DEPARTMENT OF LABOR

Employee Benefits Security Administration

[D–11509; D–11532; D–11555; D–11556; L–11558; et al.]

Notice of Proposed Exemptions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemptions.

Application Nos. and Proposed Exemptions: D–11509, Goldman, Sachs & Co. and its Affiliates (Goldman or the Applicant); D–11532, Louis B. Chaykin, M.D., P.A.; D–11555, The Coca-Cola Company (TCCC, or the Applicant); D–11556, Columbia Management Advisors, LLC (Columtia, or the Applicant) and its Current and Future Affiliates (collectively, the Applicants); and L–11558, Boston Carpenters Apprenticeship and Training Fund (the Fund); *et al.*

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 (ERISA or 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.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

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.

Goldman, Sachs & Co. and Its Affiliates (Goldman or the Applicant), Located in New York, New York.

[Application No. D–11509.]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[1]

Section I. Sales of Auction Rate Securities From Plans to Goldman: Unrelated to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to Goldman, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.

Section II. Conditions Applicable to Transactions Described in Section I

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Goldman to the Plan;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by Goldman for its own employees (a Goldman Plan), the Unrelated Sale is made pursuant to a written offer by Goldman (the Offer) containing all of the material terms of the Unrelated Sale. Either the Offer or other materials available to the Plan provide: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due and unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available). Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Goldman, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Goldman Plan) receives written notice regarding the Unrelated Sale, where such notice contains the material terms of the Unrelated Sale;

[1] For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in Section V(d)) of Goldman. Notwithstanding the foregoing: (1) In the case of an IRA (as defined in Section V(e)) which is beneficially owned by an employee, officer, director or partner of Goldman, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Goldman Plan or a pooled fund maintained or advised by Goldman, the decision to accept the Offer may be made by Goldman after Goldman has determined that such purchase is in the best interest of the Goldman Plan or pooled fund; [2]

(h) Except in the case of a Goldman Plan or a pooled fund maintained or advised by Goldman, neither Goldman nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Goldman and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that:

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Goldman and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Goldman or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

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

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission;

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of Goldman, or commercial or financial information which is privileged or confidential; and

(3) Should Goldman refuse to disclose information on the basis that such information is exempt from disclosure, Goldman shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III. Sales of Auction Rate Securities From Plans to Goldman: Related to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to Goldman, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

Section IV. Conditions Applicable to Transactions Described in Section III

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement and acceptance of the offer does not constitute a waiver of any claim of the tendering Plan;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

(1) The securities available for purchase under the Offer;

(2) The background of the Offer;

(3) The methods and timing by which Plans may accept the Offer;

(4) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer, if the Offer had any limitation on such dates;

(5) The timing for acceptance by Goldman of tendered Auction Rate Securities, if there were any limitations on such timing;

(6) The timing of payment for Auction Rate Securities accepted by Goldman for payment, if payment was materially delayed beyond the acceptance of the Offer;

(7) The expiration date of the Offer; and

(8) How to obtain additional information concerning the Offer;

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in Section II have been met.

Section V. Definitions

For purposes of this proposed exemption:

(a) The term ''affiliate'' means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term ''Auction Rate Security'' means a security: (1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and (2) with an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

[2] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Goldman for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by Goldman of all relevant information.

(d) A person is ''independent'' of Goldman if the person is: (1) Not Goldman or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term ''Plan'' means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by section 3(42) of the Act; and

(f) The term ''Settlement Agreement'' means a legal settlement involving Goldman and a U.S. State or Federal authority that provides for the purchase of an ARS by Goldman from a Plan.

Effective Date: If granted, this proposed exemption will be effective as of February 1, 2008.

Summary of Facts and Representations

1. The Applicant, Goldman, is a global financial services firm headquartered in New York, New York. As of August 29, 2008, Goldman had approximately $1 trillion in assets. Among other things, Goldman is both a registered investment adviser subject to the Investment Advisers Act of 1940 and a broker-dealer registered with the U.S. Securities and Exchange Commission. In this last regard, Goldman acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities.

2. The Applicant describes Auction Rate Securities and the arrangement by which ARS are bought and sold as follows. Auction Rate Securities are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale, and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro rata basis.

3. The Applicant states that, under a typical Dutch Auction process, Goldman is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. Goldman may place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (a) A failed auction (*i.e.,* an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate, resulting in no ARS being sold through the auction process); or (b) an auction from clearing at a rate that Goldman believes does not reflect the market for the particular ARS being auctioned.

4. The Applicant states that for many ARS, Goldman has been appointed by the issuer of the securities to serve as a dealer in the auction and is paid by the issuer for its services. Goldman is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and Goldman. That agreement provides that Goldman will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Goldman.

5. The Applicant states further that Goldman may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through Goldman, for those orders that Goldman successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Goldman act as dealer, such other broker-dealers may share auction dealer fees with Goldman for orders submitted by Goldman.

6. According to the Applicant, since February 2008, only a minority of auctions have cleared, particularly involving municipalities. As a result, Plans holding ARS may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.[3]

7. The Applicant represents that, in certain instances, Goldman may have previously advised or otherwise caused a Plan to acquire and hold an Auction Rate Security.[4] In connection with Goldman's role in the acquisition and holding of ARS by various Goldman clients, including the Plans, Goldman entered into Settlement Agreements with certain U.S. states and Federal authorities. Pursuant to these Settlement Agreements, among other things, Goldman was required to send a written offer to certain Plans that held ARS in connection with the advice and/or brokerage services provided by Goldman. As described in further detail below, eligible Plans that accepted the Offer were permitted to sell the ARS to Goldman for cash equal to the par value of such securities, plus any accrued but unpaid interest and/or dividends. The Applicant is requesting retroactive and prospective relief for the Settlement Sales. With respect to Unrelated Sales, the Applicant states that to the best of its knowledge, no Unrelated Sale has occurred. However, the Applicant is requesting retroactive relief (and prospective relief) for Unrelated Sales in the event that a sale of Auction Rate Securities by a Plan to Goldman has occurred outside the Settlement process. If granted, the proposed exemption will be effective February 1, 2008.

8. Specifically, the Applicant is requesting exemptive relief for the sale of Auction Rate Securities under two different circumstances: (a) Where Goldman initiates the sale by sending to a Plan a written Offer to acquire the ARS (*i.e.,* an Unrelated Sale), notwithstanding that such Offer is not required under a Settlement Agreement; and (b) where Goldman is required under a Settlement Agreement to send to Plans a written Offer to acquire the ARS (*i.e.,* a Settlement Sale). The Applicant states that the Unrelated Sales and Settlement Sales (hereinafter, either, a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales would permit Plans to normalize Plan investments. The Applicant represents that each Covered Sale will be for no consideration other than cash payment against prompt delivery of the ARS, and

[3] The Department notes that Prohibited Transaction Exemption 80–26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the plan.

[4] The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

such cash will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans will not pay any commissions or transaction costs with respect to any Covered Sale.

9. The Applicant represents that the proposed exemption is protective of the Plans. The Applicant states that: each Covered Sale will be made pursuant to a written Offer; and the decision to accept the Offer or retain the ARS will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Goldman. Additionally, each Offer will be delivered in a manner designed to alert a Plan fiduciary that Goldman intends to purchase ARS from the Plan. Offers made in connection with an Unrelated Sale will include the material terms of the Unrelated Sale and either the Offer or other materials available to the Plan describe: The identity and par value of the Auction Rate Security; the interest or dividend amounts that are due with respect to the Auction Rate Security; and the most recent rate information for the Auction Rate Security (if reliable information is available). Offers made in connection with a Settlement Agreement will specifically include, among other things: The background of the Offer; the method and timing by which a Plan may accept the Offer; the expiration date of the Offer; and how to obtain additional information concerning the Offer. The Applicant states that neither Goldman nor any affiliate will exercise investment discretion or render investment advice with respect to a Plan's decision to accept the Offer or retain the ARS.[5] In the case of a Goldman Plan or a pooled fund maintained or advised by Goldman, the decision to engage in a Covered Sale may be made by Goldman after Goldman has determined that such purchase is in the best interest of the Goldman Plan or pooled fund. The Applicant represents further that Plans will not waive any rights or claims in connection with any Covered Sale.

10. The Applicant represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale will occur at the par value of the affected ARS (plus accrued but unpaid interest and dividends, to the extent applicable), and such value is readily ascertainable. The Applicant represents further that Goldman will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria of section 408(a) of the Act because, among other things:

(a) Each Covered Sale shall be made pursuant to a written Offer;

(b) Each Covered Sale shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale shall equal the par value of the ARS, plus any accrued but unpaid interest or dividends;

(d) Plans will not waive any rights or claims in connection with any Covered Sale;

(e)(1) the decision to accept an Offer or retain the ARS shall be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Goldman; and (2) neither Goldman nor any affiliate shall exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the ARS;

(f) Plans shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Offer, and the terms of Settlement Sale, shall be consistent with the requirements set forth in the Settlement Agreement;

(i) Goldman shall make available in connection with an Unrelated Sale the material terms of the Unrelated Sale, including: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due but unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available);

(j) Each Offer made in connection with a Settlement Agreement shall describe the material terms of the Settlement Sale, including the following (and shall not constitute a waiver of any claim of the tendering Plan): (1) The background of the Offer; (2) the methods and timing by which the Plan may accept the Offer; (3) the purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Offer; (4) the expiration date of the Offer; and (5) how to obtain additional information concerning the Offer.

[5] The Applicant states that while there may be communication between a Plan and Goldman subsequent to an Offer, such communication will not involve advice regarding whether the Plan should accept the Offer.

Notice to Interested Persons

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

FOR FURTHER INFORMATION CONTACT: Brian Shiker of the Department, telephone (202) 693–8552. (This is not a toll-free number.)

Louis B. Chaykin, M.D., P.A., Cross-Tested Profit Sharing Plan (the Plan), Located in Lakewood Ranch, Florida.

[*Exemption Application Number:* D–11532.]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570 Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), through (E) of the Code, shall not apply to the proposed sale (the Sale) at fair market value by the Plan of certain coins (the Collectibles), to Louis B. Chaykin, M.D. (the Applicant), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The Sale is a one-time transaction for cash;

(b) The Plan pays no commissions, fees or other expenses in connection with the Sale;

(c) The terms and conditions of the Sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party;

(d) The fair market value of the Collectibles was determined by a qualified, independent appraiser;

(e) The Plan receives no less than the fair market value of the Collectibles at the time of the Sale; and

(f) All of the participants of the Plan, with the exception of the Applicant, have been paid their benefits in full.

Summary of Facts and Representations

1. The Plan is a profit-sharing plan sponsored by Louis B. Chaykin, M.D., P.A., a private professional corporation

engaged in the practice of medicine in Lakewood Ranch, Florida. The Applicant represents that, as of January 1, 2007, there were seven (7) participants in the Plan, including five employees, the Applicant, and the Applicant's spouse. The Applicant is also the discretionary trustee of the Plan. The Plan, which was formally terminated on March 1, 2006, received a favorable determination letter from the Internal Revenue Service on May 11, 2007. The determination letter stated that the termination of the Plan did not adversely affect its qualification for Federal tax purposes.

The Applicant represents that, pursuant to the termination of the Plan, all participants (with the exception of the Applicant) have been paid their benefits in full. In this regard, the Applicant represents that, of the five employees who were participants in the Plan, two rolled over cash into their respective individual retirement accounts (IRAs), while the other three took lump sum distributions of cash. The Applicant's spouse also rolled over cash to her IRA. The Applicant himself has received prior distributions of cash to satisfy his minimum distribution requirements because he is over age 70 and a half. The Applicant has also rolled over some publicly-traded securities in kind to his IRA. Apart from the Collectibles, the Plan holds residual assets consisting of a limited partnership interest and other coins. The Applicant represents that the total value of the non-Collectibles held by the Plan as of December 31, 2008 is $63,720.17.

2. The Applicant represents that the IRA custodial trustee which the Applicant has designated to receive his rollover contributions from the Plan will not accept the Collectibles as IRA assets. Accordingly, the Applicant requests an exemption to permit the Sale of the Collectibles and the distribution of the resulting cash proceeds to himself, which he would then roll over into his IRA account. The Plan had originally purchased the Collectibles from unrelated parties at various times between 2005 and 2008. The Applicant also represents that the Plan purchased the Collectibles as an investment and held the Collectibles for appreciation. The Applicant states that the Collectibles have never used by himself, or by any other party in interest with respect to the Plan, for personal purposes. The Applicant represents that the proposed Sale will maximize the preservation of the Plan assets by avoiding the payment of sales commissions, advertising costs and other selling expenses which would generally be incurred in open market sales.[6] In addition, the Applicant states that the Plan will receive an amount in cash reflecting the fair market value of the Collectibles, as established by a qualified, independent appraiser.

3. The Collectibles were appraised in June of 2009 by Mr. John Albanese of Blanchard and Company, an independent qualified appraiser located in New Orleans, Louisiana. Mr. Albanese represents that he has over 28 years experience in the appraisal of coins. Mr. Albanese further states that he has not previously sold or been promised future sales of coins to the Applicant. Additionally, Mr. Albanese represents that less than 1% of the gross receipts of his business for the past year are derived from the Applicant. Mr. Albanese states that he examined the Collectibles submitted to him by the Applicant and, after evaluating the condition of the Collectibles, he reviewed the Coin Deal Newsletter as well as major auction results to arrive at their current value. Based on the foregoing methodology, Mr. Albanese determined that, as of June 3, 2009, the Collectibles had a fair market value of $284,895.

4. In summary, the applicant represents that the transaction will satisfy the statutory requirements for an exemption under section 408(a) of the Act because: (a) The Sale is a one-time transaction for cash; (b) The Plan pays no commissions, fees or other expenses in connection with the Sale; (c) The terms and conditions of the Sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party; (d) The fair market value of the Collectibles was determined by Mr. Albanese, a qualified, independent appraiser; and (e) The Plan receives no less than the fair market value of the Collectibles at the time of the Sale.

Notice to Interested Persons: The Applicant represents that the Plan has been terminated and that all participants of the Plan (with the exception of the Applicant) have been paid their benefits in full. Accordingly, the only practical means of notifying terminated plan participants is by publication of the proposed exemption in the **Federal Register**. Therefore, the Department must receive all written comments and requests for a hearing no later than forty-five (45) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8550. (This is not a toll-free number).

The Coca-Cola Company (TCCC, or the Applicant), Located in Atlanta, Georgia. [Application No. D–11555.]

Proposed Exemption

The Department is considering granting an 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, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) and (b) of the Act shall not apply to the reinsurance of risks and the receipt of premiums therefrom by Red Re Inc. (Red Re), in connection with a medical stop-loss insurance policy sold by the Prudential Insurance Company of America (Prudential), or any successor insurance company to Prudential which is unrelated to TCCC, which would pay for certain benefits under the TCCC Retiree Health Plan (the Plan), provided the following conditions are met:

(a) Red Re—

(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with TCCC that is described in section 3(14)(E) or (G) of the Act;

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as defined in section 3(10) of the Act;

(3) Has obtained a Certificate of Authority from the Insurance Commissioner of its domiciliary state that has not been revoked or suspended;

(4)(A) Has undergone an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction; or

(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, by the Insurance Commissioner of the State within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred; and

(5) Is licensed to conduct reinsurance transactions by a State whose law requires that an actuarial review of reserves be conducted annually by an

[6] Section 408(m) of the Code stipulates that the acquisition by an individual retirement account or by an individually-directed account under a plan described in section 401(a) of the Code of any collectible shall be treated (for purposes of sections 402 and 408 of the Code) as a distribution from such account in an amount equal to the cost to such account of such collectible. The Applicant represents, however, that this provision of the Code is not applicable to the proposed transaction because the Plan is trusteed by a discretionary trustee (*e.g.,* the Applicant), and does not allow for participant direction of Plan investments. The Department is providing no determination with respect to the Applicant's representation detailed above.

independent firm of actuaries and reported to the appropriate regulatory authority; and

(b) The Plan pays no more than adequate consideration for the insurance contracts;

(c) No commissions are paid by the Plan with respect to the direct sale of such contracts or the reinsurance thereof;

(d) In the initial year of any contract involving Red Re, there will be an immediate and objectively determined benefit to the Plan's participants and beneficiaries in the form of increased benefits;

(e) In subsequent years, should the relationship with Prudential be terminated, the formula used to calculate premiums by any successor insurer will be similar to formulae used by other insurers providing comparable stop-loss coverage under similar programs. Furthermore, the premium charge calculated in accordance with the formula will be reasonable and will be comparable to the premium charged by the insurer and its competitors with the same or a better rating providing the same coverage under comparable programs;

(f) To the extent Red Re earns any profit due to favorable claims experience, such profit will be promptly returned to the Plan.

(g) The Plan only contracts with insurers with a rating of A or better from A.M. Best Company. The reinsurance arrangement between the insurer and Red Re will be indemnity insurance only, *i.e.,* the insurer will not be relieved of liability to the Plan should Red Re be unable or unwilling to cover any liability arising from the reinsurance arrangement;

(h) The Plan retains an independent fiduciary (the Independent Fiduciary), at TCCC's expense, to analyze the transactions and render an opinion that the requirements of sections (a) thorough (g) have been complied with. For purposes of this exemption, the Independent Fiduciary is a person who:

(1) Is not directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with TCCC or Red Re (this relationship hereinafter referred to as an ''Affiliate'');

(2) Is not an officer, director, employee of, or partner in TCCC or Red Re (or any Affiliate of either);

(3) Is not a corporation or partnership in which TCCC or Red Re has an ownership interest or is a partner;

(4) Does not have an ownership interest in TCCC or Red Re, or any of either's Affiliates;

(5) Is not a fiduciary with respect to the Plan prior to the appointment; and

(6) Has acknowledged in writing acceptance of fiduciary responsibility and has agreed not to participate in any decision with respect to any transaction in which the Independent Fiduciary has an interest that might affect its best judgment as a fiduciary.

For purposes of this definition of an ''Independent Fiduciary,'' no organization or individual may serve as an Independent Fiduciary for any fiscal year if the gross income received by such organization or individual (or partnership or corporation of which such individual is an officer, director, or 10 percent or more partner or shareholder) from TCCC, Red Re, or their Affiliates (including amounts received for services as Independent Fiduciary under any prohibited transaction exemption granted by the Department) for that fiscal year exceeds 3 percent of that organization or individual's annual gross income from all sources for the prior fiscal year.

In addition, no organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow funds from TCCC, Red Re, or their Affiliates during the period that such organization or individual serves as Independent Fiduciary, and continuing for a period of six months after such organization or individual ceases to be an Independent Fiduciary, or negotiates any such transaction during the period that such organization or individual serves as Independent Fiduciary.

Summary of Facts and Representations

1. TCCC, which is headquartered in Atlanta, Georgia, is the world's largest beverage company and markets four of the world's top five non-alcoholic sparkling brands. In 2008, TCCC employed 92,400 associates worldwide with approximately 13,000 associates in the United States. TCCC reported revenue of approximately $31.2 billion in 2008.

2. Red Re is a captive insurance company owned by Coca-Cola Oasis, Inc., a consolidated entity of TCCC. Red Re was established on March 14, 2006 in Charleston, South Carolina. Red Re was issued a Certificate of Authority permitting it to transact the business of a captive insurance company by the State of South Carolina on April 25, 2006. Red Re is a sound, viable insurance company that has been in business since 2006. Management and administrative services for Red Re are performed by Marsh Management Services, Inc. of Charleston, South Carolina. Red Re currently provides deductible reimbursement policies to TCCC for selected automobile liability, product liability, general liability, workers' compensation and terrorism risks. In addition, TCCC's international employee benefits for selected countries are reinsured with Red Re. As of December 31, 2008, Red Re had total capital and surplus of $18.1 million and gross written premium of $46 million.

3. TCCC provides medical benefits to eligible retired employees in the United States under the TCCC Retiree Health Plan (the Plan). The Plan provides coverage or reimbursement for major medical expenses, treatment of illness, sickness or injury, prescriptions and, in most cases, preventative care and vision exams to eligible retired employees (and their beneficiaries) of TCCC or its affiliates. Depending on the geographic area in which a Plan participant lives, there are a number of different coverage options, including an HMO option in some areas. As of January 1, 2009, the Plan provided retiree health benefits to approximately 5,000 retirees and dependents. TCCC has established a Voluntary Employees' Beneficiary Association (VEBA) as a funding vehicle for the Plan. However, TCCC retains the option of making benefit payments out of its general assets and may then seek reimbursement from the VEBA.[7] Participants make contributions to the Plan which vary from year-to-year, but which generally are set at levels intended to cover 15–20% of the Plan's costs. However, the Applicant represents that no participant contributions will be used to pay any premium for the stop-loss policy which is the subject of this proposed exemption.

4. TCCC has proposed that the VEBA purchase a non-cancellable accident and health medical stop-loss policy from the Prudential Insurance Company of America (Prudential) to insure benefits under the Plan as follows. This policy would pay the sum of all individual participant claims that are greater than a certain amount (the Attachment Point) in any year, but no more than an upper limit (the Upper Corridor Limit) for certain retirees (other than those who have either selected an HMO coverage option or are younger than age 55 on January 1, 2008) and their dependents as of the purchase date of the policy (the Covered Group). The Covered Group consists of approximately 4,000 individuals (each of whom will be

[7] *See* representation 16.

specifically identified in an attachment to the stop-loss policy). At the time the exemption application for the subject transaction was filed, it was anticipated that for those members of the Covered Group who are under age 65, the Attachment Point would be $100 and the Upper Corridor Limit would be $5,800. For those members of the Covered Group aged 65 or higher, the Attachment Point would be $100 and the Upper Corridor Limit would be $3,500. (The range of covered benefits between the Attachment Point and the Upper Corridor Limit is referred to as ''the Corridor.'') These coverage limits would apply per participant, per year. Claims below the Attachment Point would continue to be paid out of TCCC's general assets. It was also anticipated that TCCC through the VEBA, would pay a premium to Prudential of approximately $185.3 million to cover or insure benefits within the Corridor for the lifetime of the members of the Covered Group.[8]

5. The Applicant anticipates that Prudential will enter into a reinsurance agreement with Red Re for 100 percent of the risks under the stop-loss policy. Specifically, Prudential would provide the medical stop-loss insurance policy for the Plan's benefit risks in connection with the Covered Group, but Red Re would provide reinsurance coverage for 100 percent of those risks pursuant to Red Re's agreement with Prudential. Prudential's reinsurance agreement will be ''indemnity only''—that is, Prudential will not be relieved of its liability for benefits under the Plan if Red Re is unable or unwilling to satisfy the liabilities arising from the reinsurance agreements. The overall financial strength of Prudential is rated A+ by A.M. Best.

6. The Applicant represents that in connection with the proposed transaction, the Plan will pay no more than adequate consideration for the stop-loss insurance contracts with Prudential or any successor insurer. The formula that Prudential and any successor insurer will use to calculate its premiums will be similar to the formulae used by other insurers providing similar insurance coverages under similar insurance programs. Moreover, the premium charge resulting from application of the formula will be reasonable and comparable to the premium charged by the insurer and its competitors with the same rating or better, providing the same coverage under comparable programs of insurance. Finally, the Plan will not pay any commissions in connection with either the direct sale of insurance or the reinsurance transactions described herein.

7. The Applicant represents that the subject transactions have a number of advantages for the Plan. Specifically, TCCC will substantially improve benefits for members of the Covered Group by converting the currently revocable commitment to provide benefits into a fully paid-for insured arrangement that will provide them with benefits under the Plan for the rest of their lives. Currently, TCCC has reserved the right to reduce benefits or terminate the Plan at any time. Thus, for any claims not yet accrued, Plan participants do not have a guarantee or expectation that benefits will be paid. However, the VEBA's purchase of the non-cancellable medical stop-loss policy from Prudential will fully fund a contract insuring that members of the Covered Group will receive all benefits within the Corridor for the rest of their lives. If TCCC were to exercise its right to reduce benefits or terminate the Plan as to other participants who are not members of the Covered Group sometime in the future, members of the Covered Group would continue to receive all benefit payments within the Corridor. TCCC represents that this benefit enhancement is not required of TCCC as part of a legal proceeding, court order or judgment, or by State law.

8. In connection with this exemption request, Red Re engaged the services of U.S. Trust Company, N.A. (U.S. Trust), as the Independent Fiduciary for the Plan.[9] U.S. Trust is a national banking association formed under the laws of the United States and authorized to exercise all fiduciary powers that may be exercised by State banks and trust companies under the laws of the State of Connecticut. In May, 2009, BOA's Special Fiduciary Services business was acquired by Evercore Trust Company, N.A. (Evercore). All of the BOA personnel who were part of the Special Fiduciary Services business joined Evercore. TCCC gave its written consent to the transfer of its account from BOA to Evercore. Thus, for purposes of the exemption proposed herein, the Independent Fiduciary is Evercore.

9. Evercore has represented that it meets the following requirements to be an independent fiduciary:

(a) Evercore is not directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with TCCC or Red Re;

(b) Evercore is not an officer, director, employee of, or partner in TCCC or Red Re (or any Affiliate of either);

(c) Evercore is not a corporation or partnership in which TCCC or Red Re has an ownership interest or is a partner;

(d) Evercore does not own any shares of TCCC or Red Re, or any of their Affiliates, for its own account;

(e) Evercore was not a fiduciary to the Plan prior to its appointment in connection with the transactions described herein;

(f) Evercore has acknowledged, in writing, its acceptance of fiduciary obligations, and has agreed not to participate in any decision with respect to any transaction in which it would have an interest that might affect its judgment as a fiduciary;

(g) The gross income received by Evercore from TCCC or Red Re and their Affiliates (including amounts received for services as the Independent Fiduciary for the Plans under any prohibited transaction exemption granted by the Department), does not exceed 3 percent of Evercore's annual gross income from all sources for its prior fiscal year; and

(h) Evercore, and any partnership or corporation of which Evercore is an officer, director, or ten (10) percent or more partner or shareholder, will not acquire any property from, sell any property to, or borrow funds from TCCC or Red Re while it is the Independent Fiduciary for the Plan and for a period of six months thereafter.

10. Evercore represents that: (i) Red Re is licensed to do business in the State of South Carolina; and (ii) Red Re obtained a Certificate of Authority from the State of South Carolina on April 25, 2006 which has neither been revoked nor suspended. Red Re has undergone an audit examination by Ernst & Young LLP, certified CPAs, for the year ended

[8] The Upper Corridor Limits were based on an expected premium of $185.3 million for the stop-loss policy. However, since the 2006 TCCC contribution of $216 million to the VEBA, approximately $50 million in Plan benefits have been paid from the VEBA. Further, the VEBA has suffered approximately $23 million in investment losses. Thus, it is anticipated that the VEBA will pay a premium lower than $185.3 million. As a result, the Upper Corridor Limits for members of the Covered Group will be reduced. Because there may be additional changes to the value of the VEBA's assets (including potential increases due to investment earnings), TCCC is unable to predict with certainty the exact dollar amount that the Upper Corridor Limits will be until the time the policy is issued. If the exemption proposed herein is granted, the premium will be paid at that time, the Upper Corridor Limits will be fixed, and the Corridor will be guaranteed for the lifetime of the members of the Covered Group irrespective of the performance of the investment markets or claims experience. The Department expects that TCCC will provide an estimate as to the expected Upper Corridor Limits by the end of the comment period.

[9] The Independent Fiduciary was, in fact, Bank of America, N.A. (BOA), which had acquired U.S. Trust effective July 1, 2007. BOA continued to do business under the U.S. Trust name.

December 31, 2008. Evercore and its legal advisor have reviewed a copy of the audit report, and are satisfied there are no issues outstanding. Evercore has determined that Red Re is licensed to conduct reinsurance transactions by a State whose law requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries, and reported to the appropriate regulatory authority.

11. The Independent Fiduciary has represented that the Plan will pay no more than adequate consideration for the insurance contract. In addition, the Plan will pay no commissions with respect to the direct sale of the insurance contract or the reinsurance thereof.

12. The Independent Fiduciary has reviewed the proposed transactions and determined that they will provide an important financial benefit to the Plan's participants and beneficiaries. TCCC has reserved the right to modify or eliminate its retiree health benefit. By virtue of the proposed transactions, TCCC will effectively vest the Covered Group with medical benefits in an amount equal to the Corridor.[10] The terms of the arrangement provide that Prudential cannot cancel or terminate the coverage, and this will help assure benefit payments, within the coverage parameters, to participants and beneficiaries. Thus, the Independent Fiduciary has concluded that this protection of the retirees' health benefits provides an immediately and objectively determined benefit to the Plan's participants and beneficiaries as of the initial year of the contract.

13. In designing and implementing the proposed transactions, TCCC worked with Towers Perrin (TP), one of the largest benefits, insurance and reinsurance consulting firms in the world, with extensive experience in captive reinsurance transactions. TP has advised TCCC that non-cancellable medical stop-loss insurance is not a new product, but that it is offered in the market by only one insurer, John Hancock, as a method to finance post-retirement medical liabilities. Prudential is the only insurer that has developed an insurance product for such liabilities that couples a stop-loss policy with captive reinsurance. TP introduced the same concept to three other "A"-rated insurers, but none were interested in offering the coverage. TP compared the standard cost parameters of the John Hancock stop-loss policy to the Prudential/Captive product and determined that the latter has lower costs for the Plan, as measured by discounted cash flows over 50 years. TP also evaluated the costs and risks of other financing options including: paying benefits from the general assets of TCCC, trust-owned life insurance, and VEBA trusts with no insurance investments, and found that the Prudential/Captive product offered the lowest cost solution for the Plan.

14. TP represents that this type of guaranteed, long-term health insurance is not available in the market for individuals; it is only because Red Re is willing to assume these risks for TCCC retirees that the retirees can hope to obtain this valuable coverage. Thus, it is difficult to assign an absolute dollar amount to the value of the benefit enhancement. However, TP compared the value of the lifetime guarantee of coverage within the Corridor to the cost of an annuity with annual payments equal to the size of the Corridor. The Applicant states that from the perspective of the participant, having an annuity that provides cash that is equal to the amount of claims that he or she can expect to have paid by the proposed stop-loss insurance is the same as having an insurer who is obligated to pay those same claims pursuant to a contract for health insurance. TP represents that the average expected claims would be approximately $10,000 per year for retirees under age 65, and approximately $5,000 per year for retirees over age 65. Since the proposed coverage Corridors are $5,700 for retirees younger than 65 years of age and $3,400 for retirees 65 years of age and older,[11] TP assumes that the participants, on average, will use the full Corridor to cover their claims. TP then estimated the value of an annuity that would provide payments equal to the amounts the average participant will receive in health insurance coverage under the proposed transactions. TP used the present value of the expected payment each year until death is expected. TP estimates that for an individual who retires at age 55 with a life expectancy of age 85, the present value of those payments (discounted at 4%) would be approximately $77,000. TP estimates that for an individual who retires at age 65 with a life expectancy of age 85, the present value of those payments (discounted at 4%) would be approximately $46,000.

15. The Applicant represents that the policy premium charged to the Plan by Prudential does not include a profit or risk charge for Red Re. There is an assumption in Red Re's business model which anticipates an expected return on investments greater than the rate of 4% used to price the stop-loss policy. Notably, that investment "profit" may turn out to be an investment "loss" to Red Re if investment returns are less than 4%. Moreover, Red Re is taking the risk that there will not be mortality improvements that would cause benefits to be paid for longer periods than expected. Both scenarios present substantial risks, which are not accounted for in the pricing by risk charges. Nonetheless, TCCC and Red Re both represent that to the extent Red Re earns any profit due to favorable claims experience, such profit will be returned to the Plan.

16. The Applicant represents that the premiums paid to Red Re by Prudential pursuant to the proposed reinsurance arrangement, plus any investment earnings thereon, will be held in a New York Regulation 114 Trust (114 Trust). The 114 Trust is a three-way investment trust agreement involving the ceding insurance company (*i.e.,* Prudential), a financial institution (the trustee), and the reinsurer (*i.e.,* Red Re).[12] The 114 Trust is a method for securing the obligations of an insurance company that cedes reserves to reinsurers not admitted in the State of the ceding company. It is named after Regulation 114 of the Official Compilation of Codes, Rules and Regulations of the New York State Insurance Department (11 NYCRR 4). Under Regulation 114, the reinsurer (Red Re) establishes a trust of which the ceding company (Prudential) is the beneficiary; the beneficiary is entitled to demand assets from the trust at any time to satisfy the reinsurer's obligations under the reinsurance agreement. Regulation 114 prohibits the assets in a 114 Trust from being loaned to any affiliate of the reinsurer. Thus, the Applicant represents that no loans will be made by Red Re to TCCC using assets held by Red Re as a result of the proposed transaction.

17. TCCC has represented that it will retain the option of making benefit payments out of its general assets and may then seek reimbursement from the VEBA. TCCC represents that many claims paid under the Plan will be paid

[10] The Applicant states that since the right of members of the Covered Group to have claims within the Corridor paid for the rest of their lives will be guaranteed under the proposed transaction, it may be said that members of the Covered Group have a vested right to receive benefits in that amount. However, the guarantee is to dollar amounts, not particular types of medical procedures and treatments that may be covered under the Plan.

[11] The exact coverage limits will be set closer to the time the transaction is executed.

[12] In this proposed exemption, the Department is expressing no opinion on whether the assets of the 114 Trust constitute Plan assets.

directly by TCCC without expectation of any reimbursement from the VEBA. For example, where a claim is paid that falls outside the Corridor, TCCC will likely pay the claim out of its general assets without seeking any reimbursement from the VEBA. However, because the VEBA, and not TCCC, will be the policyholder of the Stop-Loss Policy, claims within the Corridor must be submitted by the VEBA to Prudential, which will in turn submit them to Red Re. In order to avoid the need for a separate administrative mechanism (under which some claims would be paid directly by TCCC while others are paid directly by the VEBA), TCCC will pay such claims and then submit them to the VEBA for reimbursement (with the VEBA submitting them to Prudential in turn).

The Applicant represents that to the extent that this arrangement might be considered an extension of credit between a party in interest and a Plan, TCCC will fully comply with the provisions of Prohibited Transaction Exemption (PTE) 80–26, as amended (71 FR 17917, April 7, 2006). In particular, no interest or fee will be charged to the Plan when TCCC pays a claim and later seeks reimbursement. Further, the proceeds of such extension of credit will be used only to pay operating expenses of the Plan, including benefits paid in accordance with the terms of the Plan. Such loan or extension of credit would be unsecured, will not be made by an employee benefit plan, and will not be the type of loan described in section 408(b)(3) of the Act. It is not anticipated that more than 60 days will pass between the date TCCC pays a claim and the date the VEBA reimburses TCCC for such claim; to ensure compliance with the provisions of PTE 80–26 in the event unforeseen delay results in more than 60 days passing before reimbursement, a written loan agreement will be entered into setting forth the material terms of such extension of credit between TCCC and the Plan.[13]

18. TCCC represents that an audit procedure will be in place to ensure that reimbursements received by TCCC do not exceed the amount due to TCCC. TCCC represents that the Plan will undergo an annual audit by an independent qualified public accountant that will contain the following: (a) A description of the process, methodology and criteria used to select the Plan's transactions which comprise the sample collected for review and an explanation of how the sample was objectively determined to be representative of the reimbursements made during the Plan year; (b) an explanation of why the number of transactions comprising the sample selected for review was appropriate, taking into account, among other things, each instance in which there was a specific finding that there was a reimbursement that exceeded the amount due to TCCC; and (c) specific findings made (without condition, qualification, caveat or limitation) by the independent qualified public accountant for each instance in which a reimbursement exceeded the amount due to TCCC. The audit will be completed within the time frame required for the timely filing of the Plan's Form 5500. A copy of the audit will be provided to the Independent Fiduciary within 30 days after the audit is received by TCCC.

19. In summary, the Applicant represents that the proposed reinsurance transactions will meet the criteria of section 408(a) of the Act because: (a) The Plan's participants and beneficiaries are afforded insurance protection by Prudential, a carrier rated A or better by A.M. Best; (b) Red Re, which will enter into the reinsurance agreements with Prudential, is a sound and viable insurance company; (c) the protections provided to the Plan and its participants and beneficiaries under the proposed reinsurance transactions are based, in part, on those required for direct insurance by a ''captive'' insurer, under the conditions of Prohibited Transaction Exemption 79–41 (PTE 79–41), 44 FR 46365 (notwithstanding certain other requirements related to, among other things, the amount of gross premiums or annuity considerations received from customers who are not related to, or affiliated with, the insurer);[14] (d) the Plan's Independent Fiduciary, has reviewed the proposed reinsurance transaction and has determined that the transaction is appropriate for, and in the best interests of, the Plan and that there will be an immediate benefit to the Plan's participants as a result thereof by reason of the guaranteed payment of benefits in the Corridor by Prudential; and (e) the Independent Fiduciary will monitor compliance by the parties with the terms and conditions of the proposed reinsurance transaction, and will take whatever action is necessary and appropriate to safeguard the interests of the Plans and of their participants and beneficiaries.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

Columbia Management Advisors, LLC (Columbia, or the Applicant) and its Current and Future Affiliates (collectively, the Applicants), Located in Boston, Massachusetts.

[Application No. D–11556.]

Proposed Exemption

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Transactions

If the proposed exemption is granted, the restrictions of section 406 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 (F) of the Code, shall not apply to the purchase of certain securities (the Securities), as defined, below in Section III(i), by an Asset Manager, as defined, below, in Section III(d), from any person other than such Asset Manager, during the existence of an underwriting or selling syndicate with respect to such Securities, where a broker-dealer affiliated with Columbia (the Affiliated Broker-Dealer), as defined, below, in Section III(b), is a manager or member of such syndicate and the Asset

[13] The Department expresses no opinion as to whether such proposed arrangement would be exempt under PTE 80–26.

[14] The proposal of this exemption should not be interpreted as an endorsement by the Department of the transactions described herein. The Department notes that the fiduciary responsibility provisions of Part 4 of Title I of the Act apply to the fiduciary's decision to engage in the reinsurance arrangement.

Specifically, section 404(a)(1) of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of the plan. In this regard, the Department is not providing any opinion as to whether a particular insurance or investment product, strategy or arrangement would be considered prudent or in the interests of a plan, as required by section 404 of the Act. The determination of the prudence of a particular product or arrangement must be made by a plan fiduciary after appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular product or arrangement involved, including the plan's potential exposure to losses and the role a particular insurance or investment product plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties and responsibilities (*see* 29 CFR 250.404a–1).

Manager purchases such Securities, as a fiduciary:

(a) On behalf of an employee benefit plan or employee benefit plans (Client Plan(s)), as defined, below, in Section III(f); or

(b) On behalf of Client Plans, and/or In-House Plans, as defined, below, in Section III(m), which are invested in a pooled fund or in pooled funds (Pooled Fund(s)), as defined, below, in Section III(g); provided that the conditions as set forth, below, in Section II, are satisfied (An affiliated underwriter transaction (AUT)).[15]

Section II—Conditions

The proposed exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following requirements:

(a)(1) The Securities to be purchased are either—

(i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a *et seq.*). If the Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities:

(A) Are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States,

(B) Are issued by a bank,

(C) Are exempt from such registration requirement pursuant to a Federal statute other than the 1933 Act, or

(D) Are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (the 1934 Act) (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding twelve (12) months; or

(ii) Part of an issue that is an Eligible Rule 144A Offering, as defined in SEC Rule 10f–3 (17 CFR 270.10f–3(a)(4)).[16] Where the Eligible Rule 144A Offering of the Securities is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum;

(2) The Securities to be purchased are purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that—

(i) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such Securities are debt securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased; and

(3) The Securities to be purchased are offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if—

(i) Such Securities are purchased by others pursuant to a rights offering; or

(ii) Such Securities are offered pursuant to an over-allotment option.

(b) The issuer of the Securities to be purchased pursuant to this proposed exemption must have been in continuous operation for not less than three years, including the operation of any predecessors, unless the Securities to be purchased are—

(1) Non-convertible debt securities rated in one of the four highest rating categories by Standard & Poor's Rating Services, Moody's Investors Service, Inc., FitchRatings, Inc., Dominion Bond Rating Service Limited, Dominion Bond Rating Service, Inc., or any successors thereto (collectively, the Rating Organizations), provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(2) Debt securities issued or fully guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Debt securities which are fully guaranteed by a person (the Guarantor) that has been in continuous operation for not less than three years, including the operation of any predecessors, provided that such Guarantor has issued other securities registered under the 1933 Act; or if such Guarantor has issued other securities which are exempt from such registration requirement, such Guarantor has been in continuous operation for not less than three years, including the operation of any predecessors, and such Guarantor is:

(a) A bank; or

(b) An issuer of securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(c) An issuer of securities that are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such securities and that has filed all reports required to be filed thereunder with the SEC during the preceding twelve (12) months.

(c) The aggregate amount of Securities of an issue purchased, pursuant to this proposed exemption, by the Asset Manager with: (i) The assets of all Client Plans; and (ii) The assets, calculated on a *pro-rata* basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the Asset Manager; and (iii) The assets of plans to which the Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c) does not exceed:

(1) Ten percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities;

(2) Thirty-five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in one of the four highest rating categories by at least one of the Rating Organizations, provided that none of the Rating Organizations rates such Securities in a category lower

[15] For purposes of this proposed exemption an In-House Plan may engage in AUTs only through investment in a Pooled Fund.

[16] SEC Rule 10f–3(a)(4), 17 CFR 270.10f–3(a)(4), states that the term ''Eligible Rule 144A Offering'' means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 [15 U.S.C. 77d(d)], rule 144A thereunder [§ 230.144A of this chapter], or rules 501–508 thereunder [§§ 230.501–230–508 of this chapter];

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

than the fourth highest rating category; or

(3) Twenty-five percent (25%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the sixth highest rating category; and

(4) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) may not be used to purchase any Securities being offered, if such Securities are debt securities rated lower than the sixth highest rating category by any of the Rating Organizations;

(5) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Section II(c)(1), (2), and (3), above, of this proposed exemption, the amount of Securities in any issue (whether equity or debt securities) purchased, pursuant to this proposed exemption, by the Asset Manager on behalf of any single Client Plan, either individually or through investment, calculated on a *pro-rata* basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue, and;

(6) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages, described, above, in Section II(c)(1)–(3) and (5), is the total of:

(i) The principal amount of the offering of such class of Securities sold by underwriters or members of the selling syndicate to ''qualified institutional buyers'' (QIBs), as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)); plus

(ii) The principal amount of the offering of such class of Securities in any concurrent public offering.

(d) The aggregate amount to be paid by any single Client Plan in purchasing any Securities which are the subject of this proposed exemption, including any amounts paid by any Client Plan or In-House Plan in purchasing such Securities through a Pooled Fund, calculated on a *pro-rata* basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan or In-House Plan, as of the last day of the most recent fiscal quarter of such Client Plan or In-House Plan prior to such transaction.

(e) The covered transactions are not part of an agreement, arrangement, or understanding designed to benefit the Asset Manager or its affiliate.

(f) The Affiliated Broker-Dealer does not receive, either directly, indirectly, or through designation, any selling concession, or other compensation or consideration that is based upon the amount of Securities purchased by any single Client Plan, or that is based on the amount of Securities purchased by Client Plans or In-House Plans through Pooled Funds, pursuant to this proposed exemption. In this regard, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designations generated by purchases of the Securities by the Asset Manager on behalf of any single Client Plan or any Client Plan or In-House Plan in Pooled Funds.

(g)(1) The amount the Affiliated Broker-Dealer receives in management, underwriting, or other compensation or consideration is not increased through an agreement, arrangement, or understanding for the purpose of compensating the Affiliated Broker-Dealer for foregoing any selling concessions for those Securities sold pursuant to this proposed exemption. Except as described above, nothing in this Section II(g)(1) shall be construed as precluding the Affiliated Broker-Dealer from receiving management fees for serving as manager of the underwriting or selling syndicate, underwriting fees for assuming the responsibilities of an underwriter in the underwriting or selling syndicate, or other compensation or consideration that is not based upon the amount of Securities purchased by the Asset Manager on behalf of any single Client Plan, or on behalf of any Client Plan or In-House Plan participating in Pooled Funds, pursuant to this proposed exemption; and

(2) The Affiliated Broker-Dealer shall provide to the Asset Manager a written certification, dated and signed by an officer of the Affiliated Broker-Dealer, stating the amount that the Affiliated Broker-Dealer received in compensation or consideration during the past quarter, in connection with any offerings covered by this proposed exemption, was not adjusted in a manner inconsistent with Section II(e), (f), or (g) of this proposed exemption.

(h) The covered transactions are performed under a written authorization executed in advance by an independent fiduciary of each single Client Plan (the Independent Fiduciary), as defined, below, in Section III(h).

(i) Prior to the execution by an Independent Fiduciary of a single Client Plan of the written authorization described, above, in Section II(h), the following information and materials (which may be provided electronically) must be provided by the Asset Manager to such Independent Fiduciary.

(1) A copy of the Notice of Proposed Exemption (the Notice) and a copy of the final exemption (the Grant) as published in the **Federal Register**, provided that the Notice and the Grant are supplied simultaneously; and

(2) Any other reasonably available information regarding the covered transactions that such Independent Fiduciary requests the Asset Manager to provide.

(j) Subsequent to the initial authorization by an Independent Fiduciary of a single Client Plan permitting the Asset Manager to engage in the covered transactions on behalf of such single Client Plan, the Asset Manager will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary requests the Asset Manager to provide.

(k)(1) In the case of an existing employee benefit plan investor (or existing In-House Plan investor, as the case may be) in a Pooled Fund, such Pooled Fund may not engage in any covered transactions pursuant to this proposed exemption, unless the Asset Manager provides the written information, as described, below, and within the time period described, below, in this Section II(k)(2), to the Independent Fiduciary of each such plan participating in such Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund).

(2) The following information and materials (which may be provided electronically) shall be provided by the Asset Manager not less than 45 days prior to such Asset Manager engaging in the covered transactions on behalf of a Pooled Fund, pursuant to this proposed exemption, and provided further that the information described below, in this Section II(k)(2)(i) and (iii) is supplied simultaneously:

(i) A notice of the intent of such Pooled Fund to purchase Securities pursuant to this proposed exemption, a copy of this Notice, and a copy of the Grant, as published in the **Federal Register**;

(ii) Any other reasonably available information regarding the covered transactions that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the Asset Manager to provide; and

(iii) A termination form expressly providing an election for the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Such form shall include instructions specifying how to use the form. Specifically, the instructions will explain that such plan (or such In-House Plan) has an opportunity to withdraw its assets from a Pooled Fund for a period of no more than 30 days after such plan's (or such In-House Plan's) receipt of the initial notice of intent, described, above, in Section II(k)(2)(i), and that the failure of the Independent Fiduciary of such plan (or fiduciary of such In-House Plan) to return the termination form to the Asset Manager in the case of a plan (or In-House Plan) participating in a Pooled Fund by the specified date shall be deemed to be an approval by such plan (or such In-House Plan) of its participation in the covered transactions as an investor in such Pooled Fund.

Further, the instructions will identify the Asset Manager and the Affiliated Broker-Dealer and will provide the address of the Asset Manager. The instructions will state that this proposed exemption may be unavailable, unless the fiduciary of each plan participating in the covered transactions as an investor in a Pooled Fund is, in fact, independent of the Asset Manager and the Affiliated Broker-Dealer. The instructions will also state that the fiduciary of each such plan must advise the Asset Manager, in writing, if it is not an ''Independent Fiduciary,'' as that term is defined, below, in Section III(h).

For purposes of this Section II(k), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this proposed exemption for each plan be independent of the Asset Manager shall not apply in the case of an In-House Plan.

(l)(1) In the case of each plan (and in the case of each In-House Plan) whose assets are proposed to be invested in a Pooled Fund after such Pooled Fund has satisfied the conditions set forth in this proposed exemption to engage in the covered transactions, the investment by such plan (or by such In-House Plan) in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary representing such plan (or the prior written authorization by the fiduciary of such In-House Plan, as the case may be), following the receipt by such Independent Fiduciary of such plan (or by the fiduciary of such In-House Plan, as the case may be) of the written information described, above, in Section II(k)(2)(i) and (ii), provided that the Notice and the Grant, described above in Section II(k)(2)(i), are provided simultaneously.

(2) For purposes of this Section II(l), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this proposed exemption for each plan proposing to invest in a Pooled Fund be independent of the Asset Manager and its affiliates shall not apply in the case of an In-House Plan.

(m) Subsequent to the initial authorization by an Independent Fiduciary of a plan (or by a fiduciary of an In-House Plan) to invest in a Pooled Fund that engages in the covered transactions, the Asset Manager will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary of such plan (or the fiduciary of such In-House Plan, as the case may be) requests the Asset Manager to provide.

(n) At least once every three months, and not later than 45 days following the period to which such information relates, the Asset Manager shall furnish:

(1) In the case of each single Client Plan that engages in the covered transactions, the information described, below, in this Section II(n)(3)–(7), to the Independent Fiduciary of each such single Client Plan.

(2) In the case of each Pooled Fund in which a Client Plan (or in which an In-House Plan) invests, the information described, below, in this Section II(n)(3)–(6) and (8), to the Independent Fiduciary of each such Client Plan (and to the fiduciary of each such In-House Plan) invested in such Pooled Fund.

(3) A quarterly report (the Quarterly Report) (which may be provided electronically) which discloses all the Securities purchased pursuant to this proposed exemption during the period to which such report relates on behalf of the Client Plan, In-House Plan, or Pooled Fund to which such report relates, and which discloses the terms of each of the transactions described in such report, including:

(i) The type of Securities (including the rating of any Securities which are debt securities) involved in each transaction;

(ii) The price at which the Securities were purchased in each transaction;

(iii) The first day on which any sale was made during the offering of the Securities;

(iv) The size of the issue of the Securities involved in each transaction;

(v) The number of Securities purchased by the Asset Manager for the Client Plan, In-House Plan, or Pooled Fund to which the transaction relates;

(vi) The identity of the underwriter from whom the Securities were purchased for each transaction;

(vii) The underwriting spread in each transaction (*i.e.,* the difference, between the price at which the underwriter purchases the Securities from the issuer and the price at which the Securities are sold to the public);

(viii) The price at which any of the Securities purchased during the period to which such report relates were sold; and

(ix) The market value at the end of the period to which such report relates of the Securities purchased during such period and not sold;

(4) The Quarterly Report contains:

(i) A representation that the Asset Manager has received a written certification signed by an officer of the Affiliated Broker-Dealer, as described, above, in Section II(g)(2), affirming that, as to each AUT covered by this proposed exemption during the past quarter, the Affiliated Broker-Dealer acted in compliance with Section II(e), (f), and (g) of this proposed exemption, and

(ii) A representation that copies of such certifications will be provided upon request;

(5) A disclosure in the Quarterly Report that states that any other reasonably available information regarding a covered transaction that an Independent Fiduciary (or fiduciary of an In-House Plan) requests will be provided, including, but not limited to:

(i) The date on which the Securities were purchased on behalf of the Client Plan (or the In-House Plan) to which the disclosure relates (including Securities purchased by Pooled Funds in which such Client Plan (or such In-House Plan) invests);

(ii) The percentage of the offering purchased on behalf of all Client Plans (and the *pro-rata* percentage purchased on behalf of Client Plans and In-House Plans investing in Pooled Funds); and

(iii) The identity of all members of the underwriting syndicate;

(6) The Quarterly Report discloses any instance during the past quarter where the Asset Manager was precluded for any period of time from selling Securities purchased under this proposed exemption in that quarter because of its status as an affiliate of an Affiliated Broker-Dealer and the reason for this restriction;

(7) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each single Client Plan that engages in the covered transactions that the authorization to engage in such covered transactions may be terminated, without penalty to such single Client Plan, within five (5) days after the date that the Independent Fiduciary of such single Client Plan informs the person identified in such notification that the authorization to engage in the covered transactions is terminated; and

(8) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each Client Plan (and to the fiduciary of each In-House Plan) that engages in the covered transactions through a Pooled Fund that the investment in such Pooled Fund may be terminated, without penalty to such Client Plan (or such In-House Plan), within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans, after the date that the Independent Fiduciary of such Client Plan (or the fiduciary of such In-House Plan, as the case may be) informs the person identified in such notification that the investment in such Pooled Fund is terminated.

(o) For purposes of engaging in covered transactions, each Client Plan (and each In-House Plan) shall have total net assets with a value of at least $50 million (the $50 Million Net Asset Requirement). For purposes of engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be) (the $100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in covered transactions, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets with a value of at least $50 million. Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets with a value of at least $50 million, the $50 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which has total net assets with a value of at least $50 million. For purposes of a Pooled Fund engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be). Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or In-House Plan, as the case may be), the $100 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be), and the Pooled Fund itself qualifies as a QIB, as determined pursuant to SEC Rule 144A (17 CFR 230.144A(a)(F)).

For purposes of the net asset requirements described above, in this Section II(o), where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $50 Million Net Asset Requirement (or in the case of an Eligible Rule 144A Offering, the $100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

(p) The Asset Manager qualifies as a ''qualified professional asset manager'' (QPAM), as that term is defined under Part V(a) of PTE 84–14. Further, the Asset Manager, which qualifies as a QPAM, must also have total client assets under its management and control in excess of $5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of $1 million.

(q) No more than 20 percent of the assets of a Pooled Fund at the time of a covered transaction are comprised of assets of In-House Plans for which the Asset Manager or the Affiliated Broker-Dealer exercises investment discretion.

(r) The Asset Manager and the Affiliated Broker-Dealer, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons, described, below, in Section II(s), to determine whether the conditions of this proposed exemption have been met, except that—

(1) No party in interest with respect to a plan which engages in the covered transactions, other than the Asset Manager and the Affiliated Broker-Dealer, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by Section II(s); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of the Asset Manager, or the Affiliated Broker-Dealer, as applicable, such records are lost or destroyed prior to the end of the six-year period.

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

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

(ii) Any fiduciary of any plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary; or

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by a plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a plan that engages in the covered transactions, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above, in Section II(s)(1)(ii)–(iv), shall be authorized to examine trade secrets of the Asset Manager, or the Affiliated Broker-Dealer, or commercial or financial information which is privileged or confidential; and

(3) Should the Asset Manager or the Affiliated Broker-Dealer refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(s)(2) above, the Asset Manager shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III—Definitions

(a) The term, ''the Applicant,'' means Columbia Management Advisors, LLC.

(b) The term, ''Affiliated Broker-Dealer,'' means any broker-dealer affiliate, as ''affiliate'' is defined, below, in Section III(c), of the Applicant, as

''Applicant'' is defined, above, in Section III(a), that meets the requirements of this proposed exemption. Such Affiliated Broker-Dealer may participate in an underwriting or selling syndicate as a manager or member. The term, ''manager,'' with respect to a syndicate, means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the Securities, as defined below, in Section III(i), being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(c) The term ''affiliate'' of a person includes:

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

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

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

For purposes of this proposed exemption, the definition of ''affiliate'' shall include any entity that satisfies such definition in the future.

(d) The term ''Asset Manager'' means Columbia or an affiliate of Columbia as defined above in Section III(c), which entity acts as the fiduciary with respect to Client Plan(s), as defined in Section III(f), below, or Pooled Fund(s), as defined in Section III(g), below.

(e) The term, ''control,'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term, ''Client Plan(s),'' means an employee benefit plan(s) that is subject to the Act and/or the Code, and for which plan(s) an Asset Manager exercises discretionary authority or discretionary control respecting management or disposition of some or all of the assets of such plan(s), but excludes In-House Plans, as defined, below, in Section III(m).

(g) The term, ''Pooled Fund(s),'' means a common or collective trust fund(s) or a pooled investment fund(s):

(1) In which employee benefit plan(s) subject to the Act and/or Code invest,

(2) Which is maintained by an Asset Manager, and

(3) For which such Asset Manager exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s).

(h)(1) The term, ''Independent Fiduciary,'' means a fiduciary of a plan who is unrelated to, and independent of the Asset Manager and the Affiliated Broker-Dealer. For purposes of this proposed exemption, a fiduciary of a plan will be deemed to be unrelated to, and independent of the Asset Manager and the Affiliated Broker-Dealer, if such fiduciary represents in writing that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for the transactions described above, in Section I of this proposed exemption, is an officer, director, or highly compensated employee (within the meaning of Code section 4975(e)(2)(H)) of the Asset Manager and the Affiliated Broker-Dealer, and represents that such fiduciary shall advise the Asset Manager within a reasonable period of time after any change in such facts occur.

(2) Notwithstanding anything to the contrary in this Section III(h), a fiduciary of a plan is not independent:

(i) If such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Asset Manager or the Affiliated Broker Dealer;

(ii) If such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager, or the Affiliated Broker-Dealer for his or her own personal account in connection with any transaction described in this proposed exemption;

(iii) If any officer, director, or highly compensated employee (within the meaning of Code section 4975(e)(2)(H)) of the Asset Manager responsible for the transactions described above, in Section I of this proposed exemption, is an officer, director, or highly compensated employee (within the meaning of Code section 4975(e)(2)(H)) of the sponsor of the plan or of the fiduciary responsible for the decision to authorize or terminate authorization for the transactions described above, in Section I. However, if such individual is a director of the sponsor of the plan or of the responsible fiduciary, and if he or she abstains from participation in: (A) The choice of the plan's investment manager/adviser; and (B) the decision to authorize or terminate authorization for transactions described above, in Section I, then this Section III(h)(2)(iii) shall not apply.

(3) The term, ''officer,'' means a president, any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance), or any other officer who performs a policy-making function for Columbia or any affiliate thereof.

(i) The term, ''Securities,'' shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a–2(36)(2001)). For purposes of this proposed exemption, mortgage-backed or other asset-backed securities rated by one of the Rating Organizations, as defined, below, in Section III(l), will be treated as debt securities.

(j) The term, ''Eligible Rule 144A Offering,'' shall have the same meaning as defined in SEC Rule 10f–3(a)(4) (17 CFR 270.10f–3(a)(4)) under the 1940 Act).

(k) The term, ''qualified institutional buyer,'' or the term, ''QIB,'' shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(l) The term, ''Rating Organizations,'' means Standard & Poor's Rating Services, Moody's Investors Service, Inc., Fitch Ratings, Inc., Dominion Bond Rating Service Limited, and Dominion Bond Rating Service, Inc., or any successors thereto.

(m) The term, ''In-House Plan(s),'' means an employee benefit plan(s) that is subject to the Act and/or the Code, and that is sponsored by the Applicant as defined, above, in Section III(a), or its affiliate, as defined in Section III(c), for its own employees.

Summary of Facts and Representations

The Applicants

1. The Applicants consist of Columbia and its current and future affiliates. Columbia and Columbia Wanger Asset Management, LP (CWA), both of which are SEC-registered investment advisers, are wholly-owned subsidiaries of Columbia Management Group, LLC (CMG), and collectively had assets under management of approximately $405 billion as of September 30, 2008. Of these assets, Columbia managed approximately $380 billion. CMG, including Columbia and CWA, is the investment management division of Bank of America Corporation (with its subsidiaries, BOA). The Applicants manage institutional portfolios for mutual funds, corporations, pension plans endowments, foundations, healthcare organizations, educational organizations, public agencies, insurance companies and Taft-Hartley plans. They also act as fiduciary to numerous employee benefit plans and individual retirement accounts, providing trustee, custodial recordkeeping, consulting and investment management services.

CMG is wholly-owned by BOA, which is one of the world's largest financial institutions, serving individual consumers, small and middle market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. It serves more than 59 million consumer and small-business relationships. As of October 2008, BOA served clients in more than 150 countries and had relationships with 99 percent of the U.S. Fortune 500 companies and 80 percent of the Fortune Global 500. BOA had approximately $564 billion in assets under management as of September 30, 2008.

On September 15, 2008, BOA announced an agreement to acquire Merrill Lynch & Co., Inc. (ML) in an all-stock transaction (the Merger). The Merger became effective on January 1, 2009. Per the agreement, a wholly-owned merger subsidiary of BOA merged with and into ML, with ML continuing as the surviving company that is a subsidiary of BOA. ML had total client assets of approximately $1.5 trillion and more than 16,000 financial advisors as of September 26, 2008. Upon consummation of the Merger, ML and its affiliates became affiliates of the Applicants.

2. The Applicants' activities are subject to oversight and are regulated by Federal government agencies, such as the SEC, the Federal Reserve Board and the Office of the Comptroller of the Currency, as well as by State government agencies, and industry self-regulatory organizations (*e.g.,* the New York Stock Exchange and the Financial Industry Regulatory Authority).

Requested Exemption

3. The Applicants request a prohibited transaction exemption that would permit the purchase of certain Securities by an Asset Manager (the Asset Manager), acting on behalf of Client Plans subject to the Act or Code, and acting on behalf of Client Plans and In-House Plans which are invested in certain Pooled Funds for which an Asset Manager acts as a fiduciary, from any person other than such Asset Manager or any affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such Securities, where an Affiliated Broker-Dealer is a manager or member of such syndicate. Further, the Affiliated Broker-Dealer will receive no selling concessions in connection with the Securities sold to such plans.

4. The Applicants represent that if the Affiliated Broker-Dealer is a member of an underwriting or selling syndicate, the Asset Manager may purchase underwritten securities for Client Plans in accordance with Part III of Prohibited Transaction Exemption (PTE) 75–1, (40 FR 50845, October 31, 1975). Part III provides limited relief from the Act's prohibited transaction provisions for plan fiduciaries that purchase securities from an underwriting or selling syndicate of which the fiduciary or an affiliate is a member. However, such relief is not available if the Affiliated Broker-Dealer manages the underwriting or selling syndicate.

5. In addition, regardless of whether a fiduciary or its affiliate is a manager or merely a member of an underwriting or selling syndicate, PTE 75–1 does not provide relief for the purchase of unregistered securities. This includes securities purchased by an underwriter for resale to a ''qualified institutional buyer'' (QIB) pursuant to the SEC's Rule 144A under the 1933 Act. Rule 144A is commonly utilized in connection with sales of securities issued by foreign corporations to U.S. investors that are QIBs. Notwithstanding the unregistered nature of such shares, it is represented that syndicates selling securities under Rule 144A (Rule 144A Securities) are the functional equivalent of those selling registered securities.

6. The Applicants represent that the Affiliated Broker-Dealer regularly serves as manager of underwriting or selling syndicates for registered securities, and as a manager or a member of underwriting or selling syndicates for Rule 144A Securities. Accordingly, the Asset Manager is currently unable to purchase on behalf of the Client Plans both registered securities and Rule 144A Securities sold in such offerings, resulting in such Client Plans being unable to participate in significant investment opportunities.

7. It is represented that since 1975, there has been a significant amount of consolidation in the financial services industry in the United States. As a result, there are more situations in which a plan fiduciary may be affiliated with the manager of an underwriting syndicate. Further, many plans have expanded investment portfolios in recent years to include securities issued by foreign corporations. As a result, the exemption provided in PTE 75–1, Part III, is often unavailable for purchase of domestic and foreign securities that may otherwise constitute appropriate plan investments.

Client Plan Investments in Offered Securities

8. The Applicants represent that the Asset Manager makes its investment decisions on behalf of, or renders investment advice to, Client Plans pursuant to the governing document of the particular Client Plan or Pooled Fund and the investment guidelines and objectives set forth in the management or advisory agreement. Because the Client Plans are covered by Title I of the Act and/or are subject to section 4975 of the Code, such investment decisions are subject to, among other requirements, the fiduciary responsibility provisions of the Act and the prohibited transaction rules set forth in the Act and the Code.

9. The Applicants state, therefore, that the decision to invest in a particular offering is made on the basis of price, value and a Client Plan's investment criteria, not on whether the securities are currently being sold through an underwriting or selling syndicate. The Applicants further state that, because the Asset Manager's compensation for its services is generally based upon assets under management, the Asset Manager has little incentive to purchase securities in an offering in which the Affiliated Broker Dealer is an underwriter unless such a purchase is in the interests of Client Plans. If the assets under management do not perform well, the Asset Manager will receive less compensation and could lose clients, costs which far outweigh any gains from the purchase of underwritten securities.[17]

10. The Applicants state that the Asset Manager generally purchases securities in large blocks because the same investments will be made across several accounts. If there is a new offering of an equity or fixed income security that the Asset Manager wishes to purchase, it may be able to purchase the security through the offering syndicate at a lower price than it would pay in the open market, without transaction costs and with reduced market impact if it is buying a relatively large quantity. This is because a large purchase in the open market can cause an increase in the market price and, consequently, in the cost of the securities. Purchasing from an offering syndicate can thus reduce the costs to the Client Plans.

11. However, absent this proposed exemption, if the Affiliated Broker-Dealer is a manager of a syndicate that is underwriting a securities offering, the Asset Manager will be foreclosed from purchasing any securities on behalf of its Client Plans from that underwriting syndicate. This will force the Asset Manager to purchase the same securities

[17] In fact, under the terms of the proposed exemption set forth herein, the Affiliated Broker-Dealer may receive no compensation or other consideration, direct or indirect, in connection with any transaction that would be permitted under the proposed exemption.

in the secondary market. In such a circumstance, the Client Plans may incur greater costs both because the market price is often higher than the offering price, and because of transaction and market impact costs. In turn, this may cause the Asset Manager to forego other investment opportunities because the purchase price of the underwritten security in the secondary market exceeds the price that the Asset Manager would have paid to the selling syndicate.

Underwriting of Securities Offerings

12. The Applicants represent that the Affiliated Broker-Dealer currently manages and participates in firm commitment underwriting syndicates for registered offerings of both equity and debt securities. While equity and debt underwritings may operate differently with regard to the actual sales process, the basic structures are the same. In a firm commitment underwriting, the underwriting syndicate acquires the securities from the issuer and then sells the securities to investors.

13. The Applicants represent that while, as a legal matter, a selling syndicate assumes the risk that the underwritten securities might not be fully sold, as a practical matter, this risk is reduced, in marketed deals, through ''building a book'' (*i.e.,* taking indications of interest from potential purchasers) prior to pricing the securities. Accordingly, there is no incentive for the underwriters to use their discretionary accounts (or the discretionary accounts of their affiliates) to buy up the securities as a way to avoid underwriting liabilities.

14. Each selling syndicate has one or more lead managers, who are the principal contact between the syndicate and the issuer and who are responsible for organizing and coordinating the syndicate. The syndicate may also have co-managers, who generally assist the lead manager in working with the issuer to prepare the registration statement to be filed with the SEC and in distributing the underwritten securities. While equity syndicates typically include additional members that are not managers, more recently, membership in many debt underwriting syndicates has been limited to lead and co-managers.

15. If more than one underwriter is involved in a selling syndicate, the lead manager, who has been selected by the issuer of the underwritten securities, contacts other underwriters, and the underwriters enter into an ''Agreement Among Underwriters.'' Most lead managers have a standing form of agreement. This document is then supplemented for the particular deal by sending an ''invitation telex'' or ''terms telex'' that sets forth particular terms to the other underwriters.

16. The arrangement between the syndicate and the issuer of the underwritten securities is embodied in an underwriting agreement, which is signed on behalf of the underwriters by one or more of the managers. In a firm commitment underwriting, the underwriting agreement provides, subject to certain closing conditions, that the underwriters are obligated to purchase the underwritten securities from the issuer in accordance with their respective commitments. This obligation is met by using the proceeds received from the buyers of the securities in the offering, although there is a risk that the underwriters will have to pay for a portion of the securities in the event that not all of the securities are sold.

17. The Applicants represent that, generally, the risk that the securities will not be sold is small because the underwriting agreement is not executed until after the underwriters have obtained sufficient indications of interest to purchase the securities from a sufficient number of investors to assure that all the securities being offered will be acquired by investors. Once the underwriting agreement is executed, the underwriters immediately begin contacting the investors to confirm the sales, at first by oral communication and then by written confirmation. Sales are finalized within hours and sometimes minutes. In registered transactions, the underwriters are particularly anxious to complete the sales as soon as possible because until they ''break syndicate,'' they cannot enter the market. In many cases, the underwriters will act as market-makers for the security. A market-maker holds itself out as willing to buy or sell the security for its own account on a regular basis.

18. The Applicants represent that the process of ''building a book'' or soliciting indications of interest occurs as follows: In a registered equity offering, after a registration statement is filed with the SEC and, while it is under review by the SEC staff, representatives of the issuer of the securities and the selling syndicate managers conduct meetings with potential investors, who learn about the company and the underwritten securities. Potential investors also receive a preliminary prospectus. The underwriters cannot make any firm sales until the registration statement is declared effective by the SEC. Prior to the effective date, while the investors cannot become legally obligated to make a purchase, they indicate whether they have an interest in buying, and the managers compile a ''book'' of investors who are willing to ''circle'' a particular portion of the issue. These indications of interest are sometimes referred to as a ''soft circle'' because investors cannot be legally bound to buy the securities until the registration statement is effective. However, the Applicants represent that investors generally follow through on their indications of interest, and would be expected to do so, barring any sudden adverse developments (in which case it is likely that the offering would be withdrawn or the price range modified and the process restarted), because, if the investors that gave an indication of interest do not follow through, the underwriters may be reluctant to include them in future offerings.

19. Assuming that the marketing efforts have produced sufficient indications of interest, the Applicants represent that the issuer of the securities and the selling syndicate managers together will set the price of the securities and ask the SEC to declare the registration effective. After the registration statement becomes effective and the underwriting agreement is executed, the underwriters contact those investors that have indicated an interest in purchasing securities in the offering to execute the sales. The Applicants represent that offerings are often oversubscribed, and many have an over-allotment option that the underwriters can exercise to acquire additional shares from the issuer. Where an offering is oversubscribed, the underwriters decide how to allocate the securities among the potential purchasers. However, if an issue is a ''hot issue,'' (*i.e.,* it is selling in the market at a premium above its offering price) the underwriters may not hold this hot issue in their own accounts, nor sell it to their employees, officers and directors. Subject to certain exceptions, a hot issue may also not be sold to the personal accounts of those responsible for investing for others, such as officers of banks, insurance companies, mutual funds and investment advisers.

20. The Applicants represent that debt offerings may be ''negotiated'' offerings, ''competitive bid'' offerings, or ''bought deals.'' ''Negotiated'' offerings, which often involve non-investment grade securities, are conducted in the same manner as an equity offering with regard to when the underwriting agreement is executed and how the securities are offered. ''Competitive bid'' offerings, in which the issuer determines the price

for the securities through competitive bidding rather than negotiating the price with the underwriting syndicate, are performed under ''shelf'' registration statements pursuant to the SEC's Rule 415 under the 1933 Act (17 CFR 230.415).[18]

21. In a competitive bid offering, prospective lead underwriters will bid against one another to purchase debt securities, based upon their determinations of the degree of investor interest in the securities. Depending on the level of investor interest and the size of the offering, a bidding lead underwriter may bring in co-managers to assist in the sales process. Most of the securities are frequently sold within hours, or sometimes even less than an hour, after the securities are made available for purchase.

22. The Applicants represent that, because of market forces and the requirements of Rule 415, the competitive bid process is generally available only to issuers of investment-grade securities who have been subject to the reporting requirements of the 1934 Act for at least one (1) year.

23. Occasionally, in highly-rated debt issues, underwriters ''buy'' the entire deal off of a ''shelf registration'' before obtaining indications of interest. These ''bought'' deals involve issuers whose securities enjoy a deep and liquid secondary market, such that an underwriter has confidence without pre-marketing that it can identify purchasers for the bonds.

Structure of Diversified Financial Services Firms

24. The Applicants represent that there are internal policies in place that restrict contact and the flow of information between investment management personnel and non-investment management personnel in the same or affiliated financial service firms. These policies are designed to protect against ''insider trading,'' *i.e.,* trading on information not available to the general public that may affect the market price of the securities. Diversified financial services firms must be concerned about insider trading problems because one part of the firm—*e.g.,* the mergers and acquisitions group—could come into possession of non-public information regarding an upcoming transaction involving a particular issuer, while another part of the firm—*e.g.,* the investment management group—could be trading in the securities of that issuer for its clients.

25. The Applicants represent that the business separation policies and procedures of Columbia and its affiliates are also structured to restrict the flow of any information to or from the Asset Manager that could limit its flexibility in managing client assets, and of information obtained or developed by the Asset Manager that could be used by other parts of the organization, to the detriment of the Asset Manager's clients.

26. The Applicants represent that major clients of the Affiliated Broker-Dealer include investment management firms that are competitors of the Asset Manager. Similarly, the Asset Manager deals on a regular basis with broker-dealers that compete with the Affiliated Broker-Dealer. If special consideration were shown to an affiliate, such conduct would likely have an adverse effect on the relationships of the Affiliated Broker-Dealer and of the Asset Manager with firms that compete with such affiliate. Therefore, a goal of the Applicants' business separation policies is to avoid any possible perception of improper flows of information between the Affiliated Broker-Dealer and the Asset Manager, in order to prevent any adverse impact on client and business relationships.

Underwriting Compensation

27. The Applicants represent that the underwriters are compensated through the ''spread,'' or difference, between the price at which the underwriters purchase the securities from the issuer and the price at which the securities are sold to the public. The spread is divided into three components.

28. The first component includes the management fee, which generally represents an agreed upon percentage of the overall spread and is allocated among the lead manager and co-managers. Where there is more than one managing underwriter, the way the management fee will be allocated among the managers is generally agreed upon between the managers and the issuer prior to soliciting indications of interest. Thus, the allocation of the management fee is not reflective of the amount of securities that a particular manager sells in an offering.

29. The second component is the underwriting fee, which represents compensation to the underwriters (including the non-managers, if any) for the risks they assume in connection with the offering and for the use of their capital. This component of the spread is also used to cover the expenses of the underwriting that are not otherwise reimbursed by the issuer of the securities.

30. The first and second components of the ''spread'' are received without regard to how the underwritten securities are allocated for sales purposes or to whom the securities are sold. The third component of the spread is the selling concession, which generally constitutes 60 percent or more of the spread. The selling concession compensates the underwriters for their actual selling efforts. The allocation of selling concessions among the underwriters generally follows the allocation of the securities for sales purposes. However, a buyer of the underwritten securities may designate other broker-dealers (who may be other underwriters, as well as broker-dealers outside the syndicate) to receive the selling concessions arising from the securities they purchase.

31. Securities are allocated for sales purposes into two categories. The first and larger category is the ''institutional pot,'' which is the pot of securities from which sales are made to institutional investors. Selling concessions for securities sold from the institutional pot are generally designated by the purchaser to go to particular underwriters or other broker-dealers. If securities are sold from the institutional pot, the selling syndicate managers sometimes receive a portion of the selling concessions, referred to as a ''fixed designation,'' [19] attributable to securities sold in this category, without regard to who sold the securities or to whom they were sold. For securities covered by this proposed exemption, however, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designation generated by purchases of securities by the Asset Manager on behalf of its Client Plans.

32. The second category of allocated securities is ''retail,'' which are the securities retained by the underwriters for sale to their retail customers. The underwriters receive the selling concessions from their respective retail retention allocations. Securities may be shifted between the two categories based upon whether either category is oversold or undersold during the course of the offering.

33. The Applicants represent that the Affiliated Broker-Dealer's inability to receive any selling concessions, or any compensation attributable to the fixed designations generated by purchases of securities by the Asset Manager's Client

[18] Rule 415 permits an issuer to sell debt as well as equity securities under an effective registration statement previously filed with the SEC by filing a post-effective amendment or supplemental prospectus.

[19] A fixed designation is sometimes referred to as an ''auto pot split.''

Plans, removes the primary economic incentive for the Asset Manager to make purchases that are not in the interests of its Client Plans from offerings for which the Affiliated Broker-Dealer is an underwriter. The reason is that the Affiliated Broker-Dealer will not receive any additional fees as a result of such purchases by the Asset Manager.

Rule 144A Securities

34. The Applicants represent that a number of the offerings of Rule 144A Securities in which the Affiliated Broker-Dealer participates represent good investment opportunities for the Asset Manager's Client Plans. Particularly with respect to foreign securities, a Rule l44A offering may provide the least expensive and most accessible means for obtaining these securities. However, as discussed above, PTE 75–1, Part III, does not cover Rule 144A Securities. Therefore, absent an exemption, the Asset Manager is foreclosed from purchasing such securities for its Client Plans in offerings in which the Affiliated Broker-Dealer participates.

35. The Applicants state that Rule 144A acts as a ''safe harbor'' exemption from the registration provisions of the 1933 Act for sales of certain types of securities to QIBs. QIBs include several types of institutional entities, such as employee benefit plans and commingled trust funds holding assets of such plans, which own and invest on a discretionary basis at least $100 million in securities of unaffiliated issuers.

36. Any securities may be sold pursuant to Rule 144A except for those of the same class or similar to a class that is publicly traded in the United States, or certain types of investment company securities. This limitation is designed to prevent side-by-side public and private markets developing for the same class of securities and is the reason that Rule 144A transactions are generally limited to debt securities.

37. Buyers of Rule 144A Securities must be able to obtain, upon request, basic information concerning the business of the issuer and the issuer's financial statements, much of the same information as would be furnished if the offering were registered. This condition does not apply, however, to an issuer filing reports with the SEC under the 1934 Act, for which reports are publicly available. The condition also does not apply to a ''foreign private issuer'' for whom reports are furnished to the SEC under Rule 12g3–2(b) of the 1934 Act (17 CFR 240.12g3–2(b)), or to issuers who are foreign governments or political subdivisions thereof and are eligible to use Schedule B under the 1933 Act (which describes the information and documents required to be contained in a registration statement filed by such issuers).

38. Sales under Rule 144A, like sales in a registered offering, remain subject to the protections of the anti-fraud rules of Federal and State securities laws. These rules include Section 10(b) of the 1934 Act and Rule 10b–5 thereunder (17 CFR 240.10b–5) and Section 17(a) of the 1933 Act (15 U.S.C. 77a). Through these and other provisions, the SEC may use its full range of enforcement powers to exercise its regulatory authority over the market for Rule 144A Securities, in the event that it detects improper practices or fraud.

39. The Applicants represent that this regulatory structure provides a considerable incentive to the issuer of the securities and the members of the selling syndicate to insure that the information contained in a Rule 144A offering memorandum is complete and accurate in all material respects. Among other things, the lead manager typically obtains an opinion from a law firm, commonly referred to as a ''10b–5'' opinion, stating that the law firm has no reason to believe that the offering memorandum contains any untrue statement of material fact or omits to state a material fact necessary in order to make sure the statements made, in light of the circumstances under which they were made, are not misleading.

40. The Applicants represent that Rule 144A offerings generally are structured in the same manner as underwritten registered offerings. The major difference is that a Rule l44A offering uses an offering memorandum rather than a prospectus that is filed with the SEC. The marketing process is the same in most respects, except that the selling efforts are limited to contacting QIBs and there are no general solicitations for buyers (*e.g.,* no general advertising). In addition, the Affiliated Broker-Dealer's role in these offerings is typically that of a lead or co-manager. Generally, there are no non-manager members in a Rule 144A selling syndicate. Nonetheless, the Applicants request that the proposed exemption extend to authorization for situations where the Affiliated Broker-Dealer acts as a manager or as a syndicate member.

Summary

41. The proposed exemption is administratively feasible. In this regard, compliance with the terms and conditions of the proposed exemption will be verifiable and subject to audit.

42. The proposed exemption is in the interest of participants and beneficiaries of Client Plans that engage in the covered transactions. In this regard, it is represented that the proposed exemption will increase investment opportunities and will reduce administrative costs for Client Plans.

43. In summary, the Applicants represent that the proposed transactions will satisfy the statutory criteria for an exemption set forth in section 408(a) of the Act because:

(a) The Client Plans and In-House Plans will gain access to desirable investment opportunities;

(b) In each offering, the Asset Manager will purchase the securities for its Client Plans and In-House Plans from an underwriter or broker-dealer other than the Affiliated Broker-Dealer;

(c) Conditions similar to those of PTE 75–1, Part III, will restrict the types of securities that may be purchased, the types of underwriting or selling syndicates and issuers involved, and the price and timing of the purchases;

(d) The amount of securities that the Asset Manager may purchase on behalf of Client Plans and In-House Plans will be subject to percentage limitations;

(e) The Affiliated Broker-Dealer will not be permitted to receive, either directly, indirectly or through designation, any selling concessions with respect to the securities sold to the Asset Manager for the account of a Client Plan or an In-House Plan;

(f) Prior to any purchase of securities, the Applicant will make the required disclosures to an Independent Fiduciary of each Client Plan (or the fiduciary of each In-House Plan) and obtain the required written authorization to engage in the covered transactions;

(g) The Applicant will provide regular reporting to an Independent Fiduciary of each Client Plan (or the fiduciary of each In-House Plan) with respect to all securities purchased pursuant to the exemption, if granted;

(h) Each Client Plan and each In-House Plan will be subject to net asset requirements, with certain exceptions for Pooled Funds; and

(i) The Asset Manager must have total assets under management in excess of $5 billion and shareholders' or partners' equity in excess of $1 million, in addition to qualifying as a QPAM, pursuant to Part V(a) of PTE 84–14.

Notice to Intersted Persons: The Applicants represent that because those potentially interested Plans proposing to engage in the covered transactions cannot all be identified, the only practical means of notifying Independent Plan Fiduciaries or Plan participants of such affected Plans is by publication of the proposed exemption in the **Federal Register.** Therefore, any comments from interested persons must be received by the Department no later than 30 days from the publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

Boston Carpenters Apprenticeship and Training Fund (the Fund), Located in Boston, Massachusetts.

[*Exemption Application No.:* L–11558.]

Proposed Exemption

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Act in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act shall not apply to the purchase by the Fund from the NERCC, LLC (the Building Corporation), a party in interest with respect to the Fund, of a condominium unit (the Condo) in a building (the Building) owned by the New England Regional Council of Carpenters (the Union), also a party in interest with respect to the Fund, where the Union will own the only other condominium unit in the Building; provided that, at the time the transaction is entered into, the following conditions are satisfied:

(1) An independent, qualified fiduciary (the I/F), acting on behalf of the Fund, is responsible for analyzing the relevant terms of the transaction and deciding whether the Board of Trustees (the Trustees) should proceed with the transaction;

(2) The Fund may not purchase the Condo, unless and until the I/F approves such purchase;

(3) Acting as the independent fiduciary on behalf of the Fund, the I/F is responsible for: (a) Establishing the purchase price of the Condo, (b) reviewing the financing terms, (c) determining that such financing terms are the product of arm's length negotiations, and (d) ensuring that the Fund will not close on the Condo until the I/F has determined that proceeding with the proposed transaction is feasible, in the interest of, and protective of the participants and beneficiaries of the Fund;

(4) The purchase price paid by the Fund for the Condo, as documented in writing and approved by the I/F, acting on behalf of the Fund, is the *lesser of:*

(a) The fair market value of the Condo, as of the date of the closing on the transaction, as determined by an independent, qualified appraiser selected by the I/F; or

(b) 58.3 percent (58.3%) of the amount actually expended by the Building Corporation in the construction of the Condo under the guaranteed maximum price contract (the GMP), plus the following amounts:

(i) 58.3 percent (58.3%) of the additional construction soft costs incurred outside the GMP contract (*i.e.,* the amount expended on furniture, fixtures, and equipment, and the amount expended for materials for minor work);

(ii) 54.4 percent (54.4%) of the amount expended on construction soft costs (*i.e.* architect, legal, zoning, permits, and other fees); and

(iii) 54.4 percent (54.4%) of the cost of the land underlying the Building;

(5) Acting as the independent fiduciary on behalf of the Fund, the I/F is responsible, prior to entering into the proposed transaction, for: (a) Reviewing an appraisal of the fully completed Condo, which has been prepared by an independent, qualified appraiser, and updated, as of the date of the closing on the transaction, (b) evaluating the sufficiency of the methodology of such appraisal, and (c) determining the reasonableness of the conclusions reached in such appraisal;

(6) The terms of the transaction are no less favorable to the Fund than terms negotiated under similar circumstances at arm's length with unrelated third parties;

(7) The Fund does not purchase the Condo or take possession of the Condo until such Condo is completed;

(8) The Fund has not been, is not, and will not be a party to the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or by the Union;

(9) The Fund does not pay any commissions, sales fees, or other similar payments to any party as a result of the transaction, and the costs incurred in connection with the purchase of the Condo by the Fund at closing do not include, directly or indirectly, any developer's profit, any premium receive by the developer, nor any interest charges incurred on the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or by the Union;

(10) Under the terms of the current collective bargaining agreement(s) and any future collective bargaining agreement(s), the Union has the ability, unilaterally, to increase the contribution rate to the Fund at any time by diverting money from wages and contributions to other benefit funds within the total wage and benefit package, and the Union is obligated to do so in order to prevent a default by the Fund under the terms of the financing obtained by the Fund to purchase the Condo;

(11) In the event the Building Corporation and/or the Union defaults on the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or the Union, the creditors under the terms of such construction financing loan or such permanent financing loan shall have no recourse against the Condo or any of the assets of the Fund;

(12) Acting as the independent fiduciary with respect to the Fund, the I/F is responsible for reviewing and approving the allocation between funding the purchase of the Condo from the Fund's existing assets or financing; and

(13) Acting as the independent fiduciary with respect to the Fund, the I/F is responsible for determining whether the proposed transaction satisfies the criteria, as set forth in section 404 and section 408(a) of the Act.

Summary of Facts and Representations

1. The Union is a labor organization made up of thirty (30) local carpenter unions in six (6) New England states. The local unions that are affiliated with the Union include local union nos. 33, 40, 67, 218, and 723 (the Locals). Members of the Union are covered by the Fund. The Union is a party in interest with respect to the Fund, pursuant to section 3(14)(D) of the Act, as an employee organization any of whose members are covered by such Fund.

2. The Fund is an employee welfare benefit plan, as that term is defined in the Act. Further, the Fund is a multiemployer apprenticeship and training fund. The Fund is a Massachusetts nonprofit organization, and is exempt from income taxes under the provisions of Section 501(c)(3) of the Internal Revenue Code.

3. In the fiscal year ending September 30, 2008, the Fund received employer contributions of $2,584,069, based on approximately 6.7 million hours of work. In addition, the Fund received other income of approximately $189,000. As of September 30, 2008, the Fund had expenses of $2,254,078 and total assets of $5,910,043. Included in the Fund's total assets is a parcel of improved real property (the Existing Facility) located at 385 Market Street in the Brighton section of Boston, Massachusetts.

4. The Trustees of the Fund have authority to invest the assets of the Fund. The Trustees consist of six (6)

labor representatives and six (6) management representatives. Among the labor representatives serving as Trustees are Joseph Power, John Estano, Steve Tewksbury, Charles MacFarlane, Richard Pedi, and Neal O'Brien. Mr. Power, one of the labor Trustees, also serves on the Executive Board of the Union. It is represented that Mr. Power will recuse himself from all votes and matters before the Trustees relating to the purchase by the Fund of the Condo from the Building Corporation.

The representatives of management serving as Trustees are Donald MacKinnon, Steven Affanato, George Allen, William Fitzgerald, Christopher Pennie, and Mark DeNapoli. Mr. DeNapoli, one of the management Trustees, also is the Executive Vice President and General Manager of Suffolk Construction (Suffolk) which is responsible for the construction of the Condo that is the subject of this proposed exemption. It is represented that Mr. DeNapoli will recuse himself from all votes and matters before the Trustees relating to the construction of the Condo.

5. The Fund provides training and education to carpenter apprentices in the greater Boston area. From 1993 to 2009 there was an increase in the number of apprentices from 267 to 539.

The Fund also provides training and education to journeymen carpenters in the greater Boston area. During 2008, the Fund provided journeyman upgrade training to approximately 2,671 journeymen carpenters. From 1995–2008 there was an increase in the number of journeymen carpenters taking classes from the Fund from 292 to 2,671.

In 2008, the Fund offered 265 courses in numerous aspects of the carpentry trade. These courses represented an increase from the 100 courses offered by the Fund in 2004.

6. The Fund provides all of its classes and training in the Existing Facility. Purchased in 1975, from an unrelated third party, the Fund owns the Existing Facility free and clear of any mortgages. In the opinion of Gary R. Schwandt, a principal of Great Point Investors, LLC the value of the Existing Facility after brokerage fees and closing costs is $1,750,000.

The Existing Facility is an approximately 14,600 square foot building situated on a 33,500 square foot parcel of land. Due to space limitations at the Existing Facility, it is represented that the Fund has been unable to offer certain courses.

The Existing Facility has forty-eight (48) regular parking spaces and two (2) spaces for disabled persons. It is represented that these parking spaces service approximately 100 to 150 apprentices and journeymen attending classes nightly at the Existing Facility. In addition, it is represented that there is not adequate public transportation for servicing the Existing Facility.

7. The Fund is maintained under collective bargaining agreements negotiated between the Union of the United Brotherhood of Carpenters and Joiners of America and the following multiemployer bargaining organizations: (a) The Labor Relations Division of the Associated General Contractors of Massachusetts, Inc.; (b) The Building Trades Employers' Association of Boston and Eastern Massachusetts, Inc.; and (c) The Labor Relations Division of the Construction Industry of Massachusetts (collectively, the Employer Associations).

It is represented that when the Union negotiates a multi-year collective bargaining agreement, it negotiates a single increase in the wage and benefit package for each year of the contract. Then, on an annual basis, the Union allocates that increase between wages and various benefit funds.

It is represented that the wage and benefit package for local union nos. 33, 40, 67, 218, the commercial construction local unions affiliated with the Fund, has historically accounted for approximately 93 percent (93%) of the Fund's revenue. It is represented that the collective bargaining agreement for these commercial construction local unions was renegotiated for a period of three (3) years, effective September 1, 2009, through August 31, 2012. The contribution rate to the Fund for work performed under this collective bargaining agreement is $.50 per hour. The current total wage and benefit package is $60.23, and as of March 1, 2012, the total package will be $65.10.

It is represented that the wage and benefit package for local union no. 723, the wood frame residential union affiliated with the Fund, has historically accounted for approximately 7 percent (7%) of the Fund's revenue. The collective bargaining agreement for local union no. 723 expires on March 31, 2010. Under the terms of the collective bargaining agreement for local union no. 723, as of March 1, 2009, each employer signatory is required to contribute to the Fund $.25 per hour for each hour of work performed by its carpenter employees. The current wage and benefit package for local union no. 723 is $39.68 per hour.

In the fiscal year ending September 30, 2008, there were 6,719,058 hours of work for which contributions in the amount of $2,584,069 were made to the Fund. It is represented that, at the per hour rates, effective as of March 1, 2009, under the collective bargaining agreements, the same number of hours of work, would yield $2,939,516 in annual contributions to the Fund.

It is represented that under the terms of the collective bargaining agreements, the Union has the right, at its discretion, to divert money from wages to benefit funds or to transfer future contributions from one benefit fund to another benefit fund, provided that the Union gives sixty (60) days written notice to the employers. It is further represented that, where the employers and the Union negotiate fixed contribution rates to the various employee benefit funds, such collective bargaining agreements at the same time provide that the Union with advanced notice can divert future contributions from one fund to another. In doing so, the Union maintains that it is acting as a settlor and not as a fiduciary. Further, the applicant maintains that a collective bargaining agreement contribution rate for future hours does not constitute a plan asset under the Act.[20]

8. The Union currently rents office space at 803 Summer Street, Boston, Massachusetts, from an unrelated third party. It is represented that the Union for the past several years has been seeking either to buy a building or to buy unimproved land and construct a building to house the Union offices.

To this end, on February 1, 2008, the Union purchased for cash in the amount of $5.8 million, a parcel of improved real property (the Original Property). The Union established the Building Corporation as a limited liability company for the purpose of developing the Original Property. In this regard, the Union contributed the Original Property to the Building Corporation in exchange for sole interest in the Building Corporation. The Building Corporation is a party in interest with respect to the Fund, pursuant to section 3(14)(G) of the Act, as 50 percent (50%) or more of the interests in the Building Corporation are owned by the Union.

9. It is represented that the Union purchased the Original Property from the Tyott Co. Neither the Tyott Co., nor its owners, nor its principals are parties in interest with respect to the Fund.

The Original Property is described as a 48,000 square foot two-story building on a 64,000 square foot lot located at 750 Dorchester Avenue, in Boston, Massachusetts. It is represented that the

[20] The Department, herein, is not opining, as to whether the Union in diverting money from wages to benefit funds or in transferring future contributions from one benefit fund to another benefit fund is acting as a settlor and not as a fiduciary.

location of the Original Property is within ⅛ of a mile of the exit and entrance ramps to a major interstate highway and within ¼ of a mile from two (2) different train stations that offer access to public transportation.

10. The Union is currently in the process of renovating and expanding the Original Property into two (2) condominium units. One of the condominium units is intended for the Union, and the other condominium unit is intended for the Fund. In order to finance the renovation and expansion of the Original Property, the Executive Board of the Union decided, on January 30, 2009, to obtain a construction loan in the amount of $10 million to finance the renovation and expansion of the Original Property and to pay the remaining construction costs from existing assets. It is the Union's intention for the loan to cover the last $10 million dollars of payment at the end of the construction project.

Because the Original Property is located in a low-income neighborhood, the renovation and expansion of the Original Property is potentially eligible for New Market Tax Credit (NMTC) financing. The Union is currently pursuing NMTC financing from two (2) Community Development Entities (CDEs) only for the Union's condominium unit. These CDEs are, respectively, the Massachusetts Housing Investment Corporation and the Bank of America. The NMTC financing will be in the form of long-term, non-recourse loans that must remain in place for at least seven (7) years during which time the loans will be non-amortizing. It is represented that the Fund's Condo will not serve as collateral for these loans, nor will any of the other assets of the Fund serve as collateral for these loans. These loans will bear a very low annual interest charge, estimated at one percent (1%) or below, to cover annual accounting expenses. After seven (7) years and a day, these loans will be repurchased by the Union at their fair market value.[21]

11. The plans for renovation and expansion of the Original Property call for taking the walls and columns of the existing building on the Original Property down to the second floor slab, rebuilding the second floor, and then adding a new third floor. It is represented that the full design and construction documents and the city approvals were completed at the end of 2008. It is expected that renovation and expansion of the Original Property will take approximately one (1) year. Construction on the renovation and expansion of the Original Property began in January 2009. It is anticipated that the renovated and expanded Building will be ready for occupancy by early 2010.

12. Upon completion of the renovated and expanded Building, it is represented that there will be approximately 71,539 square feet of training and office space, and 6,826 square feet of common space. The first floor of the Building intended for the Fund will have approximately 21,406 square feet of training space with fifteen (15) foot ceilings which are necessary for erecting and working off scaffolding, a major component of apprentice training. The first floor of the Building will also have 2,354 square feet of common space for the entrance and lobby. The second floor will have approximately 13,820 square feet of office and classroom space intended for the Fund, 4,233 square feet of office space intended for the Union, and 4,472 square feet of common space. The third floor will have approximately 25,254 square feet of office space intended for the Union. The Building will have a parking deck with 40 spaces built above a ground level parking area with 53 spaces, for a total of approximately 93 parking spaces on the site that will serve as the parking area for both the Union and the Fund.

13. The Union retained ADD Inc. to serve as the architect for the renovation and expansion of the Building. It is represented that ADD Inc. selected Suffolk to serve as the construction manager for the project. It is represented that Suffolk is a Union signatory contractor. As such, Suffolk is a party in interest with respect to the Fund, pursuant to section 3(14)(C), an employer any of whose employees are covered by the Fund.

Suffolk and the Union negotiated the GMP contract, including change orders through May 11, 2009, in the amount of $19.1 million for the renovation and expansion of the Building. Any savings on that price will be shared 75 percent (75%) to the Union and 25 percent (25%) to Suffolk.[22]

In addition to the $19.1 million construction costs under the GMP contract, the Union anticipates that there will be $600,000 in materials and construction costs not included within the scope of the GMP contract. This $600,000 represents $400,000 in what is known as furniture, fixtures, and equipment which is frequently contracted out directly by owners, and $200,000 for materials for minor work. Further, the Union has incurred ''soft costs'' of $1 million, including architect's fees, due diligence expenses, legal fees related to the purchase of the Original Property, and fees related to zoning and permits. It is estimated that the total cost of acquisition, development, and construction of the renovated and expanded Building, including the parking garage, will be approximately $27 million.

14. As mentioned above, the Union will retain one of the condominium units in the renovated and expanded Building for its own use. Specifically, the Union's condominium will consist of approximately 32,597 square feet of floor space, including a portion of the common space in the Building, and will constitute approximately 45.6 percent (45.6%) of the total square footage (71,539 square feet) in the Building.

The Union intends to lease out at market rate any space in its condominium unit that it does not utilize. It is represented that if the Union leases office space to an employee benefit fund to which it is a party in interest, the Union will do so pursuant to section 408(b)(2) of the Act.[23] The Union will also own and intends to lease the retail portions on the second floor of the Building. It is represented that the intended retail lessees include an eye care center, a banking area, and an ATM.

15. It is represented that in numerous meetings over the past several years, the Trustees of the Fund have discussed and acknowledged the need for additional parking, better access to public transportation, and additional space for offices, classrooms, and training. In this regard, the Trustees

[21] It is represented that the Fund will attempt to obtain from NMTC partial financing on its own in 2010 at the time it purchases the Condo, but is proceeding with the proposed transaction on the assumption that NMTC financing will not be available for its unit. It is represented that the Fund will only utilize the NMTC financing, if obtained, if such financing results in more favorable financing terms for the purchase of the Condo. It is further represented that any NMTC financing obtained by the Fund will not involve any transaction with the Union. For a discussion of additional methods of financing the purchase of the Condo that are being considered by the Fund, *see* the discussion in paragraph 19, below.

[22] It is represented that as a condition to the purchase, the Fund will share in the constructions savings with the Union at a rate equal to the Fund's proportional share of the square footage of the Building and this share of the savings will be reflected in the cost allocation method, as discussed, below, in paragraph 32, in determining the purchase price of the Condo.

[23] The Department is offering no view, herein, as to whether the leasing of office space to any employee benefit fund to which the Union is a party in interest is covered by the statutory exemption provided in sections 408(b)(2) of the Act and the Department's regulations, pursuant to 29 CFR 2550.408b–2. Further, the Department is not providing, herein, any relief with respect to the leasing of office space to any such employee benefit fund by the Union.

reviewed utilization reports proved by the Fund Administrator, Benjamin Tilton.

In 2003, the Trustees retained Sam Park & Co., a Boston real estate firm, to research the availability of buildings to purchase or to lease that would meet the present and future needs of the Fund. After review, the Trustees found that none of the options resulting from the 2003 search met the needs of the Fund. At that time, the Trustees suspended the search for a new training space.

16. Because the Union was aware of the Fund's need for additional training and classroom space, parking, and access to public transportation, the Union approached the Trustees with a proposal that the Union develop a portion of the Original Property to the specifications of the Fund for the purpose of providing apprenticeship training (*i.e.,* ''build to suit'') and then sell it to the Fund as a condominium unit.

17. On July 11, 2008, Gary Schwandt of Great Point Investors, LLC provided the Trustees of the Fund with an update to the 2003 search for a training facility that would meet the Fund's requirements. After reviewing the results of the 2003 and 2008 real estate search, the Trustees determined that the Original Property was the best available site. In a meeting on May 20, 2008, the Trustees voted to proceed with the purchase of the Condo from the Building Corporation where the Fund's space would be ''built to suit,'' provided that: (i) The transaction is reviewed and approved by an I/F; (ii) the Fund receives a prohibited transaction exemption from the Department, and (iii) there is not a better building option available that meets the Fund's space, parking, access, and financial requirements. Accordingly, the Trustees, acting on behalf of the Fund, have requested an administrative exemption from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act which would permit the Fund to purchase the Condo for cash from the Building Corporation.

18. In order to purchase the Condo, the Trustees of the Fund intend to sell the Existing Facility and expect to realize net proceeds of approximately $1.75 million. In the event that the sale of the Existing Facility is not completed by the closing date on the Fund's purchase of the Condo, the Trustees intend to obtain a bridge loan. The Trustees intend to contribute an amount yet to be determined from the Fund's existing assets toward the purchase of the Condo, and then to finance the remaining costs. Acting as the independent fiduciary with respect to the Fund, the I/F is responsible for reviewing and approving the allocation between funding the purchase of the Condo from the Fund's existing assets or financing such purchase. It is represented that in addition to the purchase price, in order to complete the proposed transaction the Fund will incur certain ''soft costs,'' in the amount of $650,000, including the cost of engaging the I/F, legal costs related to the prohibited transaction exemption process, real estate legal costs, and underwriters fees. Once the Fund purchases the Condo, the Fund will also be responsible for paying for electrical, gas, telephone, and water service to the Condo, and for sharing the cost of the common areas in the Building with the Union.

The Condo will be established in accordance with Massachusetts law M.G.L. chapter 183A. The Fund's interest in the Condo will be recorded as a deed for real property with the Suffolk County Registry of Deeds. Further, the Massachusetts Condominium Act, Massachusetts General Law Chapter 183A, provides that the default method for allocating common expenses is that such expenses be ''assessed against all units in accordance with their respective percentages of undivided interest in the common areas and facilities.'' Specifically, Section 5(a) of the Chapter 183A provides:

> Each owner shall be entitled to an undivided interest in the common areas and facilities in the percentage set forth in the master deed. Such percentage shall be in the approximate relation that the fair value of the of the unit on the date of the master deed bears to the aggregate fair value of all the units.

The I/F's projection of the split of common expenses is approximately 58% for the Fund and 42% for the Union, which percentages are based on the May 19, 2009 fair market value appraisal of the Building, as if completed, prepared by CB Richard Ellis/New England, and is consistent with the methodology set forth in Section 5(a) of the Chapter 183A of the Massachusetts Condominium Act, Massachusetts General Law.

19. As discussed above, in footnote 1, the Trustees, on behalf of the Fund, are considering various means of financing the purchase price of the Condo and associated costs. It is represented that financing the purchase of commercial property is the normal method of acquiring such an asset. It is represented that financing the purchase of the Condo is in the interest of the Fund, because the Fund does not have sufficient equity to acquire the Condo on an all equity basis, even if it were advantageous to do so.

In this regard, the Fund is considering a commercial real estate loan which may take the form of a private bank loan or private taxable bond financing. Such a commercial loan would be secured by a first mortgage on the Condo and by a general pledge of assets. It is represented that in the current real estate market, non-recourse loans to commercial entities are not available. Interest rates required on commercial loans are based on interest rates for highly-rated long term government bonds, and are priced at a spread above the current market level of government interest rates. The spread varies with credit quality.

In the alternative to a commercial loan, the Trustees represent that certain lenders and underwriters are willing to lend or to finance projects through the Massachusetts Health and Education Facilities Agency (HEFA), or similar agency, such as the Massachusetts Development/Boston Industrial Development Finance Agency (Mass Development/BIFA). In this regard, HEFA and Mass Development/BIFA offer availability to capital markets for apprenticeship and training funds. The interest rate on an HEFA or Mass Development/BIFA loan or public debt is not subject to Federal or State income tax. Therefore, the interest rate on such tax-exempt bond financing would be lower than market interest rates on similar commercial debt. Like a commercial loan, the tax-exempt bond financing through these agencies would entail recourse debt to the Fund. In this regard, the debt would be secured by a first mortgage lien on the Condo, as well as a pledge of revenues of the Fund, as the borrower. Holders of tax-exempt bonds generated by these agencies have no recourse or guaranty from HEFA or Mass Development/BIFA as to the payment of interest or principal.

The Fund is in the process of working with HEFA and Mass Development/BIFA and anticipates formally applying for tax-exempt bond financing from one of those agencies. The tax-exempt bond financing will be either through a fixed rate private placement with a local bank or through variable-rate debt. The I/F has based its projections assuming a 5.50 percent (5.50%) fixed tax-exempt rate. It is further represented that, if the Fund is able to procure a variable rate financing secured with a letter of credit, as described in the next paragraph, below, the interest rate on the debt, would be lower than the 5.50 percent (5.50%) projections. The amount of the proposed tax-exempt bond financing is not yet determined.

In May 2009, the Fund obtained an offer of an irrevocable direct pay letter of credit from First Trade Union Bank (FTUB)[24] in support of the tax-exempt bond financing[25] for the purchase of the Condo by the Fund. The amount of the letter of credit would not exceed the *lesser of:* (i) 80 percent (80%) of the appraised value of the underlying real estate collateral, or (ii) 80 percent (80%) of the purchase price, and in no event would exceed the legal lending limit ($8 million) of FTUB. The letter of credit would be secured with a valid first mortgage and security interest on the Condo and would include an assignment of all leases, rents, plans, specifications, contracts, licenses, permits, warranties, and approvals pertaining to the Condo. The letter of credit would also be secured by a first position lien on all business assets of the Fund and a negative pledge of the Fund's deposit and investment accounts held at FTUB with a minimum liquidity provision, to be determined. The term of the letter of credit would be seven (7) years. The Union would be required to provide a letter of support[26] to assure adequate cash flow to the Fund to meet debt service requirements. The offer by FTUB has expired, but it is represented that similar terms are still available to the Fund.

The Fund is interviewing prospective lenders and underwriters, and will obtain a firm commitment letter for the initial purchase of the tax-exempt bonds at the time of the closing on the proposed transaction. The Union anticipates that as a precondition for the Fund to obtain tax-exempt bond financing, the Union will be required to make a commitment to HEFA or to Mass Development/BIFA during the term of existing and future collective bargaining agreements to increase the hourly contribution to the Fund whenever necessary to ensure that the Fund has sufficient income and reserves to meet its debt obligation. It is represented that the Union is willing to make this commitment.

20. CB Richard Ellis/New England, Consulting and Valuation Group, a division of CB Richard Ellis/New England is the appraiser chosen by Mark Haroutunian, VP & Credit Officer of FTUB, for the purposes of mortgage financing. James T. Moore (Mr. Moore), First Vice President/Partner of CB Richard Ellis/New England, and Harris E. Collins (Mr. Collins), Senior Vice President/Partner of CB Richard Ellis/New England prepared an appraisal of the fair market value of Building, as if completed.

Mr. Moore is qualified in that he is an associate member of the Appraisal Institute, a member of the Real Estate Finance Association, Greater Boston Real Estate Board, and a Massachusetts Certified General Appraiser. Mr. Collins is qualified in that he is a member of the Appraisal Institute, a member of the Counselors of Real Estate, and a member of the Real Estate Finance Association-Greater Boston Real Estate Board, and is a Massachusetts Certified General Appraiser.

Both Mr. Moore and Mr. Collins are independent in that neither has a present or prospective interest in or bias with respect to the property that is the subject of the appraisal and neither have a business or personal interest in or bias with respect to the parties involved. It is further represented that the engagement of Mr. Moore and Mr. Collins and the compensation for completing the appraisal assignment was not contingent upon the development or reporting of predetermined results.

The fair market value conclusions and projections reached by Mr. Moore and Mr. Collins are as follows:

Appraisal premise	Interest appraised	Date of value	Value conclusion
As Is (Land & Shell Value)	Fee Simple Estate	May 11, 2009	$5,710,000
As Complete-Total Property	Fee Simple Estate	January 1, 2010	23,000,000
As complete—The Fund's Unit	Fee Simple Estate	January 1, 2010	13,360,000
As complete—The Union's Unit	Fee Simple Estate	January 1, 2010	9,640,000

21. It is represented that in purchasing the Condo, the Fund will acquire a real property interest in the Condo, the land underlying the Building, and any common areas in the Building. Specifically, the Fund's Condo will consist of approximately 38,942 square feet of space, including a portion of the common space in the Building, and will constitute approximately 54.4 percent (54.4%) of the total square footage (71,539 square feet) in the Building.

It is represented that the Fund may share and/or rent at fair market value some of the storage and training space (approximately 3,800 square feet) on the first floor and office space (approximately 600 square feet) on the second floor to other apprenticeship and training funds affiliated with the Union. It is further represented that the leasing of this space in the Condo will provide the Fund with supplemental income in the short-term, and that this space will provide the Fund with room for expansion in the long-term.

The intended lessee is the Pile Drivers Local No. 56 Apprenticeship and Training Fund (the Pile Drivers Fund). It is represented that although the Pile Drivers Fund is affiliated with the Union, the Pile Drivers Fund and the Fund do not share any trustees in common. Accordingly, the applicant has represented that the Pile Drivers Fund is not a party in interest with respect to the Fund. To the extent that any leasing arrangement between the Fund and the Pile Drivers Fund and any leasing arrangement between the Fund any other training fund affiliated with the Union violates section 406 of the Act, the applicant represents that such transaction will either be exempt under section 408(b)(2) of the Act and/or will be exempt pursuant to class exemptions, PTE 76–1, PTE 77–10, or PTE 78–6.[27]

22. It is represented that the proposed transaction is feasible in that the purchase of the Condo by the Fund is

[24] It is represented that ownership interests in FTUB are as follows: New England Carpenters Pension Fund—36.5%, New England Carpenters Guaranteed Annuity Fund—18.2%, Empire State Carpenters Pension Fund—45%, and Bank Senior Management (through rabbi trust)-.3%.

[25] The Department, herein, is not providing any relief for the lending of money or other extension of credit between the Fund and FTUB, any other bank, financial institution, or entity.

[26] The Department, herein, is not providing any relief in connection with the letter of support.

[27] The Department is offering no view, herein, as to whether any sharing or leasing arrangement between the Fund and any training fund affiliated with the Union is covered by the Department's regulations, pursuant to 29 CFR 2550.408b–2; nor, is the Department offering a view that any sharing or leasing arrangement between the Fund and any training fund affiliated with the Union would be exempt under the provisions of the class exemptions, PTE 76–1, PTE 77–10, or PTE 78–6. Further, the Department is not providing, herein, any relief with respect to any sharing or leasing arrangement between the Fund and any training fund affiliated with the Union.

a one-time transaction for cash. The Fund will not pay any commissions, sales fees, or other similar payments to any party as a result of the transaction.

23. The applicant maintains that the proposed transaction is in the interest of the participants and beneficiaries of the Fund, because the Fund would obtain a modern state of the art training and education facility that is ''built to suit'' the Fund's specifications, that is accessible both by automobile and public transportation, and that would alleviate the over-crowding that exists at the Existing Facility.

The Union and the Fund also believe that the proposed transaction would be beneficial, because it would provide ''one-stop shopping'' for the Fund's apprentices and journeymen and the employers of those apprentices to have the Fund's training facility and Union offices at the same location. Such an arrangement would allow the apprentices and the journeymen to conduct Union business before or after attending classes or training. This arrangement would also allow contributing employers of the Fund to conduct business with the Union and address any apprentice issues with the Fund. Further, the arrangement would permit the Union and the Fund to showcase the training programs and facilities to contractors and developers. As the Building directly abuts a major interstate highway, this location would also provide both the Union and the Fund with the use of electronic signage on the roof for low-cost promotional opportunities for their respective programs.

24. The proposed exemption contains conditions which are designed to ensure the presence of adequate safeguards to protect the interests of the Fund regarding the subject transaction. In this regard, on July 16, 2008, the Trustees interviewed the candidates for the position of I/F with respect to the purchase by the Fund of the Condo. The Trustees selected and entered into an agreement (the Agreement), dated October 30, 2008, with Independent Fiduciary Services, Inc. (IFS) to serve as the I/F to act on behalf of the Fund with regard to the subject transaction. IFS has represented that acting as the independent fiduciary with respect to the Fund, it is responsible for determining whether the proposed transaction satisfies the criteria, as set forth in section 404 and section 408(a) of the Act.

25. The Trustees retained IFS to provide a report to the Department which would state IFS' conclusions and would summarize the analysis and considerations used by IFS to determine whether it is prudent to go forward with the proposed transaction.

26. It is represented that IFS is qualified to serve as I/F in that it specializes in acting as an independent fiduciary to plans covered by the Act. It is represented that IFS is experienced as a fiduciary in making and evaluating investment decisions, including decisions involving the acquisition and management and disposition of real estate. IFS is registered as an investment adviser under the Investment Advisers Act of 1940. IFS has acted in a variety of roles, including independent fiduciary, named fiduciary, investment manager, and adviser or special consultant. In this regard, IFS serves as an ongoing investment consultant to plans with assets valued at approximately $17.9 billion. The staff of IFS includes professionals experienced with the management and disposition of portfolio assets, including real estate, as well as lawyers familiar with the Act and sensitive to fiduciary responsibilities involving investment activities. IFS acknowledges that with respect to its duties as I/F acting on behalf of the Fund with regard to the proposed transaction that it is a fiduciary, as defined in section 3(21)(A) of the Act.

27. It is represented that IFS is independent of the parties involved in the proposed transaction in that it has no relationship with either the Fund or the Union, except for its role as the I/F with respect to the proposed transaction. It is represented that IFS' fee for its services as I/F of the Fund will be less than 1 percent (1%) of its annual revenues.

28. Pursuant to the Agreement with the Trustees, IFS has agreed:

(a) To evaluate the proposed transaction to determine whether it is in the interest of the Fund's participants and beneficiaries and, if IFS determines that the transaction is in the interest of the Fund, to submit a report to the Department in support of an application for a prohibited transaction exemption; and

(b) To negotiate and agree on behalf of the Fund to the specific terms of the transaction, to decide whether to consummate the proposed transaction and, if IFS decides to consummate the proposed transaction to direct the appropriate Fund fiduciaries to execute the instruments necessary for such transaction.

Further, IFS has represented that acting as I/F on behalf of the Fund, it is responsible for:

(a) A review of the reasonableness of the purchase price;

(b) A review of architect and contractor documentation to determine the appropriate proportional cost of the purchase and construction of the Condo and the common areas;

(c) A review of the Fund's independently prepared financial statements and projections of future cash flow in order to evaluate the Fund's ability to financially support the purchase of the Condo and the future operating costs associated with it;

(d) A review, with legal counsel, of the proposed sale agreement, the condominium agreement, the financing agreements, and other documents supporting the sale, ownership, and occupancy of the Condo;

(e) A review of the Fund's financial and business analysis supporting the purchase of the Condo compared to leasing that space or buying or leasing other similar space; and

(f) A review of the exemption application and other documentation provided to the Department.

29. In carrying out its duties, IFS requested, received, and has reviewed the following documents concerning the Fund and the proposed transaction: (a) The Prohibited Transaction Exemption application, dated February 24, 2009, including all attachments; (b) the Department's response, dated April 1, 2009; (c) the draft purchase and sale agreement between the Building Corporation, as seller, and the Fund, as buyer, dated June 9, 2009, as negotiated on behalf of the Fund by IFS with the assistance of Kenneth Gould of Lawson & Weitzen, who is acting as independent real estate counsel for the Fund, including the negotiation of the purchase agreement by which the Fund will acquire the Condo and various related instruments governing the condominium; (d) the draft master deed and by-laws of the condominium regime under which the Fund's Condo would be established and managed; (e) audited financial statements of the Fund, as at year end September 30, 2004–2008, prepared by Michael P. Ross, CPA; (f) forecasted income statements prepared by Christine Riley, Accounting Manager for the Fund, and Ben Tilton, Fund Administrator; (g) layout drawings of the existing and new structures; (h) the GMP between the Union and Suffolk, as set forth through change orders dated May 11, 2009, for the renovation and expansion of the Building, including exhibits; (i) the cost allocation report prepared by Casendino & Company (Casendino), an MAI architecture firm located in Boston, Massachusetts; and (j) the appraisal report, dated May 11, 2009, prepared by Mr. Moore and Mr. Collins of CB Richard Ellis/New

England, Consulting and Valuation Group.

In addition, IFS discussed the proposed transaction with: (a) Aaron D. Krakow, Esq., Krakow & Souris, LLC, outside legal counsel representing the Fund in connection with filing the application for exemption for the proposed transaction; (b) Richard Kronish, Advisor to the Fund and to the Union on financial matters; (c) David Cary, Integra Realty Resources Inc., (Integra) the appraiser for the appraisal of the Condo to be completed prior to closing; (d) Christine Riley, Accounting Manager for the Fund; and (e) Benjamin Tilton, the Fund's Training Director.

30. It is represented that IFS has visited both the Fund's Existing Facility and the site of the Condo. In this regard, IFS has observed the following: (i) There is no public transportation station in the vicinity of the Existing Facility, while the site of the Condo is approximately ¼ mile from two (2) public transportation stations; (ii) the Existing Facility has no immediate access to a major highway, while the Condo is adjacent to an interstate highway; (iii) the Condo will give the Fund's journeymen and apprentices access to almost double the number of parking spaces available in the Existing Facility; (iv) the Condo is three (3) times as large as the Existing Facility and appears to IFS to be proportionate and reasonable in light of the growth in the number of apprentices and journeymen taking classes and the increase in the number of courses offered by the Fund; and (v) the design drawings for the Condo shows that the unit will provide substantially more shop and classroom space than is available in the Existing Facility. Based on the foregoing observation, IFS concurs with the judgment of the Fund's Trustees that the Condo which the Fund will acquire, if the proposed transaction is consummated, will be adequate for the Fund's needs and represents a significant improvement over the current facility as a site for conducting the Fund's training and apprenticeship programs.

31. According to IFS, the Fund has considered the following options: (1) Renovate and expand the Existing Facility; (2) purchase and renovate another building; (3) build a new facility; (4) lease space in the Building from the Union or lease space from an unrelated third party; (5) purchase a ''built to suit'' property.

The first option, renovating and expanding the Existing Facility, according to IFS, is not tenable as the underlying lot is too small for expansion, there is no room for more parking spaces, and the facility is not convenient to public transportation. With regard to the second option, it is represented that the Fund has not been able to find a suitable property to purchase and renovate. With regard to the third option, no sites were available to build a new facility that would meet the Fund's requirements.

With regard to a comparison between: (i) Leasing space from a third party or from the Union; and (ii) purchasing a ''built to suit'' property, IFS has determined that ownership of the Condo is less expensive and more secure to the Fund than leasing. First, the Fund's exemption from property taxes renders purchasing a property superior to leasing. Leased property would be subject to property taxes, notwithstanding the Fund's tax exempt status as the tenant. In this regard, the 2009 property taxes estimated in the CB Richard Ellis appraisal, dated May 2009, were $211,000. Further, the Condo is being built according to the Fund's design and meets the Fund's parking, transportation, space, and usage requirements. The Condo offers the added benefit of synergies created by sharing common elements with the Union, permitting the apprentices and journeymen carpenters to do Union related business and obtain training in the same location. With the Condo ownership, the Fund has long-term stability in owning the Condo, control over the space, and the flexibility to modify such space. The long-term appreciation in value of the Condo would benefit the Fund as an owner. Accordingly, IFS has concluded that ownership of the Condo is in the interest and protective of the Fund to a greater extent than leasing space from a third party or from the Union. Further, IFS agrees with the Fund's conclusion that a ''build to suit'' facility is the only feasible solution.

32. It is represented that the terms of the proposed transaction are on terms which are at least as favorable to the Fund as those which would have been negotiated at arm's length with an unrelated party. The purchase contract will be signed not more than thirty (30) days before the closing on the Condo, and the master deed and by-laws will be signed at closing. IFS has reviewed drafts of the purchase contract, master deed, and by-laws for the Condo and concurs, in general, with the structure of the condominium regime.

It is represented that the master deed and property by-laws, as currently drafted, are protective of the Fund's interest. IFS represents that it will continue to negotiate the master deed and by-laws to make sure that the Fund is protected with regard to allocation of common expenses, rights with regard to sale of the Condo (either right of first refusal or right of first offer) [28] and major decisions.

It is represented that the purchase contract between the Fund and the Building Corporation will set the purchase price that the Fund will pay for the Condo. In this regard, the purchase price paid by the Fund for the Condo, as documented in writing and approved by IFS, will be the *lesser of:* (1) The fair market value of the Condo (the Appraisal Method); or (2) the Fund's proportionate share of the cost of acquisition and development of the Building (the Cost Allocation Method).

With regard to the Appraisal Method of calculating the purchase price of the Condo, IFS has engaged Integra, a certified MAI appraiser, to compute the fair market value of the Condo as of the date of the closing. It is represented that Integra is an independent company and will derive less than one percent (1%) of its gross proceeds in the past year in performing the appraisal of the Fund's Condo unit. It is represented that the format of this appraisal will be to value the Condo, according to normal practice, using a combination of income, replacement cost, and sales comparison approaches. In the view of IFS, this methodology is reasonable under the circumstances. It is represented that IFS will use Integra's appraisal to arrive at the fair market value of the Condo, at closing. The fair market value of the Condo will be compared to the actual cost of the Condo allocated to the Fund in order to arrive at the purchase price to be paid by the Fund for the Condo. In this regard, IFS will require that the purchase price for the Condo will be the lower of fair market value of the Condo or the actual cost of the Condo allocated to the Fund.

With regard to the Cost Allocation Method of calculating the purchase price of the Condo, it is represented that under the provisions of Massachusetts Property Law and the master deed, an owner of a condominium unit has an undivided interest in the land equal to its proportional interest in the building. Comparing the size of the Fund's Condo (35,226 square feet) and the Union's condominium unit (29,487 square feet) with the total square footage in the Building (71,539 square feet), results in a ratio of 54.4 percent (54.4%) for the Fund and 45.6 percent (45.6%) for the Union. Using this 54.4% ratio, the

[28] The Department, herein, is not proposing any relief with regard to the entry into a right of first refusal or a right of first offer between the Union and the Fund.

Fund's share of the cost ($5.8 million) of the land underlying the Building would be $3.155 million. Similarly, using the same 54.4% ratio, the Fund's share of the costs ($1 million) incurred by the Union for architect, legal, zoning, permits, and other construction-related fees would be approximately $544,000.

IFS estimates that the Fund will bear a slightly higher percentage 58.3 percent (58.3% or $11.152 million) of the $19.128 million in construction costs, as set forth in the GMP. In addition, IFS estimates that the Fund will bear 58.3 percent (58.3% or $349,800) of the $600,000 charges for construction costs outside the GMP (*i.e.,* the amount expended on furniture, fixtures, and equipment, and the amount expended for materials for minor work).

In order to confirm its understanding of the allocation of the acquisition and development costs between the Fund's Condo and the unit to be retained by the Union, IFS engaged Casendino, an MAI architecture firm located in Boston, Massachusetts, to review and report on the cost allocations delineated in the GMP, and more specifically the cost breakdown between the condominium units. Based on its review, in the opinion of Casendino, the construction costs for the Fund should be allocated at 58.34% of the construction budget (including any savings distribution).

Accordingly, the purchase price paid by the Fund for the Condo, as documented in writing and approved by IFS, will be the *lesser of:*

(1) The fair market value of the Condo, as of the date of the closing on the transaction, as determined by an independent, qualified appraiser selected by IFS; or

(2) 58.3 percent (58.3%) of the amount actually expended by the Building Corporation in the construction of the Condo under the GMP, plus the following amounts:

(i) 58.3 percent (58.3%) of the additional construction soft costs incurred outside the GMP contract (*i.e.,* the amount expended on furniture, fixtures, and equipment, and the amount expended for materials for minor work);

(ii) 54.4 percent (54.4%) of the amount expended on construction soft costs (*i.e.,* architect, legal, zoning, permits, and other fees); and

(iii) 54.4 percent (54.4%) of the cost of the land underlying the Building.

The following chart summarized the purchase price of the Condo under the Cost Allocation Method:

Component	Price or value	Allocation percent	Fund cost
Purchase Land & Building	$5,800,000	54.4	$3,155,200
Construction Soft Costs	1,000,000	54.5	544,000
GMP Construction Contract	19,128,992	58.3	11,152,202
Non-GMP Contract Construction Costs	600,000	58.3	349,800
Total Construction	26,528,992	....	15,201,202

33. IFS has considered the size of the investment that the Fund proposes to make in purchasing the Condo relative to total Fund assets. In this regard, IFS maintains that as a training fund, the Fund is not limited by investment diversification principles with regard to investing in facilities which fulfill the Fund's training purpose and its ancillary administrative activities. In the opinion of IFS, the primary consideration is the Fund's ability to meet its financial obligations, as they come due without impairing its training mandate.

IFS relies on a number of assumptions in evaluating the Fund's projected financial status, and used these assumptions to develop sensitivity models to project the Fund's financial status under a variety of both positive and negative assumptions. The assumptions break down into four categories: (1) Equity investment as a source of funds; (2) the collective bargaining agreements; (3) projected carpenter hours; and (4) fixed and variable costs.

With regard to the first category concerning sources of funds, in addition to the value of the Existing Facility, the Fund has annual investment income of approximately $200,000, including revenue anticipated to arise from rental of excess space in the Condo.

With regard to the second category, the main source of revenue for the Fund is the hourly contributions to be provided by the current collective bargaining agreements. It is anticipated that increases in the hourly rate and increases in the total wage and benefit package will be included in any future collective bargaining agreements.

With regard to the third category, while the 2009 fiscal year's carpenter hours underlying the revenue projection is 20 percent (20%) below the 2008 carpenter hours, IFS estimates that hours will stay at the 2009 level in 2010, and then increase in each of the years 2011 and 2012, and thereafter stabilizes at 6,720,000 for the next twenty years.

With regard to the fourth category, IFS also reviewed the anticipated annual fixed costs of operating the Condo and the variable costs of operating the Fund. In this regard, IFS assumed an annual two-percent (2%) increase in fixed and variable costs.

IFS evaluated the Fund's ability to service the tax exempt bond financing under stressed scenarios in which the carpenters' hours upon which contributions to the Fund are based decrease over time. In projecting a worse case scenario, IFS assumes annual reductions in carpenters' hours of 16 percent (16%) per year, each year from 2013 to 2022. In 2022, carpenters' hours would total only 1.05 million (down from 5.4 million hours in 2009). Under this scenario, the projected wage and benefit package would be $77.92 per hour, of which the Fund would receive $.598 per hour. In this regard, IFS estimates that the contribution rate to the Fund would have to increase by approximately $1.30 per hour from within the total projected wage and benefit package. Accordingly, as part of IFS' review and possible approval of the proposed transaction, IFS will require that the Union pledge to increase contributions to the Fund by diversion from other aspects of the wage and benefit package to cover the Fund's cash flow needs. In IFS' view, these potential diversions by the Union of up to an additional $1.30 per hour do not appear to be unmanageable given the projected size of the total wage and benefit package of $77.92.

Based on its review of preliminary information and its financial analysis, IFS concludes that the Fund reasonably can be expected to make all payments of interest and principal on its loan to acquire the Condo, maintain the Condo, and meet its expected training obligations. In addition, IFS concludes that under certain stress scenarios, a pledge by the Union to increase contributions to the Fund will be required to pay operating costs and debt service requirements.

In the event the Fund does not meet its obligations under the financing documents, the consequences of such an event would be spelled out in the loan agreement and the trust indenture of the tax-exempt bonds which provided such financing. Such instruments customarily require that the indenture trustee give the Fund notice of any breach and an opportunity to cure the breach within thirty (30) days. As discussed above, the cure would be effected by invoking the Union's obligation to increase the Fund's allocation from the total wage and benefit package.

34. IFS' analysis of the proposed transaction makes certain assumptions, about the level, security lien, and interest rate of tax-exempt debt, the amount of the Fund's equity participation in the proposed transaction, and the funds available from the sale of the Existing Facility. Each of these assumptions, as well as escalation assumptions in revenue and expense calculations and interest rate assumptions is subject to change and further analysis by IFS. In this regard, IFS has represented that it will continue to monitor the terms of the proposed transaction and will not consent to the closing until IFS is able to confirm that the terms of the purchase contract under which the Fund will acquire the Condo and all of the closing documents are reasonable and in the interest of the Fund and its participants.

35. IFS has examined the potential conflict of interest of two (2) of the Trustees of the Fund. In this regard, one member of the Executive Board of the Union is also a labor Trustee of the Fund, and a management Trustee of the Fund is also an executive with Suffolk, the contractor on the project. Both Trustees have recused themselves from all votes and matters relating to the construction of the Condo. As IFS is engaged to decide whether and on what terms to consummate the proposed transaction and not the Trustees of the Fund, these recusals provide further assurance that there is no conflict of interest arising out of the positions these two Trustees hold with the Union and Suffolk, respectively. It is further represented that any of the Trustees of the Fund who present similar conflicts in the future will recuse themselves as well.

IFS will also require that the by-laws and the master deed of the Building provide the Fund with appropriate authority regarding the on-going management of the Building over time. In this regard, Article II, section 2.1 of the proposed by-laws provides for each condominium unit owner to appoint one "manager" to the Condominium Association Board of Managers that has the responsibility for the operations and maintenance of the common area. The Trustees of the Fund represent that the manager appointed by the Fund shall be a management trustee at all times that the other condominium unit is owned by the Union.

36. IFS has also addressed the marketability of the Condo. In this regard, it is represented that depending on the needs of various possible tenants and purchasers the Condo could be sold or leased as a single unit or could be subdivided into separate rental units. IFS further represents that the location relative to highway and mass transit and adequate parking makes the Condo competitively attractive for a number of commercial uses, as there are very few properties that combine a large open space suitable for industrial or warehouse use that also have office space for company staff.

37. In conclusion, subject to certain caveats listed below, and subject to all of the terms of the Agreement and the assumptions developed in IFS's financial model to protect the Funds assets, as of June 11, 2009, IFS finds that the purchase of the Condo by the Fund is in the interest of the Fund. IFS's ultimate approval of the proposed transaction will be subject to the following caveats: (a) Review and agreement on the terms of the NMTC and tax-exempt bond financing; (b) agreement on the final terms of the Condo by-laws, the purchase contract, the master deed, and all closing documents, based on assistance and advice from legal counsel; (c) the final financing available to the Fund is on terms consistent with the assumptions described in the report prepared by IFS, dated June 11, 2009, and the terms thereof have been reviewed and approved by Fund counsel; and (d) satisfaction of all conditions set forth in the purchase agreement and related instruments.

38. In summary, the applicant represents that the proposed transaction meets the statutory criteria for an exemption under section 408(a) of the Act because:

(a) IFS, acting as the I/F on behalf of the Fund, is responsible for analyzing the relevant terms of the transaction and deciding whether the Trustees should proceed with the transaction;

(b) The Fund may not purchase the Condo, unless and until IFS, acting as the I/F on behalf of the Fund, approves such purchase;

(c) IFS, acting as the I/F on behalf of the Fund, is responsible for: (i) Establishing the purchase price of the Condo, (ii) reviewing the financing terms, (iii) determining that such financing terms are the product of arm's length negotiations, and (iv) ensuring that the Fund will not close on the Condo until IFS has determined that to proceed with the proposed transaction is feasible, in the interest of, and protective of the participants and beneficiaries of the Fund;

(d) The purchase price paid by the Fund for the Condo, as documented in writing and approved by IFS, acting as the I/F on behalf of the Fund, is the *lesser of:*

(1) The fair market value of the Condo, as of the date of the closing on the transaction, as determined by an independent, qualified appraiser selected by the I/F; or

(2) 58.3 percent (58.3%) of the amount actually expended by the Building Corporation in the construction of the Condo under the GMP, plus the following amounts:

(i) 58.3 percent (58.3%) of the additional construction soft costs incurred outside the GMP contract (*i.e.,* the amount expended on furniture, fixtures, and equipment, and the amount expended for materials for minor work);

(ii) 54.4 percent (54.4%) of the amount expended on construction soft costs (*i.e.* architect, legal, zoning, permits, and other fees; and

(iii) 54.4 percent (54.4%) of the cost of the land underlying the Building;

(e) IFS, acting as the independent fiduciary on behalf of the Fund, is responsible, prior to entering into the proposed transaction, for: (i) Reviewing an appraisal of the fully completed Condo, which has been prepared by an independent, qualified appraiser, and updated, as of the date of the closing of the transaction, (ii) evaluating the sufficiency of the methodology of such appraisal, and (iii) determining the reasonableness of the conclusions reached in such appraisal;

(f) The terms of the transaction are no less favorable to the Fund than terms negotiated under similar circumstances at arm's length with unrelated third parties;

(g) The Fund does not purchase the Condo or take possession of the Condo until such Condo is completed;

(h) The Fund has not been, is not, and will not be a party to the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or by the Union;

(i) The Fund does not pay any commissions, sales fees, or other similar payments to any party as a result of the transaction, and the costs incurred in connection with the purchase of the Condo by the Fund at closing do not include, directly or indirectly, any developer's profit, any premium receive by the developer, nor any interest charges incurred on the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or by the Union;

(j) Under the terms of the current collective bargaining agreement(s) and any future collective bargaining agreement(s), the Union has the ability, unilaterally, to increase the contribution rate to the Fund at any time by diverting money from wages and contributions to other benefit funds within the total wage and benefit package, and the Union is obligated to do so in order to prevent a default by the Fund under the terms of the financing obtained by the Fund to purchase the Condo;

(k) In the event, the Building Corporation and/or the Union defaults on the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or the Union, the creditors under the terms of such construction financing loan or such permanent financing loan shall have no recourse against the Condo or any of the assets of the Fund;

(l) IFS, acting as the independent fiduciary with respect to the Fund, is responsible for reviewing and approving the allocation between funding the purchase of the Condo from the Fund's existing assets or financing such purchase;

(m) IFS, acting as the independent fiduciary with respect to the Fund, is responsible for determining whether the proposed transaction satisfies the criteria, as set forth in section 404 and section 408(a) of the Act.

Notice to Interested Persons

Those persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include all members of the Locals in the Boston area and the Employer Associations.

It is represented that notification will be provided to all such interested persons by first class mail within fifteen (15) calendar days of the date of publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the supplemental statement, as required, pursuant to 29 CFR § 2570.43(b)(2) of the Department's regulations, which will advise all interested persons of the right to comment and to request a hearing.

The Department must receive all written comments and requests for a hearing no later than forty-five (45) days from the date of the publication of the Notice in the **Federal Register**.

Further Information Contact: Angelena C. Le Blanc of the Department, telephone (202) 693–8551 (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 15th day of December 2009.

Ivan Strasfeld,

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

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