notices to all terminated YMCA employees who have a deferred vested benefit under the Plan by first-class mail to their last known address on the books and records of the Fund and to all active YMCA employees who currently participate in the Plan by posting such notice at their place of employment in those locations which are customarily reserved for employer-employee communications or by personal delivery. Interested persons include all active employees who currently participate in the Plan and all former YMCA employees with deferred vested benefits. The notice to interested persons, which will contain the information required by Department Regulation § 2570.43, will be mailed, posted or delivered, as the case may be, within 30 days after the Notice of Proposed Exemption is published in the **Federal Register**. The notice to interested persons will inform such persons of their right to comment on the proposed exemption within 60 days after the Notice of Proposed Exemption is published in the **Federal Register**.

#### FOR FURTHER INFORMATION CONTACT:

Wendy M. McColough of the Department, telephone (202) 693-8540. (This is not a toll-free number.) Little Rock Diagnostic Clinic, P.A., Profit Sharing Plan (the Plan). Located in Little Rock, AR, [Application No. D-11350].

### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) 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 proposed cash sale by the Plan of a leased fee interest (the Leased Fee Interest) in certain real property (the Property) to LRDC Real Estate, LLC (the LLC), a party in interest with respect to the Plan.

This proposed exemption is subject to the following conditions:

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

(b) The sales price for the Leased Fee Interest is based on its fair market value as established by a qualified, independent appraiser, who updates the appraisal on the date the sale is consummated.

(c) The terms of the proposed transaction are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) The Plan does not pay any real estate fees or commissions in connection with the sale.

(e) An independent fiduciary is appointed to approve and monitor the sale transaction on behalf of the Plan.

(f) Within 90 days of the date the notice granting this exemption is published in the **Federal Register**, the Little Rock Diagnostic Clinic, P.A. (LRDC), the Plan sponsor, files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes that are attributed to the past and continued leasing arrangement (the Ground Lease) between the Plan and the LRDC Land Company (the Land Company) of certain land (the Land) comprising part of the Property.

### Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan, which as stated above, is sponsored by LRDC. The Plan's current trustees and decision makers with respect to Plan investments are Richard W. Houk, J. Neal Beaton and Paul Williams (the Trustees). The Trustees are employees and shareholders of LRDC, and participants in the Plan.

As of December 31, 2005, the Plan had 137 participants and beneficiaries. As of December 31, 2005, the Plan had approximately \$23,917,262 in assets.

2. LRDC is a professional corporation located on the campus of the Baptist Medical Center at 10001 Lile Drive, Little Rock, Arkansas. LRDC provides medical services in the internal medicine field as well as ancillary services such as laboratory work and radiology services.

3. The Land Company is a general partnership that was created in 1974 for the sole purpose of leasing real property to LRDC for the operation of a medical clinic. The Land Company is owned 24% by current shareholder/employees of LRDC. The 76% remainder of the Land Company is owned by former shareholder/employees of LRDC and former employees of LRDC who were not shareholders of LRDC.

4. The LLC is a limited liability company that was formed in 2005 for the purpose of purchasing real estate. The principals of the LLC are LRDC

physicians. Six of the physician owners are also partners in the Land Company.

5. Among the assets of the Plan is its Leased Fee Interest in the Property, which also bears the 10001 Lile Drive address and is legally described as "Lot 4A, Baptist Medical Center Development, City of Little Rock, Pulaski County, Arkansas." The Plan's Leased Fee Interest or "leased fee estate"<sup>4</sup> consists of a present possessory interest in approximately 4.444 acres of land that was acquired by the Plan in 1972 for \$56,000 from an unrelated party. The Land is subject to the provisions of the Ground Lease executed between the Plan and the Land Company. In addition, the Plan's Leased Fee Interest includes a future reversionary interest in a 64,945 square foot medical building (the Building) that was constructed on the Land by the Land Company in 1976. The Land Company leases the Building to LRDC. At the conclusion of the Ground Lease, both the Land and the Building will revert to the Plan. The Land and the Building, which are together referred to herein as "the Property," are contiguous to other real property owned by the LLC.<sup>5</sup>

6. On July 20, 1982, the Department granted Prohibited Transaction Exemption (PTE) 82-126 at 47 FR 31457. PTE 82-126 permitted the Plan to lease the Land<sup>6</sup> underlying the Building to the Land Company under the provisions of the Ground Lease. In addition, PTE 82-126 allowed the Plan to subordinate its title on the leased premises to the mortgage lien holder of the Building constructed thereon, which was an unrelated bank.

The Ground Lease was divided into two parts. It had a temporary term beginning April 1, 1974 and ending July 31, 1975, and a permanent term of 25 years, beginning August 1, 1975 and ending July 31, 2000. The rent for the temporary term was equal to the 1974 real estate taxes and any other taxes assessed against the premises. The rent for the permanent term was equal to \$27,000 per year subject to adjustment every five years based on the Cost of

<sup>4</sup> The term "leased fee estate" refers to an ownership interest held by a landlord with the right of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee estate owner) and the lessee are specified by contract terms contained within the lease. See APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL (4th ed. 2002).

<sup>5</sup> Specifically, in Final Authorization Number 2005-11E (July 11, 2005), the Department approved a transaction involving the sale by the Plan to the LLC of a 2.2 acre tract of vacant real property (Tract 2), that is adjacent to the subject Property.

<sup>6</sup> Although PTE 82-126 states that the Land consists of 4.368 acres, this description is in error and should have been revised to read "4.444 acres."

Living Index published by the Department. At the time the proposal underlying PTE 82-126 was published in the **Federal Register** (see 47 FR 22251, May 21, 1982), the annualized rent being paid to the Plan was \$41,196 or \$3,433 per month, which was in excess of fair market value. The Ground Lease was triple net to the Plan and it could be extended for two additional five year terms, provided appropriate notice was given to the Plan.

Pursuant to an agreement dated May 8, 1974 and commencing August 1, 1975 for a period of 25 years (but subject to extensions), the Land Company started leasing the Building to LRDC under the provisions of a written lease (the Building Lease). Rents generated from the Building Lease were intended to pay the Land Company's obligations under the Ground Lease and to amortize its indebtedness under the mortgage. (In effect, LRDC also commenced subleasing the Land from the Land Company under the established leasing arrangements.)

Eventually, the Trustees and the Land Company proposed to amend the Ground Lease to provide for annual cost of living adjustments. On April 8, 1982, the partners of the Land Company, who had a net worth in excess of \$8 million agreed to indemnify the Plan from all losses, damages, and expenses the Plan might sustain by the subordination of its title under the terms of an indemnification agreement. No other modifications of the Ground Lease were made.

The fair market rental value of the amended Ground Lease was determined by Ronald E. Bragg, MAI, a qualified, independent appraiser. In an appraisal report dated August 28, 1981, Mr. Bragg placed the fair market rental value of the Land at \$3,161.67 per month or \$37,940, annually. Mr. Bragg also determined that the fair market value of the Land was \$271,000 as of August 1981.

On September 10, 1981, Twin City Bank (TCB) of North Little Rock, Arkansas, was appointed as an "independent real estate investment manager." In this capacity, TCB had sole responsibility and discretion to direct the Trustees regarding the management of real property held by the Plan. TCB was responsible for making the determination that the amended Ground Lease was an appropriate and suitable investment for the Plan and in the best interests of the Plan's participants and beneficiaries. TCB was required to reconsider the appropriateness of the amended Ground Lease prior to the time of its execution and to monitor and enforce the terms of such lease on behalf of the Plan,

including making demand for timely payment, bringing suit in the event of a breach, keeping accurate records regarding computations of the cost-of-living adjustments, and reporting annually to the Trustees.

Further, TCB reviewed the subordination provision of the amended Ground Lease.<sup>7</sup> In this regard, TCB determined that the subordination provisions were in accordance with normal business practices and the requirements of lenders in the area and this factor did not alter its opinion of the contemplated transactions.

On December 31, 1983, the Ground Lease was again amended to make the cost of living adjustment annual instead of once every five years and to remove an option to purchase provision. In addition, the base period for the calculating the cost of living adjustment was revised to "June 30, 1980" instead of "December 31, 1981."

7. The Ground Lease is currently in its first five year extension and there is no mortgage encumbering the Building.<sup>8</sup> As of August 31, 2005, the amount of monthly rental was \$7,994, which is above fair market rental value. At the end of the Ground Lease on July 31, 2010, the Land and the Building will revert to the Plan.<sup>9</sup> Although it is represented that the provisions of the Ground Lease have been complied with by the parties (*i.e.*, rent has been paid in a timely manner and there have been no defaults or delinquencies), LRDC acknowledges that the "independent real estate investment manager" described in the proposal to PTE 82-126 was not always present to oversee such lease. Accordingly, LRDC has agreed to file a Form 5330 with the Service within 90 days of the date the notice granting this proposed exemption is published in the **Federal Register** and pay all applicable excise taxes that are attributed to the past and continued prohibited leasing of the Land between the Plan and the Land Company under

<sup>7</sup>The original loan for the construction of the Building was \$1.35 million. At the time PTE 82-126 was proposed, the loan balance was approximately \$1.2 million. TCB estimated that the fair market value of the Building was \$2.28 million as of July 1, 1980 and that there was sufficient equity present to protect the Plan and its participants.

<sup>8</sup>Similarly, the Building Lease is subject to two five year extensions.

<sup>9</sup>The term "reversionary right" refers to "the right to possess and resume full and sole use and ownership of real property that has been temporarily alienated by a lease, an easement, etc.; [sic] may become effective at a stated time or under certain conditions, *e.g.*, the termination of a leasehold, the abandonment of a right of way, the end of the estimated economic life of the improvements." See APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL (4th ed. 2002).

the Ground Lease, due to the lack of oversight of such lease on a continuing basis by a qualified, independent fiduciary.<sup>10</sup>

8. Although there has been development around the vicinity of the Property, the value of the Property has not appreciated significantly in recent years. Moreover, the Building is a single-use building that was constructed in 1976. Due to the age of the Building, significant improvements would be required to bring it up to current medical office standards. The Property has been on the market since December 2001 but it has drawn no firm offers. In order that the Plan may divest itself of its Leased Fee Interest in the Property, the Trustees propose to sell such interest to the LLC. Accordingly, an administrative exemption is requested from the Department.

If the exemption is granted, the sale will allow the Plan to convert the Property into a liquid asset and provide a better opportunity for growth and permit Plan participants to direct their account balances in the Plan into other investment vehicles. Also, in order to pay participants who will retire in the coming years, a significant amount of liquidity will be needed in the Plan's portfolio. Therefore, a cash sale of the Property will provide the needed liquidity. Furthermore, due to its ownership of a Leased Fee Interest, the Plan's options for administration and management are limited.

9. The proposed sale will be a one-time transaction for cash. The sales price for the Leased Fee Interest will be based upon its fair market value, as determined by a qualified, independent appraiser on the date the sale is consummated. Moreover, the Plan will not be required to pay any real estate fees or commissions in connection with the transaction.

10. The Property has been appraised annually by Mr. Ronald Bragg, the same qualified, independent appraiser utilized in PTE 82-126. Mr. Bragg represents that he is independent of the parties involved in the proposed transaction, and states that he derives less than 1% of his gross annual revenues from LRDC and its affiliates. Mr. Bragg also states he is aware that his appraisal will be used by the LLC for purposes of obtaining an administrative exemption from the Department.

<sup>10</sup>The Department is of the view that the presence of an independent fiduciary to represent the Plan's interest with respect to the Leased Fee Interest was a material factor in the Department's determination to grant exemptive relief. Accordingly, PTE 82-126 was no longer effective when TCB stopped acting on behalf of the Plan as the "independent real estate investment manager."



In an appraisal report dated January 6, 2006 (the 2006 Appraisal), Mr. Bragg states that the Property rights being appraised are the rights of the holder of a "leased fee estate." Mr. Bragg notes that this ownership interest does not confer to the Plan direct ownership rights in the Building. However, he explains that the Plan will have reversion rights to the Building upon the termination of the Ground Lease. For these reasons, Mr. Bragg does not believe the sales comparison approach or the cost approach to valuation is applicable. Nonetheless, he states that the sales comparison approach will be utilized in projecting the future reversion value of the Property.

Therefore, Mr. Bragg concludes in the 2006 Appraisal that the only approach to valuation that can directly address the ownership benefits that accrue to the Plan is the income capitalization approach. He explains that the ownership benefits are limited to the Plan's right to receive rental income under the Ground Lease and the right to the reversion of the Land and the Building at the termination of the Ground Lease. Under the income capitalization approach, he notes that the valuation would consist of a discounted cash flow analysis based upon the projected net cash flows to be generated under the terms of the Ground Lease and the projected reversion. This analysis would include current rent, projections of future rent increases as required by the Ground Lease, and an estimate of the net reversion value upon the termination of the Ground Lease.

Mr. Bragg states that based on his inspection, investigation and analysis of the Property, it is his opinion that the fair market value of the Leased Fee Interest was \$3.1 million as of December 31, 2005. In making this determination, Mr. Bragg projected the Plan's reversionary interest in the Property at \$4.6 million upon the termination of the Ground Lease. Then, selecting a discount rate of 12% to discount the Property's income stream, Mr. Bragg arrived at the \$3.1 million estimated market value of the Leased Fee Interest. Mr. Bragg will update his appraisal on the date of the sale.

Thus, based upon the 2006 Appraisal, the Leased Fee Interest represents approximately 13% of the Plan's assets.

11. In an addendum to the 2006 Appraisal dated January 9, 2006, Mr. Bragg has provided three related value issues concerning the subject Property: (a) The fee simple value of the Property, as if unencumbered by the Ground Lease; (b) the contributory present value of the projected future reversion value of the Property; and (c) the relationship

between the current rent paid by the Land Company under the Ground Lease and the current fair market ground rent.

With respect to the fee simple value of the Property, Mr. Bragg states that it would be the fair market value of the Property if it were not encumbered by either the Ground Lease or the Building Lease. In the 2006 Appraisal, he states that he provided an estimate of \$4.6 million as the projected reversion value of the Property upon the termination of the Ground Lease. He says this estimate of value can also be considered as an estimate of the fee simple value of the Property at that point in time when it is no longer encumbered by either the Ground Lease or the Building Lease.

With respect to the contributory present value of the Property upon the termination of the Ground Lease, Mr. Bragg again utilizes the \$4.6 million projected reversion value for the Property. He also has utilized a discount rate of 12% in converting the projected reversion value (and the projected ground rent) into an indication of present value. On the basis of his calculations, Mr. Bragg concludes that the projected reversion value of \$4.6 million, four years and seven months from January 9, 2006, discounted at 12% would be \$2,736,476.

As for the relationship between contract rent under the Ground Lease and the current fair market ground rent, Mr. Bragg states that if the Ground Lease was negotiated today, the first year's rent would be based upon 10% of the fee simple value of the Land (\$700,000). Mr. Bragg explains that the annualized rent would be \$70,000 or \$5,833.33 per month. Because the current ground rent of \$7,994 per month is contract rent, Mr. Bragg further explains that such rent substantially exceeds the fair market rental value of the Land. He notes that this is not a recent occurrence.

12. With respect to the proximity of the subject Property to other real property owned by the LLC (*i.e.*, Tract 2, see Footnote 2), Mr. Bragg maintains that the proximity of the Property to Tract 2 had no impact on his estimate of the fair market value of the Leased Fee Interest and that no premium is warranted. In this regard, Mr. Bragg notes that there is an abundance of vacant, undeveloped land on the Baptist Medical Center Campus and it is "basic supply and demand that creates value." According to Mr. Bragg, market value does not consider the specific buyer and seller but rather the market at large. Although Mr. Bragg concedes that the Property is adjacent to Tract 2, he states that the Property is also contiguous to vacant land along its southern and western sides. Due to the presence of

the vacant land, Mr. Bragg represents that prospective buyers would have choices. Therefore, he does not believe the LLC should be required to pay a premium in order to acquire the Leased Fee Interest.

13. The Bank of Ozarks (the Bank) located in Little Rock, Arkansas will act on behalf of the Plan as the independent fiduciary with respect to the proposed sale. Specifically, the Bank through its Trust Division, has agreed to undertake the duties of the independent fiduciary. The Bank is a custodian of plan assets only and it maintains no retail banking relationship with LRDC, its affiliates, or their principals.

Writing on behalf of the Bank, Mr. Rex W. Kyle, President of the Bank's Trust Division states, in a letter dated January 4, 2006, that the Bank is an Arkansas state-chartered bank with trust powers. He explains that the Trust Division administers and/or manages in excess of \$500 million in accounts which include ERISA accounts.

Mr. Kyle states that the Bank is the largest state chartered bank fiduciary in Arkansas and has \$2.1 billion in assets. Moreover, he indicates that the Bank's staff has over 150 years of combined experience and has served as both an independent and special trustee in various fiduciary capacities. Mr. Kyle represents that the Bank understands and accepts its duties, responsibilities and liabilities under the Act in serving as independent fiduciary for the Plan.

14. In determining whether the sale transaction is in the best interest of the Plan and its participants and beneficiaries, Mr. Kyle states that the Bank has relied on various appraisals of the Property, including the 2006 Appraisal. Based on these appraisals, Mr. Kyle states that the sale would permit the conversion of an illiquid investment with potentially high future maintenance costs into cash. Mr. Kyle also notes that the Building is over 20 years old and extensive renovations would be necessary to modernize it. He explains that without these renovations, LRDC would be required to move. Because there are no potential tenants in the immediate area, Mr. Kyle indicates that the Plan would hold an asset that would generate no income.

Mr. Kyle states that based on the 2006 Appraisal, the sale is consistent with sales of similar properties which might be achieved in the marketplace. He also indicates that the sale would eliminate any conflict of interest and associated administrative burdens of ongoing supervision that would be involved in continuing the Ground Lease. Moreover, Mr. Kyle notes that the current rent



under the Ground Lease exceeds fair market rent for the Land.

Additionally, Mr. Kyle states that the sale would allow a greater portion of the Plan's assets to be allocated to participant-directed accounts and would lower the overall cost of administration of the Plan.

As independent fiduciary, the Bank will monitor the sale transaction on behalf of the Plan and take all actions that are necessary and proper to enforce and protect the rights of the Plan and its participants and beneficiaries. In this regard, the Bank will be given full and complete discretion regarding all aspects of the sale.

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

(a) The sale will be a one-time transaction for cash.

(b) The sales price for the Leased Fee Interest will be based on its fair market value as established by a qualified, independent appraiser, who will update the appraisal on the date of the sale is consummated.

(c) The terms 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.

(d) The Plan will not pay any real estate fees or commissions in connection with the sale.

(e) An independent fiduciary will approve and monitor the proposed sale transaction on behalf of the Plan.

(f) Within 90 days of the date the notice granting this exemption is published in the **Federal Register**, LRDC will file a Form 5330 with the Service and pay all applicable excise taxes that are attributed to the past and continued prohibited leasing of the Land under the provisions of the Ground Lease.

#### Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons within 5 calendar days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be provided to active participants in the Plan by personal delivery and it will be mailed by first-class mail to all others. The notice will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 35 days of the publication of the proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Ekaterina A. Uzlyan, U.S. Department of

Labor, telephone (202) 693-8552. (This is not a toll-free number).

American Maritime Officers Safety & Education Plan (the S&E Plan); American Maritime Officers Pension Plan (the Pension Plan); American Maritime Officers Vacation Plan (the Vacation Plan); American Maritime Officers Medical Plan (the Medical Plan); and American Maritime Officers 401(k) Plan (the 401(k) Plan); (Collectively the AMO Plan(s)). Located in Dania Beach, Florida and Toledo, Ohio, [Exemption Application Nos. L-11148; D-11149; L-11150; L-11151; D-11152; and D-11153].

#### Proposed Exemption

The Department is considering granting the following exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

#### Section I

If the exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to: (1) the S&E Plan entering into an arrangement with the American Maritime Officers (the Union), which is a party in interest with respect to the AMO Plans, for the Union to pay the S&E Plan, where appropriate and at the rate established by the independent fiduciary (the I/F), for the portion of the Union trustees' food and lodging provided by the S&E Plan that is attributable to attendance at certain Union meetings (Union Transactions) at the Dania Beach, Florida (the Dania Beach facility) and Toledo, Ohio (the Toledo facility) (collectively, the Facilities); (2) the S&E Plan entering into an arrangement with the Union and certain contributing employers, who are parties in interest with respect to the AMO Plans, to pay the S&E Plan at a rate established by the I/F, for food and lodging provided by the S&E Plan at the Facilities for the representatives of the Union and the respective contributing employers that is attributable to attendance at various conferences (Conference Transactions); and (3) the S&E Plan entering into an arrangement with the governing bodies of the American Maritime Officers Joint Employment Committee (the JEC), and the American Maritime Officers Service (AMOS), who are parties in interest with respect to the AMO Plans, to pay the S&E Plan at a rate established by the I/F, for food and lodging provided by the S&E Plan at the Facilities (Non-Plan Transactions).

#### Section II

If the exemption is granted, the restrictions of sections 406(a) and 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: (1) The AMO Plans sharing expenses based on an internal expense allocation model (the Allocation Model) for the provision of food and lodging by the S&E Plan at the Facilities to the AMO Plans' trustees (the Trustees) (Collectively the Trustee Transactions); and (2) The AMO Plans, the JEC and AMOS sharing expenses based on the Allocation Model for the provision of food and lodging by the S&E Plan at the Facilities (Professionals' Transactions).

#### Section III

If the exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to: (1) Contributing employers contracting with the S&E Plan to provide one of its regular courses at a special time (Specially Scheduled Training); and (2) The S&E Plan designing training programs or undertaking special research or modeling that is tailored to the needs of a particular contributing employer or its vessels (Specially-Designed Training).

#### Conditions

This proposed exemption is subject to the following conditions:

(a) Each AMO Plan will pay its appropriate share of expenses based on the Allocation Model;

(b) The I/F retained by the AMO Plans will:

(1) Make a determination of whether the proposed transactions (the Transaction(s)) are prudent and in the best interest of the relevant AMO Plan(s);

(2) Establish the terms for each of the Transactions, including:

(i) The price to be charged for the services provided pursuant to the Transactions; and

(ii) The terms and conditions ensuring that the Transactions are fair to the involved AMO Plans;

(3) Develop policies and guidelines for the implementation of the Transactions;

(4) Monitor the Transactions on an on-going basis, including periodic reviews of the Transactions, to ensure compliance with the I/F policies and guidelines;

(5) On a periodic basis, review the terms of each of the Transactions, including the fair market value of the services provided; and

(6) Prepare an annual report, summarizing the Transactions for that year;

(c) The costs associated with recordkeeping and all forms of independent oversight will be included in the daily rate established by the I/F for food and lodging provided by the S&E Plan at the Facilities;

(d) An independent auditor will perform annual audits of all the AMO Plans to identify and reconcile any discrepancies regarding the recordkeeping involving the Transactions and provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory;

(e) The Room Master Software System (RM Software) will create an invoice for lodging and food service accounting functions and related services at the Facilities;

(f) The AMO Plans' fiduciaries maintain or cause to be maintained, for a period of six years from the date of the covered transactions, such records as are necessary to enable the persons described in paragraph (g) to determine whether the conditions of this exemption were met, except that:

(1) If the records necessary to enable the persons described in paragraph (g) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the AMO Plans' fiduciaries, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the AMO Plans' fiduciaries responsible for recordkeeping, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (g) below;

(g)(1) Except as provided below in paragraph (g)(2) and notwithstanding the provisions of section (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (f) are unconditionally available for examination during normal business hours at their customary location by the following persons or an authorized representative thereof:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) any fiduciary of the AMO Plans or any duly authorized employee or representative of such fiduciary; or

(iii) any contributing employer and any employee organization whose members are covered by the AMO Plans, or any authorized employee or representative of these entities; or

(iv) any participant or beneficiary of the AMO Plans or the duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraphs (ii), (iii) and (iv) of paragraph (g)(1) shall be authorized to examine trade secrets or commercial or financial information which is privileged or confidential.

### Summary of Facts and Representations

#### *Description of the AMO Plans*

The S&E Plan is a multiemployer training plan funded pursuant to a collective bargaining agreement. The purposes of the S&E Plan are to (a) develop and execute programs for the education, development and improvement of licensed marine officers, (b) develop and execute programs to increase safety in the operation of marine vessels, (c) create and execute programs to develop and maintain a skilled pool of licensed marine officers and (d) develop and execute a research program on a variety of issues of interest to S&E Plan participants and their employers. The S&E Plan conducts training at the Facilities and accommodates the students attending training at the Facilities as well. As of January 6, 2006, the S&E Plan has 3,495 participants and beneficiaries and \$43,563,887 in plan assets.

The Pension Plan is a multiemployer defined benefit pension plan funded by contributions from contributing employers pursuant to collective bargaining agreements. The purpose of the Pension Plan is to provide pension and retirement benefits, including death benefits, to eligible participants and their beneficiaries. The Pension Plan also features a money purchase pension component. As of January 6, 2006, the Pension Plan has 6,238 participants and beneficiaries and \$515,160,000 in plan assets.

The Vacation Plan is a multiemployer welfare benefit plan funded by contributions from contributing employers pursuant to collective bargaining agreements. The purpose of the Vacation Plan is to provide paid vacation time to eligible participants. As of January 6, 2006, the Vacation Plan has 3,690 participants and beneficiaries and \$29,464,387 in plan assets.

The Medical Plan is a multiemployer welfare benefit plan funded by contributions from contributing

employers pursuant to collective bargaining agreements. The purpose of the Medical Plan is to provide medical and hospitalization benefits for participants and their families. As of January 6, 2006, the Medical Plan has 5,455 participants and beneficiaries and \$32,363,519 in plan assets.

The 401(k) Plan is a multiemployer profit-sharing plan, with a cash or deferred arrangement, funded by contributions from participants and contributing employers pursuant to collective bargaining agreements. The purpose of the 401(k) Plan is to provide retirement benefits, including death benefits, to participants and their beneficiaries. As of January 6, 2006, the 401(k) Plan has 4,471 participants and beneficiaries and \$157,636,687 in plan assets.

#### *Section I Transactions*

(1) *Union Transactions:* The Union often schedules its meetings at the same time as the Trustees' meetings to minimize travel burdens and ease scheduling. Scheduling Union meetings during this time facilitates the attendance of Union-side Trustees who are already at the Facility to attend Trustees' meetings. The Union Transactions will only occur when the Union meeting at issue (a) takes place during the same days as scheduled Trustees' meetings, (b) takes place on a day or days immediately and continuously preceding the days of scheduled Trustees' meetings, or (c) takes place on a day or days immediately and continuously following the days of the scheduled Trustees' meetings.

The AMO Plans wish to have their Trustees stay at one of the Facilities during the Trustees' meetings. Because the Union often schedules its meetings to coincide with Trustees' meetings, it would be unworkable or inefficient for affected Union-side Trustees to move to different lodging for the Union meetings. Instead, it is requested that the Union share in the costs of accommodating Union-side Trustees during multi-day meetings that include Union meetings.

The Union Transactions will not occur with respect to Union meetings scheduled entirely independent of and not attendant to Trustees' meetings. When the Union schedules its meetings at the Facilities to benefit from the presence of the Trustees, it would only be equitable that the Union should share, where appropriate, the food and lodging expenses incurred during the multi-day series of meetings that are attributable to non-S&E Plan business.

(2) *Conference Transactions:* The Joint Training Advisory Committee

(JTAC) and the Deep Sea Employer Conference (DSEC) are groups, which consist of representatives of Great Lakes contributing employers and Deep Sea contributing employers, respectively, and representatives of the Union.<sup>11</sup> The Union and contributing employers, who will pay for their respective representatives to attend JTAC and DSEC meetings, are parties in interest with respect to the S&E Plan.

The S&E Plan would like to provide food and lodging for the representatives of the Union and the respective contributing employers attending the JTAC and the DSEC meetings at the Facilities.

The JTAC and DSEC were formed in response to the rapidly changing regulatory environment in the maritime industry and in response to chronic manpower shortages. The Union and contributing employers thought it would be beneficial to have periodic meetings to address new regulatory requirements and strategies to address the shortage of trained officers, among other issues pertinent to the industry. The JTAC and DSEC meetings primarily focus on training needs, although matters relating to other AMO Plans are also discussed.

The contributing employers and the Union desire that the JTAC and DSEC meetings be held at the Facilities. The meetings would involve not only the use of meeting space, but also the use of overnight lodging and catering Facilities. The attendees of the JTAC and the DSEC meetings (or, more likely, the party on whose behalf they attend) would pay the S&E Plan for its costs incurred in hosting the meetings at the rates approved by the I/F.

Portions of JTAC and DSEC meetings pertain to the S&E Plan and S&E Plan personnel generally make presentations at such meetings. Thus, it would be convenient for the S&E Plan personnel to hold the meetings at the Facilities. The S&E Plan believes it is better able to make its presentations to the JTAC and DSEC meetings if they are held at the Facilities because the S&E Plan personnel would then have access to the technology and training capabilities at the Facilities.

The S&E Plan also believes that it benefits from the JTAC and DSEC meetings being held at the Facilities because regular communication with

the Union and the employers on training needs and requirements serves one of the overall purposes of the S&E Plan, *i.e.*, to improve the quality of licensed marine officers. This type of interaction allows the S&E Plan to remain up-to-date on its participants' training needs. The S&E Plan believes that hosting the JTAC and DSEC meetings is particularly helpful because the representatives of the contributing employers attending such meetings are those responsible for training, and are not the Trustees or labor relations staff who are more likely to visit the Facility on other occasions, *e.g.*, Trustee meetings. Thus, the JTAC/DSEC meetings facilitate interaction between the S&E Plan and the representatives of the employers who are responsible for training.

The S&E Plan is requesting exemptive relief for the Conference Transactions because such meetings may be beyond the scope of those benefits provided in accordance with the S&E Plan through contributions made pursuant to collective bargaining agreements, even though the stated purposes of the S&E Plan are quite broad. As such, in the interest of caution, the S&E Plan requests exemptive relief.

The primary reason for entering into the Conference Transactions is that they serve the AMO Plan's primary purpose of providing training to participants covered by the S&E Plan.

Representatives to the JTAC and DSEC meeting are not employer Trustees to the AMO Plans. The JTAC and DSEC gather periodically to address a variety of issues important to the maritime industry, including the training curriculum, course design, scheduling and budget issues.

(3) *Non-Plan Transactions*: The JEC is a labor management committee under section 302(c)(9) of the Labor Management Relations Act. Employers make contributions to the JEC pursuant to the terms of collective bargaining agreements and the JEC performs employment placement services for licensed maritime officers through an administrative services contract with the Union. Appropriately qualified and licensed Union members are placed with contributing employers who are seeking such personnel. The committee members of the JEC are also Trustees of various AMO Plans. The applicant represents that although the JEC is not a plan, it may nevertheless be classified as a party in interest with respect to the S&E Plan because it may be considered an employee organization whose members are covered by the S&E Plan.

The AMOS was formed to serve as a business league for the maritime

industry. The JEC, and the AMOS will pay the S&E Plan for their proportionate share of the costs for food and lodging at the Facilities provided by the S&E Plan at the rates approved by the I/F. Because both entities share administrative services with the AMO Plans, they would pay the S&E Plan for their use of the Facilities based on the Allocation Model.

The JEC, and the AMOS take advantage of the scheduling of the Trustees' meetings to hold their meetings. Thus, these meetings become part of the multi-day agenda associated with the Trustees' meetings. Structuring the meeting schedule this way saves costs and minimizes the travel burdens on Trustees. Because a portion of the multi-day agenda will be devoted to the JEC, and the AMOS meetings, it would only be equitable for these entities to pay the S&E Plan their proportionate share of the costs.

The S&E Plan wishes to enter into the Transactions because of the efficiencies offered by consolidating the meetings and because it believes that holding such meetings at the Facilities benefits the S&E Plan overall by improving communication and interaction with these entities in ways that are helpful to the S&E Plan.

## Section II Transactions

(1) *Trustee Transactions*: The Trustees of the AMO Plans may be parties in interest with respect to the S&E Plan for a number of different reasons. Those who are Trustees of the S&E Plan are parties in interest by reason of being fiduciaries. Others may be employees or officers of contributing employers or the Union.

The AMO Plans generally hold their respective Trustees' meetings at the Facilities. The AMO Plans typically schedule their Trustees' meetings over several consecutive days. Each AMO Plan's Trustees' meeting has a separate agenda and separate minutes are maintained for each meeting. The individual Trustees, however, are usually at the Facilities to attend a number of different Trustees' meetings and other meetings.

Each of the AMO Plans will pay the S&E Plan its share of the Trustees' room and board expenses based on the Allocation Model. Accommodating the Trustees at the Facilities during Trustees' meetings makes sense in light of the fact that the Trustees are at the Facilities for a number of days to attend a series of meetings. Providing food and lodging services to the Trustees at the Facilities maximizes the efficiency of such meetings by eliminating travel time to and from the meetings and by

<sup>11</sup> The applicant represents that the JTAC and DSEC are not incorporated or otherwise organized in any legal sense and membership in the groups is not fixed. Rather, the JTAC and DSEC are the names used to describe periodic gatherings of Union representatives and representatives of contributing employers to address issues of importance to the maritime industry.

encouraging and facilitating interaction among the Trustees, AMO Plans' participants and AMO Plans' personnel.

Another reason for entering into the Trustee Transactions is cost savings. It is likely to cost the AMO Plans less to provide food and lodging services to Trustees at the Facilities compared to providing such services at nearby hotels and restaurants. The AMO Plans must cover the reasonable expenses incurred by their Trustees while attending Trustees' meetings in any event. Thus, minimizing these expenses would be beneficial to the AMO Plans and their participants.

The AMO Plans believe that holding Trustees' meetings is necessary for the administration and operation of the AMO Plans, and that providing food and lodging for Trustees would appear to be a concomitant part therefore. It is not clear, however, whether the provision of lodging and food is the type of service that fits within any statutory or class exemptions.

The I/F will decide whether it is appropriate for an AMO Plan to enter into a Trustee Transaction with the S&E Plan for the Trustees' food and lodging. The Allocation Model will ensure that each AMO Plan pays its respective share of the expenses.

(2) *Professionals' Transactions:* Professionals providing services to the AMO Plans, such as attorneys, and accountants often need to visit the Facilities to attend to the business of one or more of the AMO Plans. The Allocation Model will ensure that each AMO Plan shares the appropriate expenses such professionals incur in visiting the Facility as an administrative expense of the respective AMO Plans. The respective AMO Plans, the JEC, and the AMOS would reimburse the S&E Plan for their proportionate share of the costs incurred in accommodating the visiting plan professionals at the rates approved by the I/F. The reimbursement would be made through the Allocation Model.

The AMO Plans believe that there is an advantage to having plan professionals stay and dine at the Facilities so that there are more opportunities for interaction between the professionals and the relevant Trustees, personnel and participants.

### Section III Transactions

(1) *Specially Scheduled Training:* Contributing employers may need to contract with the S&E Plan to provide one of its regular courses at a special time. This need may arise when special circumstances, such as a shipping schedule, prevent the employees of a particular employer from attending one

of the regularly scheduled training courses. The S&E Plan requests exemptive relief to contract with contributing employers to provide regular courses at special times to accommodate the employers' scheduling demands.

(2) *Specially-Designed Training:* A contributing employer may wish the S&E Plan to design training programs or undertake special research or modeling that is tailored to the needs of that particular employer or its vessels. In these circumstances, contributing employers will need to contract with the S&E Plan to develop special training programs or conduct specially designed research or modeling to meet their particular needs. The S&E Plan requests exemptive relief to provide such services tailored to the special needs of a particular contributing employer or its vessels.

The S&E Plan wishes to enter into the special training transactions to meet the needs of participants in a way that is fair to all employers without requiring the renegotiation of the collective bargaining agreements.

In addition, coordinating with employers to develop specially designed training and research programs benefits the purposes of the S&E Plan by developing and executing programs to improve the overall quality of maritime officers. Once special courses are designed, the materials from such courses are available to all participants in the S&E Plan and to all S&E Plan instructors. The S&E Plan believes that entering into these contracts with the contributing employers improves the quality of the instruction provided by the S&E Plan by expanding the knowledge and expertise of the S&E Plan instructors and expanding the training curriculum.

For both Specially Scheduled Training and Specially-Designed Training, the contributing employer would pay the S&E Plan directly for (1) the specially scheduled training, and (2) the specially designed training, research, and modeling. The individual employer would be responsible for paying the S&E Plan for such services in order to avoid the inequity of burdening all contributing employers with the additional costs of the S&E Plan's efforts to meet the needs of an individual contributing employer. Payment amounts would be at the rates approved by the I/F.

*The Allocation Model:* The costs of the Trustee Transactions and the Professionals' Transactions are allocated to the AMO Plans, the Maritime Building Realty Holding Trust (the MBRHT), the AMOS, and the JEC (the

MBRHT, AMOS, and the JEC are collectively referred to as other entities (Other Entities)) based on the number of AMO Plans and Other Entities that each Trustee represents. For example, where a Trustee represents four AMO Plans and one Other Entity, one fifth of the costs attributed to that Trustee will be allocated to each AMO Plan or Other Entity.

The direct attendance expenses attributable to the Trustee meetings for each Trustee are allocated among the AMO Plans that the Trustee represents. Direct attendance expenses include the cost of items like travel, meals, and lodging. Those direct attendance expenses for meals and lodging that are not attributable to the Trustee meetings are deducted before the allocation. Non-attributable billable expenses are billed directly to AMO Plan professionals, Trustees and the Union as required by the AMO Plans Policy and Guidelines on Trustee Expense Reimbursement and are not allocated among the AMO Plans and Other Entities. Such costs arise when individuals arrive early or extend their stays beyond the dates of the Trustee meetings in order to attend a Union meeting.

The percentage of the total direct attendance expenses allocated to each AMO Plan or Other Entity is used as the basis for allocating the indirect attendance expenses. The indirect attendance expenses are the costs incurred by the AMO Plans' staff, counsel, and accountants and other expenses related to hosting the meeting. Again, non-attributable billable expenses, as described above, are not allocated among the AMO Plans and Other Entities.

Finally, the direct attendance expenses of AMO Plans' professionals and AMOS employees who are only attending meetings of specific AMO Plans are allocated among those AMO Plans based on the number of meetings that each individual is attending. Then the direct and indirect attendance expenses allocated to each AMO Plan are totaled.

*Internal Plans Policy and Procedure:* The AMO Plans have set up a series of systems, policies and procedures to internally track and audit use of the lodging and the Facilities and related services. These include the STAR Center Registrar (the Registrar), RM Software and the AMO Plans' Accounting Department (the Accounting Department). In order to maximize the effectiveness, security and accuracy of these systems, the Registrar is completely independent of RM Software. The Accounting Department, nonetheless, receives the records of both

for internal auditing purposes and compares these records to its own accounting records. In addition, the Accounting Department reviews records for consistency with the purposes of the Facilities, the S&E Plan and the STAR Center in mind.

More specifically, RM Software creates an invoice for lodging and food service accounting functions and related services at the Facilities, while the Registrar creates a record of curriculum, attendance and certifications. Records from both systems are turned over to Accounting for review, audit, billing, receiving, and resolution of discrepancies. These records serve as the basis for the allocation of expenses among the AMO Plans.

Records from all three sources are subject to audit by the external auditor and review and analysis by the I/F. When the I/F begins full operation the entire system will be subject to its review and, if required, adjustments will be made in response to its recommendations. The I/F and external auditor will also use these records to review and verify the accuracy of the allocation of expenses to each AMO Plan.

*The Registrar:* All AMO Plan participants interested in participating in training programs are required to contact the Star Center to register for specific classes. The Registrar maintains training records for all S&E Plan participants so that training history and requirements are easily retrievable. AMO Plan participants are registered for specific training programs on specific dates. The Registrar enables the Star Center to identify particular training requirements for individuals, ensure that the appropriate level of training is provided, and prevents unnecessary repetition of training programs. Course schedules, registration and attendance are also maintained at this level. Thus, the Registrar documents class attendance, exam results, training upgrades for the Coast Guard, and the required ratings and certifications.

*Room Master:* RM Software, a hotel software system, is used for lodging and food service accounting functions and related services. Room Master provides the reservation system for guest rooms, classrooms, and meeting rooms. It also tracks demand for housekeeping, dining, and other related services. Currently, AMO Plan participants attending training programs at the Star Center receive a room reservation through Room Master once their registration by the STAR Center Registrar is confirmed. Training participants also are given a welcome package that provides classroom

information for their assigned course, and rules and regulations while on campus.

If this exemptive relief is provided, the use of RM Software will be expanded to provide the same reservation, recordkeeping, and reconciliation services for Trustees, Union representatives, AMO Plan professionals, non-plan entities, contributing employers and others whose use of the Facilities would serve the overall purposes of the AMO Plan. For example, RM Software would provide room reservations to Trustees, professionals or others attending meetings at the facility. Meeting and training rooms and food services also would be reserved through Room Master. In addition, Room Master would confirm the appropriateness of all lodging and food services arrangements with established meeting schedules and membership lists. Room Master records also provide daily occupancy information that can be compared to galley inventory and meal services to ensure consistency.

Upon arrival, the identification of each guest is verified and each guest is issued a photo ID, which must be worn at all times while at the Facilities. Guests are also provided with an electronic key to access perimeter gates and their guest rooms. Keys are only activated for the scheduled stay and automatically deactivate on the date of scheduled departure.

The Room Master system combined with the use of photo IDs and electronic keys helps to ensure that all guests are provided with only the accommodations and services appropriate for the designated and independently confirmed purpose of their visit.

*Accounting Department:* The Accounting Department is required to audit the use of the Facilities' lodging, food and related services against course registrations, contracts, billings and receipts, and the purpose of services provided. Any discrepancies are resolved promptly. For example, when the STAR Center finalizes an approved contract, the contract is turned over to Accounting. This contract is reviewed against Room Master for lodging information and against the Registrar to verify attendance at classes. The Accounting Department receives the lodging record of all guests on a daily basis and reviews these records against the Registrar System to identify and record the purpose of each guest's stay. The Accounting Department also reconciles lodging and attendance records with meal services provided to identify and remedy potential inconsistencies.

These systems will produce multiple and auditable records of the Facilities use. For example, with such systems in place, a Trustee's attendance at a Trustee meeting would generate a reviewable paper trail that begins with the Trustee's response to the notice of a Trustee meeting sent out by the Office of the Executive Director of the AMO Plans, which maintains a calendar of all scheduled Trustee meetings. The Trustees' response to the meeting notice would be entered into Room Master, documenting the response and setting up a reservation for the duration of the meeting.

When the Trustee arrives the Trustee would check in, receive an ID and a key that is activated for only the duration of the meeting. The Trustee's attendance at each meeting would be recorded. When the meeting is over, the Room Master record, containing all accrued expenses, and attendance records would be sent to the Accounting Department. The Accounting Department would review individual records for internal consistency and aggregated records for consistency with food, housekeeping and other expenses. The Accounting Department would also apply the allocation model so that business expenses could be distributed appropriately among the AMO Plans that the attending Trustee represents. The package of records, allocations, and analysis compiled by the Accounting Department then can be audited.

*The I/F:* To ensure that the interests of the AMO Plans and their participants are well protected, the AMO Plans have retained American Realty Advisors as the I/F with respect to the Transactions.<sup>12</sup> The I/F has extensive experience advising ERISA plans on the management of their real estate assets. The I/F will review each of the proposed uses of the Facilities and make determinations whether such uses are prudent, appropriate and in the best interest of the AMO Plans and their participants. The I/F will also have responsibility for monitoring the use of the Facilities to ensure that the Transactions never displace S&E Plan participants who wish to attend training at the Facilities.

The I/F will establish or approve reasonable terms and conditions for the Transactions, including the price to be charged and the Facilities being

<sup>12</sup> If it becomes necessary in the future to appoint a successor independent fiduciary (the Successor) to replace American Realty Advisors, the applicant will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the responsibilities, experience and independence similar to those of American Realty Advisors.

provided in the Transactions. The I/F will ensure that the Transactions are fair to all of the AMO Plans involved. The I/F will also develop guidelines pursuant to which the AMO Plans' personnel will carry out the approved Transactions.

The I/F will also have an on-going monitoring role, including periodic reviews of the Transactions to ensure compliance with the I/F policies and the terms of any exemption issued by the Department. The I/F will review all uses of the Facility on a periodic basis to determine whether the use thereof remains in the interests of the AMO Plans and their participants and whether the terms of the Transactions, including the amount charged for the Facilities provided, continue to be appropriate. The I/F will also prepare an annual report, summarizing the Transactions for that year.

The duties of the I/F will include the verification and monitoring of lodging and the Facilities use on a quarterly basis. It also will include review and analysis of the system used to allocate expenses among the AMO Plans as well as the actual allocations. American Realty also will develop and implement recommended policies and procedures for engaging in the transactions covered by the requested exemption. They will define precise requirements for staying at the facility, class attendance, use of the simulators, and other related activities.

In addition, American Realty will monitor the covered transactions on an on-going basis to verify compliance with the policies and procedures that they have developed and the terms of the prohibited transaction exemption. As part of its duties as I/F, American Realty also will develop policies and procedures to ensure that its recommendations are carried out.

The I/F role will ensure that the Transactions proposed herein remain in the AMO Plans' and participants' interest and are consistent with the conditions of the proposed exemption.

In addition, the AMO Plans have retained Bond Beebe C.P.A. (Bond Beebe) as outside auditors to perform the annual audit of all AMO Plans. Bond Beebe currently audits the S&E Plan including the use of lodging and the Facilities. They also identify and reconcile any discrepancies between the Registrar, Room Master and Accounting Department records. In addition, Bond Beebe will provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory.

The responsibilities of the independent auditor will be expanded

based on input from and the policies and procedures developed by the I/F. The costs associated with recordkeeping and all forms of independent oversight including the I/F will be allocated equally among the parties participating in each respective transaction.

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: (a) Each AMO Plan will pay its appropriate share of expenses based on the Allocation Model; (b) The I/F retained by the AMO Plans will: (1) Make a determination of whether the proposed Transaction(s) are prudent and in the best interest of the relevant AMO Plan(s); (2) Establish the terms for each of the Transactions, including: (i) The price to be charged for the services provided pursuant to the Transactions; and (ii) Ensuring that the Transactions are fair to the involved AMO Plans; (3) Develop policies and guidelines for the implementation of the Transactions; (4) Monitor the Transactions on an on-going basis, including periodic reviews of the Transactions, to ensure compliance with the I/F policies and guidelines; (5) On a periodic basis, review the terms of each of the Transactions, including the fair market value of the services provided; and (6) Prepare an annual report, summarizing the Transactions for that year; (c) The costs associated with recordkeeping and all forms of independent oversight will be included in the daily rate established by the I/F for food and lodging provided by the S&E Plan at the Facilities; (d) An independent auditor will perform annual audits of all the AMO Plans to identify and reconcile any discrepancies regarding the recordkeeping involving the Transactions and provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory; and (e) RM Software will create an invoice for lodging and food service accounting functions and related services at the Facilities.

#### Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**  
Khalif Ford of the Department,

telephone (202) 693-8562. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

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

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

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

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

Signed at Washington, DC, this 14th day of July, 2006.

**Ivan Strasfeld,**

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

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