

408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 28th day of June, 2010.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Application Nos. and Proposed Exemptions; D-11489, Morgan Stanley & Co., Incorporated; L-11609, The Finishing Trades Institute of the Mid-Atlantic Region (the Plan) et al.

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

**ACTION:** Notice of proposed exemptions.

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

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1974 (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 Involving Plans Described in Both Title I and Title II of ERISA

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and section 406(b) of ERISA, and the sanctions resulting from the application of sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met:<sup>1</sup>

(a) The sale or exchange of an "Auction Rate Security" (as defined in Section IV (b)) by a "Plan" (as defined in Section IV(h)) to the "Sponsor" (as defined in Section IV (g)) of such Plan; or

<sup>1</sup> For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer also to the corresponding provisions of section 4975 of the Code.

(b) A lending of money or other extension of credit to a Plan in connection with the holding of an Auction Rate Security by the Plan, from (1) Morgan Stanley & Co. Incorporated or an Affiliate (Morgan Stanley); (2) an "Introducing Broker" (as defined in Section IV (f)); or (3) a "Clearing Broker" (as defined in Section IV (d))—where the loan is (i) repaid in accordance with its terms, and (ii) guaranteed by the Plan Sponsor.

## II. Transactions Involving Plans Described in Title II of ERISA Only

If the proposed exemption is granted, the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met: (a) The sale or exchange of an Auction Rate Security by a "Title II-Only Plan" (as defined in Section IV(i)) to the Beneficial Owner" (as defined in Section IV(c)) of such Plan; or (b) A lending of money or other extension of credit to a Title II-Only Plan in connection with the holding of an Auction Rate Security by the Title II-Only Plan, from (1) Morgan Stanley; (2) an Introducing Broker; or (3) a Clearing Broker—where the loan is (i) repaid in accordance with its terms, and (ii) guaranteed by the Beneficial Owner.

## III. Conditions

(a) Morgan Stanley acted as a broker or dealer, non-bank custodian, or fiduciary in connection with the acquisition or holding of the Auction Rate Security that is the subject of the transaction;

(b) For transactions involving a Plan (including a Title II-Only Plan) not sponsored by Morgan Stanley for its own employees, the decision to enter into the transaction is made by a Plan fiduciary who is "Independent" (as defined in Section IV(e)) of Morgan Stanley. Notwithstanding the foregoing, an employee of Morgan Stanley who is the Beneficial Owner of a Title II-Only Plan may direct such Plan to engage in a transaction described in Section II, if all of the other conditions of this Section III have been met;

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

(d) The Plan does not waive any rights or claims in connection with the loan or sale as a condition of engaging in the above described transaction;

(e) The Plan does not pay any fees or commissions in connection with the transaction;

(f) The transaction is not part of an arrangement, agreement, or

understanding designed to benefit a party in interest or disqualified person;

(g) With respect to any sale described in Section I(a) or Section II(a):

(1) The sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security; and

(2) For purposes of the sale, the Auction Rate Security is valued at par, plus any accrued but unpaid interest;<sup>2</sup>

(h) With respect to an in-kind exchange described in Section I(a) or Section II(a), the exchange involves the transfer by a Plan of an Auction Rate Security in return for a "Delivered Security," as such term is defined in Section IV(j), where:

(1) The exchange is unconditional;

(2) For purposes of the exchange, the Auction Rate Security is valued at par, plus any accrued but unpaid interest;

(3) The Delivered Security is valued at fair market value, as determined at the time of the in-kind exchange by a third party pricing service or other objective source;

(4) The Delivered Security is appropriate for the Plan and is a security that the Plan is otherwise permitted to hold under applicable law;<sup>3</sup>

(5) The total value of the Auction Rate Security (*i.e.*, par, plus any accrued but unpaid interest) is equal to the fair market value of the Delivered Security;

(i) With respect to a loan described in Section I(b) or II(b):

(1) The loan is documented in a written agreement containing all of the

<sup>2</sup>The Department notes that this proposed exemption does not address tax issues. The Department has been informed by the Internal Revenue Service and the Department of the Treasury that they are considering providing limited relief from the requirements of sections 72(t)(4), 401(a)(9), and 4974 of the Code with respect to retirement plans that hold Auction Rate Securities. The Department has also been informed by the Internal Revenue Service that if Auction Rate Securities are purchased from a Plan in a transaction described in Sections I and II at a price that exceeds the fair market value of those securities, then the excess value would be treated as a contribution for purposes of applying applicable contribution and deduction limits under sections 219, 404, 408, and 415 of the Code.

<sup>3</sup>The Department notes that ERISA's general standards of fiduciary conduct would also apply to the transactions described herein. In this regard, section 404 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: (1) The decision to exchange an Auction Rate Security for a Delivered Security; and (2) the negotiation of the terms of such exchange (or a cash sale or loan described above), including the pricing of such securities. The Department further emphasizes that it expects plan fiduciaries, prior to entering into any of the transactions, to fully understand the risks associated with these types of transactions, following disclosure by Morgan Stanley of all the relevant information.

material terms of the loan, including the consequences of default;

(2) The Plan does not pay an interest rate that exceeds one of the following three rates as of the commencement of the loan:

(A) The coupon rate for the Auction Rate Security;

(B) The Federal Funds Rate; or

(C) The Prime Rate;

(3) The loan is unsecured; and

(4) The amount of the loan is not more than the total par value of the Auction Rate Securities held by the Plan.

(j) Morgan Stanley maintains, or causes to be maintained, for a period of at least six (6) years from the date of a covered transaction, such records as are necessary to enable the persons described in paragraph (k), below, 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 that engages in a covered transaction, other than Morgan Stanley shall be subject to a civil penalty under section 502(i) of ERISA or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination, as required, below, by paragraph (k); and

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

(k)(1) Except as provided in subparagraph (2), below, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of ERISA, the records referred to in paragraph (j), above, 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, 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 the Plan that engages in a covered transaction, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraph (k)(1)(B) or (C) shall be authorized to examine trade secrets of Morgan Stanley, or commercial or financial information which is privileged or confidential; and

(3) Should Morgan Stanley refuse to disclose information on the basis that such information is exempt from disclosure, Morgan Stanley 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.

#### IV. Definitions

(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 "Auction Rate Security" or "ARS" 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;

(c) The term "Beneficial Owner" means the individual for whose benefit the Title II-Only Plan is established and includes a relative or family trust with respect to such individual;

(d) The term "Clearing Broker" means a member of a securities exchange who acts as a liaison between an investor and a clearing corporation, helps to ensure that a trade is settled appropriately, ensures that the transaction is successfully completed, and is responsible for maintaining the paper work associated with the clearing and execution of a transaction;

(e) The term "Independent" means a person who is (1) not Morgan Stanley or an Affiliate, and (2) not a "relative" (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(f) The term "Introducing Broker" means a registered broker who is able to perform all the functions of a broker, except for the ability to accept money, securities, or property from a customer;

(g) The term "Sponsor" means a plan sponsor as described in section 3(16)(B) of ERISA and any Affiliates;

(h) The term "Plan" means any plan described in section 3(3) of ERISA and/or section 4975(e)(1) of the Code;

(i) The term "Title II-Only Plan" means any plan described in section 4975(e)(1) of the Code that is not an employee benefit plan covered by Title I of ERISA;

(j) The term "Delivered Security" means a security that is (1) Listed on a national securities exchange (excluding OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); or (2) A U.S. Treasury obligation; or (3) A fixed income security that has a rating at the time of the exchange that is in one

of the two highest generic rating categories from an Independent nationally recognized statistical rating organization (e.g., a highly rated municipal bond or a highly rated corporate bond); or (4) A certificate of deposit insured by the Federal Deposit Insurance Corporation. Notwithstanding the above, the term "Delivered Security" shall not include any Auction Rate Security, or any related Auction Rate Security, including derivatives or securities materially comprised of Auction Rate Securities or any illiquid securities.

#### Summary of Facts and Representations

1. The applicant Morgan Stanley & Co. Incorporated and its Affiliates (hereinafter, either "Morgan Stanley" or the "applicant"), headquartered in New York, New York, is one of the nation's pre-eminent global financial services firms. Morgan Stanley serves a large and diversified group of clients and customers, including corporations, governments, financial institutions, and individuals around the world. On September 21, 2008 Morgan Stanley obtained approval from the Board of Governors of the Federal Reserve System to become a bank holding company upon the conversion of its wholly owned indirect subsidiary, Morgan Stanley Bank (Utah), from a Utah industrial bank to a national bank. On September 23, 2008 the Office of the Comptroller of the Currency authorized Morgan Stanley Bank (Utah) to commence business as a national bank, operating as Morgan Stanley Bank, N.A. Concurrent with this conversion, Morgan Stanley became a financial holding company under the Bank Holding Company Act of 1956, as amended. Morgan Stanley & Co. Incorporated, Morgan Stanley's primary operating unit, is also both a registered investment adviser subject to the Investment Advisers Act of 1940 and a SEC-registered broker-dealer subject to the supervision of various governmental and self-regulatory bodies. Morgan Stanley offers a full array of investment-related services, including securities research, brokerage, execution, asset allocation, financial planning, investment advice, discretionary asset management services, sweep, and trust/custody services.

Morgan Stanley Smith Barney has recently been formed as a joint venture. Under the joint venture agreement, Citigroup, Inc. (Citigroup) and Morgan Stanley (including their respective subsidiaries) each contributed specified businesses to the joint venture, together with all contracts, employees, property licenses, and other assets (as well as

liabilities) used primarily in the contributed businesses. Generally, in the case of Citigroup, the contributed businesses include Citigroup's retail brokerage and futures business operated under the name "Smith Barney" in the United States and Australia and operated under the name "Quilter" in the United Kingdom, Ireland and Channel Islands. Certain investment advisory and other businesses of Citigroup are also included. In the case of Morgan Stanley, the contributed businesses generally consist of Morgan Stanley's global wealth management (retail brokerage) and private wealth management businesses.

As of September 30, 2009, Morgan Stanley employed 62,000 individuals and operates 1200 offices in 36 countries with over \$1.5 trillion in client assets held at its broker-dealer.

The applicant requests both retroactive and prospective exemptive relief for transactions involving certain of Morgan Stanley's client accounts in the time frame prior to the formation of the joint venture and going forward.

2. Among other things, Morgan Stanley acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities (ARS). The applicant describes ARS and the arrangement by which ARS are bought and sold as follows. ARS 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 represents that Morgan Stanley 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 ARS market in its sole discretion. Morgan Stanley may routinely place one or more bids in an auction for its own account to acquire ARS for its own inventory, to prevent (1) a failed auction (*i.e.*, an event where there are insufficient clearing bids that would result in the auction rate being set at a specified rate); or (2) an auction from clearing at a rate that Morgan Stanley believes does not reflect the market for the particular ARS being auctioned.

4. The applicant represents that for many ARS, Morgan Stanley 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. Morgan Stanley is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and Morgan Stanley. That agreement provides that Morgan Stanley will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Morgan Stanley.

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

6. According to the applicant, since February 2008, 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.<sup>4</sup>

7. The applicant represents that, in certain instances, Morgan Stanley may have previously advised or otherwise

caused a Plan to acquire and hold an ARS and thus may be considered a fiduciary to the Plan so that a loan to the Plan by Morgan Stanley may violate section 406(a) and (b) of ERISA; in addition, a sale between a Plan and its sponsor or an IRA and its Beneficial Owner violates ERISA section 406 and/or section 4975(c)(1) of the Code.<sup>5</sup> The applicant is therefore requesting relief for the following transactions, involving all employee benefit plans: (1) The sale or exchange of an ARS from a Plan to the Plan's Sponsor;<sup>6</sup> and (2) a lending of money or other extension of credit to a Plan in connection with the holding of an ARS from Morgan Stanley, an Introducing Broker, or a Clearing Broker—where the subsequent repayment of the loan is made in accordance with its terms and is guaranteed by the Plan Sponsor.

8. The applicant is requesting similar relief for plans covered by only Title II of ERISA. In this regard, the applicant is requesting relief for: (1) The sale or exchange of an ARS from a Title II-Only Plan to the Beneficial Owner of such Plan; and (2) a lending of money or other extension of credit to a Title II-Only Plan in connection with the holding of an ARS from Morgan Stanley, an Introducing Broker, or a Clearing Broker—where the subsequent repayment of the loan is made in accordance with its terms and is guaranteed by the Beneficial Owner.

9. The applicant represents that the proposed transactions are in the interests of the Plans. In this regard, the applicant represents that the exemption, if granted, will provide Plan fiduciaries with liquidity, notwithstanding changes that have occurred in the ARS markets. The applicant also notes that, other than for Plans sponsored by the applicant, the decision to enter into a transaction described herein will be made by a Plan fiduciary who is Independent of Morgan Stanley.

10. The proposed exemption contains a number of safeguards designed to protect the interests of each Plan. With respect to the sale of an ARS by a Plan, the Plan must receive cash equal to the par value of the Security, plus any accrued interest. The sale must also be unconditional, other than being for payment against prompt delivery. For in-kind exchanges covered by the proposed exemption, the security delivered to the Plan (*i.e.*, the Delivered Security) must be: (1) Listed on a

national securities exchange (excluding OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); or (2) a U.S. Treasury obligation; or (3) a fixed income security that has a rating at the time of the exchange that is in one of the two highest generic rating categories from an independent nationally recognized statistical rating organization (*e.g.*, a highly rated municipal bond or a highly rated corporate bond); or (4) a certificate of deposit insured by the Federal Deposit Insurance Corporation. The Delivered Security must be appropriate for the Plan and must be a security that the Plan is permitted to hold under applicable law. The proposed exemption further requires that the Delivered Security be valued at its fair market value, as determined at the time of the exchange from a third party pricing service or other objective source and must equal the total value of the ARS being exchanged (*i.e.*, par value, plus any accrued interest).

11. With respect to a loan to a Plan holding an ARS, such loan must be documented in a written agreement containing all of the material terms of the loan, including the consequences of default. Further, the Plan may not pay an interest rate that exceeds one of the following three rates as of the commencement of the loan: The coupon rate for the ARS, the Federal Funds Rate, or the Prime Rate. Additionally, such loan must be unsecured and for an amount that is no more than the total par value of ARS held by the affected Plan.

12. Additional conditions apply to each transaction covered by the exemption, if granted. Among other things, the Plan may not pay any fees or commissions in connection with the transaction and the transaction may not be part of an arrangement, agreement, or understanding designed to benefit a party in interest or disqualified person. Further, any waiver of rights or claims by a Plan is prohibited, in connection with the sale or exchange of an ARS by a Plan, or a lending of money or other extension of credit to a Plan holding an ARS.

13. In summary, the applicant represents that the transactions described herein satisfy the statutory criteria set forth in section 408(a) of ERISA and section 4975(c)(2) of the Code because:

(1) Any sale will be:

(A) For no consideration other than cash against prompt delivery of the ARS; and

(B) At par, plus any accrued but unpaid interest;

<sup>4</sup> The Department notes that Prohibited Transaction Exemption (PTE) 80-26 (45 FR 28545 (Apr. 29, 1980), as amended at 71 FR 17917 (Apr. 7, 2006)) is a class exemption that 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.

<sup>5</sup> The Department notes that the relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of ERISA.

<sup>6</sup> The Applicant represents that, as of May 7, 2010, no in-kind exchanges have occurred but may in the future.

(2) Any in-kind exchange will be unconditional, other than being for payment against prompt delivery, and will involve Delivered Securities that are:

(A) Appropriate for the Plan;

(B) Listed on a national securities exchange (but not OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); U.S. Treasury obligations; fixed income securities; or certificates of deposit; and

(C) Securities that the Plan is permitted to hold under applicable law; and,

(3) Any loan will be:

(A) Documented in a written agreement containing all of the material terms of the loan, including the consequences of default;

(B) At an interest rate not in excess of the coupon rate for the ARS, the Federal Funds Rate, or the Prime Rate;

(C) Unsecured; and

(D) For an amount that is not more than the total par value of ARS held by the affected Plan.

#### Notice to Interested Persons

The applicant represents that all the potentially interested persons cannot be identified and that, therefore, the only practicable means of notifying interested persons of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing are due within 45 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department, telephone (202) 693-8557. (This is not a toll-free number.)

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA), and in accordance with the 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) and 406(b)(1) and (b)(2) of the Act shall not apply to the proposed loan of approximately \$1,081,416 (the Loan) to the Plan by the International Union of Painters and Allied Trades, District Council 21 (the Union), a party in interest with respect to the Plan, for (1) the repayment of an outstanding loan (the Original Loan) made to the Plan by Commerce Bank and currently held by TD Bank (the Bank), both of which are unrelated parties; and (2) to facilitate the expansion of a training facility (the Facility) that is situated on certain real

property (the Land)<sup>7</sup> owned by the Plan, provided that the following conditions are met:

(a) The terms and conditions of the Loan are at least as favorable to the Plan as those which the Plan could have obtained in an arm's length transaction with an unrelated party;

(b) The Plan's trustees determine in writing that the Loan is appropriate for the Plan and in the best interests of the Plan's participants and beneficiaries;

(c) A qualified, independent fiduciary that is acting on behalf of the Plan (the Qualified Independent Fiduciary) reviews the terms of the Loan and determines that the Loan is an appropriate investment for the Plan and protective of and in the best interests of the Plan and its participants and beneficiaries;

(d) In determining the fair market value of the Property that serves as collateral for the Loan, the Qualified Independent Fiduciary (1) obtains an appraisal of the Property from a qualified, independent appraiser (the Qualified Independent Appraiser); and (2) ensures that the appraisal prepared by the Qualified Independent Appraiser is consistent with sound principles of valuation;

(e) The Qualified Independent Fiduciary monitors the Loan, as well as the terms and conditions of the exemption, and takes whatever actions are necessary and appropriate to safeguard the interests of the Plan and its participants and beneficiaries under the Loan;

(f) The Loan is repaid by the Plan solely with the funds the Plan retains after paying all of its operational expenses; and

(g) The Plan does not pay any fees or other expenses in connection with the servicing or administration of the Loan.

#### Summary of Facts and Representations

1. The Union is located in Philadelphia, Pennsylvania, and it represents members in the finishing trades, such as painters, drywall finishers, wall coverers, glaziers and glass workers, in Pennsylvania and New Jersey. The Plan was established by the Union in 1966 as a training program for individuals who are Union members and are employed by contributing employers with regard to the Plan. The Plan has twelve (12) trustees (the Trustees). Half of the Trustees represent Union members and half of the Trustees represent contributing employers. The purpose of the Plan is to provide eligible participants (the Participants) with

training for career advancement to journey person status and continued education in the Union's construction industries. As of February 15, 2010, the Plan had approximately 5,000 Participants and approximately \$5,649,370 in total assets.

2. Among the Plan's assets is the Facility, which is located at 2190 Hornig Road, Philadelphia, PA. The Facility is comprised mainly of classrooms and indoor work areas, and it is used by Participants to acquire construction training.

3. In 2004, the Trustees determined a need to purchase a training facility to better serve the ongoing needs of the Participants due to the increasingly sophisticated requirements of workers in the finishing trades, particularly with regard to glazing and architectural glass and metalworking. In November 2004, the Trustees identified the Property as a viable option to serve their training needs.

4. The Trustees secured third party financing of \$1,200,000 to assist in the purchase of the Property, for a total purchase price of \$2,600,000 (the Purchase).<sup>8</sup> The Property was purchased from a party that was not related to the Plan or the Union. To finance the Purchase, the Trustees caused the Plan to receive the Original Loan from the Bank. The Original Loan was entered into on March 23, 2005.

5. The Original Loan, which is in the principal amount of \$1,200,000, has a term of 15 years, and it requires the Plan to pay an adjustable rate of interest. At the time the Original Loan was made, the interest rate was set at the prime rate published in *The Wall Street Journal*, or 5.5%, calculated based on a 360-day year. Since entering into the Original Loan with the Plan, the Bank has reduced the interest rate to 3.5%. The Bank is required to review the annual interest rate of the Original Loan on the fifth and tenth anniversaries of the Original Loan, but the annual interest rate cannot exceed 5.5%.

Under the terms of the Original Loan, the Plan is required to make, commencing May 1, 2005, 179 consecutive monthly installments of principal and interest, amortized over the fifteen (15) year loan period in an amount equal to \$9,805, followed by one final payment of all outstanding principal, interest and fees on the maturity date of April 1, 2020.

Further, under the Original Loan, the Plan has assigned its lessor's interest in all rents, income and profits arising from leases pertaining to the Property as

<sup>7</sup> Unless otherwise stated herein, the Facility and the Land are together referred to as the "Property."

<sup>8</sup> The difference between \$2,600,000 and \$1,200,000 was paid with a cash down payment.

well as all contracts, licenses and permits associated with its ownership of the Property, and it has executed an environmental indemnity agreement. In addition, the Original Loan allows the Bank to reserve the right to elect, on the fifth and tenth anniversaries of the Original Loan, to call such loan in full and require the Plan to repay the remaining principal of the Original Loan and any interest then due and payable. Finally, as security for the Original Loan, the Plan has granted the Bank a first lien interest in both the Facility and the Land. As of March 23, 2010, the principal balance outstanding on the Original Loan was \$881,418.95.<sup>9</sup>

6. In March 2010, despite the fact that the Plan has made all of the payments required under the Original Loan on time without any defaults or delinquencies, the Bank indicated that it may elect to call the Original Loan by July 1, 2010. Therefore, the Union proposes to lend the Plan, as of March 23, 2010, \$1,081,416 under the terms of a replacement loan (*i.e.*, the Loan). The Loan will enable the Plan to repay the Original Loan and provide approximately \$200,000 in additional funds to finance an expansion of the Facility by adding two new classrooms.<sup>10</sup> Accordingly, an

<sup>9</sup>The outstanding principal balance on the Original Loan will decline with each monthly payment made by the Plan. As a result, the anticipated Loan amount will be adjusted to reflect any such decline.

<sup>10</sup>The Department is expressing no opinion in this proposed exemption regarding whether the Loan violates any of the fiduciary responsibility provisions of Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan 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 a plan. Section 404(a) of the Act also states that a plan fiduciary should diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

Moreover, the Department is not providing any opinion as to whether a particular category of investments or investment strategy would be considered prudent or in the best interests of a plan as required by section 404 of the Act. The determination of the prudence of a particular investment or investment course of action must be made by a plan fiduciary after appropriate consideration of 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 investment or investment course of action involved, including a plan's potential exposure to losses and the role the investment or investment course of action plays in that portion of the plan's portfolio with respect to which the fiduciary has investment duties (see 29 CFR 2550.404a-1). The Department also notes that in order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. Thus, a particular investment by a plan, which is selected

administrative exemption is requested from the Department.

7. The Loan will have a fixed rate of interest of 4% per annum, and the Loan will not be able to be called by the Union, except in the event of a complete default upon the Loan. Under the terms of the Loan, the Plan will be required to make 180 consecutive monthly installments of principal and interest, amortized over the fifteen (15) year loan period, calculated over a 365-day year, followed by one final payment of all outstanding principal, interest and fees on the maturity date. The Plan will not be required to assign its lessor's interest in rents, income and profits arising from leases pertaining to the Property or its interests in contracts, licenses and permits associated with its ownership of the Property. In addition, the Loan will not require the Plan to execute an environmental indemnity agreement. As security for the Loan, the Plan will grant the Union a first lien interest in the Facility and the Land. Finally, the Plan will not be required to pay any fees or other expenses in connection with the servicing or the administration of the Loan.

8. The Trustees represent that the Loan will be beneficial to the Plan since it allows the Plan to forecast more accurately the cost of its debt service over the life of the Loan. Further, the Trustees explain that the potential for the interest rate of the Original Loan to reset on the fifth and tenth anniversaries of the Original Loan raises problems for the Plan's ability to conduct accurate expense forecasting.

The Trustees also represent that the terms of the Loan are more favorable to the Plan than the terms of the Original Loan for several reasons. First, the Loan cannot be called by the Union except in the event of a complete default upon the Loan. Second, unlike the Original Loan, the Loan does not require provisions such as environmental indemnity agreements; assignments of contracts, licenses and permits; and assignments of leases and rents. Third, the Loan provides a more favorable interest calculation in comparison to the Original Loan, with such interest being calculated based on a 365-day year instead of a 360-day year.

Further, the Trustees state that the Loan will be beneficial to the Plan in that it will allow the Plan to expand the Facility to better serve the Participants. The Trustees note that the Plan will add two classrooms with \$200,000 of the

in preference to other alternative investments, would generally not be prudent if such investment involves a greater risk to the security of a plan's assets than other comparable investments offering a similar return or result.

proceeds from the Loan, thus allowing the Plan to offer training sessions in a broader range of subjects and to a higher number of Participants.

Finally, the Trustees assert that the Plan will repay the Loan solely with funds retained by the Plan after paying for all of its operational expenses (the Excess Funds).<sup>11</sup>

9. The Plan retained Louis A. Iatarola, MAI, SRA, to appraise the Property. Mr. Iatarola is a Qualified Independent Appraiser who is affiliated with the real estate appraisal firm of Louis A. Iatarola Appraisal Group, Ltd., located in Philadelphia, PA. Mr. Iatarola has no present or prospective interest in the Loan transaction, and he is unrelated to the Union. During 2009, he derived less than one percent of his gross revenue from parties in interest with respect to the Plan. Mr. Iatarola visited the Property on November 17, 2009, prepared a valuation report, dated December 16, 2009, and examined relevant public records. As of November 17, 2009, Mr. Iatarola opined in his appraisal report that an unencumbered fee simple interest in the Property had a fair market value \$4,000,000, with such opinion based on a reconciliation of value estimates derived from the Sales Comparison Approach and the Income Capitalization Approach to valuation.

10. The terms of the Loan have been initially reviewed and, thereafter, will be monitored by John Ward, an attorney in Washington, DC, who will act as the Plan's Qualified Independent Fiduciary. Mr. Ward has no present or prospective interest in the Loan transaction, and he is unrelated to the Union. Mr. Ward has represented labor unions and their associated benefit funds throughout his career, and he has focused his professional energies on tax and ERISA matters faced by those organizations. During 2009, Mr. Ward derived less than one percent of his gross revenue from parties in interest with respect to the Plan. Mr. Ward represents that he is qualified to act as the Qualified

<sup>11</sup>The Union represents that the Plan's operational expenses are funded by contributions made to the Plan by contributing employers. These contributions are based on a portion of each Participant's hourly wage paid by such employers. The Union represents that the Participants' hourly wage rate is negotiated periodically between the Union and the contributing employers. Thus, the Union represents that the Participants' wage deduction amount for contributions made by the employers to the Plan is determined by the parties each year.

The Union further represents that the computation of the amount of Excess Funds available for repayment of the Loan will be according to generally accepted accounting principles by a certified public accountant representing the Plan.

Independent Fiduciary, and he understands and accepts the duties, responsibilities and liabilities in acting as a fiduciary with respect to the Plan. In this regard, Mr. Ward states (a) that the Loan is both an appropriate investment for the Plan and in the best interest of the Plan and its participants and beneficiaries and (b) that he will continue to monitor the Plan's repayment of the Loan and will take whatever actions are necessary to protect the interest of the Plan and its participants and beneficiaries.

11. As part of his review of the Loan transaction, Mr. Ward engaged two additional Qualified Independent Appraisers, George Calomiris, AIA, CDS, Certified General Appraiser, and Kevin Boyle, Certified Residential Appraiser, to confirm the accuracy of the initial appraisal performed by Mr. Iatarola. Messrs. Calomiris and Boyle are affiliated with the real estate appraisal firm of William Calomiris Company, LLC, located in Washington, DC. They have no present or prospective interest in the Loan transaction, and they are unrelated to the Plan and the Union. During 2009, Messrs. Calomiris and Boyle derived less than one percent of their gross revenue from parties in interest with respect to the Plan. In developing their opinion on the accuracy of Mr. Iatarola's appraisal, Messrs. Calomiris and Boyle visited the Property, reviewed a valuation report prepared by Mr. Iatarola, and examined relevant public records. In an appraisal report dated February 19, 2010, Messrs. Calomiris and Boyle confirmed the opinion of Mr. Iatarola that the Property would have a fair market value of at least \$4,000,000, which would place the loan-to-value ratio at 28%.

12. Mr. Ward investigated the interest rates that would be available to the Plan were it to secure a fixed rate loan from an unrelated lender. In so doing, he noted that not only would any potential lender benefit from the 28% loan to value ratio, thereby making any potential loan highly secured, but that the Plan had consistently demonstrated over the past five (5) years that it was willing and able to make monthly mortgage payments on time and in full, with more than sufficient annual income to easily cover monthly obligations under nearly any potential mortgage loan.

Mr. Ward also opined that the current commercial interest rates would be higher than the rate charged by the Union under the Loan. Specifically, Mr. Ward sampled senior loan officers at PNC Bank and Wachovia Bank/Wells Fargo, and such senior loan officers indicated that neither bank would be

able to match the terms provided in the Loan. In this regard, the PNC Bank representative informed Mr. Ward that a fixed rate loan at 4% for 15 years seemed rather low and that a 6% rate would be more realistic for a 15 year commercial loan. The Wachovia Bank/Wells Fargo representative concurred with the guidance offered by the PNC Bank representative.

In conclusion, Mr. Ward opined that (a) the Loan is both an appropriate investment for the Plan and in the best interest of the Plan and its participants and beneficiaries; and (b) the terms and conditions of the Loan are more favorable to the Plan and its participants and beneficiaries than the terms of similar loans which might be made to the Plan by an unrelated party in an arm's length transaction.<sup>12</sup>

13. In summary, the Plan represents that the transaction satisfies the statutory criteria for an administrative exemption that are contained in section 408(a) of the Act for the following reasons: (a) The terms and conditions of the Loan will be at least as favorable to the Plan as those which the Plan could obtain in an arm's length transaction with an unrelated party; (b) the Trustees have determined in writing that the Loan is appropriate for the Plan and in the best interests of the Plan's participants and beneficiaries; (c) Mr. Ward, as the Plan's Qualified Independent Fiduciary, has reviewed the terms of the Loan and has determined that the Loan would be protective of and in the best interests of the Plan and its participants and beneficiaries; (d) in determining the fair market value of the Property, Mr. Ward has obtained an appraisal from a Qualified Independent Appraiser and has ensured that the appraisal prepared by the Qualified Independent Appraiser is consistent with sound principles of valuation; (e) Mr. Ward will monitor the Loan, as well as the terms and conditions of the proposed exemption (if granted), and will take whatever actions are necessary to safeguard the interests of the Plan and its participants and beneficiaries under the Loan; (f) the Loan will be repaid by the Plan solely with the funds the Plan retains after paying all of its operational expenses; and (g) the Plan will not pay any fees or other expenses in connection with

<sup>12</sup>In an addendum to his Qualified Independent Fiduciary report, dated May 6, 2010, Mr. Ward stated that he was unaware that the interest rate for the Original Loan at its outset had been 5.5%, with the interest rate being lowered to 3.5% at a later date. Nevertheless, he explained that the fact that the Original Loan's interest rate had been reduced from 5.5 to 3.5 percent would have no bearing on his opinion regarding the appropriateness of the Loan.

the servicing or administration of the Loan.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brian Shiker of the Department, telephone (202) 693-8552. (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 28th day of June, 2010.

**Ivan Strasfeld,**

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

[FR Doc. 2010-16096 Filed 7-1-10; 8:45 am]

**BILLING CODE 4510-29-P**

## **NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES**

### **National Endowment for the Arts; Proposed Collection; Comment Request**

**AGENCY:** National Endowment for the Arts, National Foundation on the Arts and the Humanities.

**ACTION:** Notice.

**SUMMARY:** The National Endowment for the Arts (NEA), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data is provided in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the impact of collection requirements on respondents is properly assessed. Currently, the NEA is soliciting comments concerning the proposed information collection of: Blanket Justification for NEA Funding Application Guidelines and Reporting Requirements. A copy of the current information collection request can be obtained by contacting the office listed below in the address section of this notice.

**DATES:** Written comments must be submitted to the office listed in the address section below within 60 days from the date of this publication in the **Federal Register**. The NEA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Can help the agency minimize the burden of the collection of information on those who are to respond, including through the use of electronic submission of responses through Grants.gov.

**ADDRESSES:** Send comments to Jillian Miller, Director, Office of Guidelines and Panel Operations, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Room 621, Washington, DC 20506-0001; telephone (202) 682-5504 (this is not a toll-free number), fax (202) 682-5049.

**Kathleen Edwards,**

*Director, Administrative Services, National Endowment for the Arts.*

[FR Doc. 2010-16155 Filed 7-1-10; 8:45 am]

**BILLING CODE 7537-01-P**

## **NUCLEAR REGULATORY COMMISSION**

### **Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on ESBWR**

The ACRS Subcommittee on ESBWR will hold a meeting on July 13, 2010, Room T-2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed to protect information that is proprietary to General Electric—Hitachi Nuclear Americas, LLC (GEH) and its contractors pursuant to 5 U.S.C. 552b(c)(4).

*The agenda for the subject meeting shall be as follows:*

**Tuesday, July 13, 2010—8:30 a.m. until 5 p.m.**

The Subcommittee will discuss issues relating to long-term core cooling, containment peak pressure, vacuum breaker isolation, and accumulation of hydrogen in containment. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, GEH, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher Brown (Telephone 301-415-7111 or Email [Christopher.Brown@nrc.gov](mailto:Christopher.Brown@nrc.gov)) five days prior to the meeting, if possible, so

that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 14, 2009, (74 FR 58268-58269).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at <http://www.nrc.gov/reading-rm/doc-collections/acrs>. Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

Dated: June 25, 2010.

**Cayetano Santos,**

*Chief, Reactor Safety Branch A, Advisory Committee on Reactor Safeguards.*

[FR Doc. 2010-16170 Filed 7-1-10; 8:45 am]

**BILLING CODE 7590-01-P**

## **NUCLEAR REGULATORY COMMISSION**

### **Advisory Committee on Reactor Safeguards (ACRS) Meeting of the Subcommittee on Plant Operations and Fire Protection**

The ACRS Subcommittee on Plant Operations and Fire Protection will hold a meeting on July 29, 2010, at the U.S. NRC Region IV, Texas Health Resources Tower, 612 E. Lamar Blvd., Suite 400, Arlington, TX 76011-4125.

*The entire meeting will be open to public attendance.*

The agenda for the subject meeting shall be as follows:

**Thursday, July 29, 2010—8:30 a.m. until 2 p.m.**

The Subcommittee will meet with the Administrator and Region IV staff on