

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC.

Dated: September 26, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Exemption Application No. D-12084]

Proposed Exemption From Certain Prohibited Transaction Restrictions Involving United Brotherhood of Carpenters and Joiners of America (the Applicant) Located in Washington, DC

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemption.

SUMMARY: This document provides notice of the pendency before the Department of Labor (the Department) of a proposed individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). This proposed exemption would provide an exemption for the Trustees of the United Brotherhood of Carpenters Pension Fund (the Plan) to sell 19.25 acres of improved real property (the Property) on behalf of the Plan to the United Brotherhood of Carpenters and Joiners of America (UBC) for cash (the Sale). The exemption, if granted, requires adherence to a number of conditions, including that an independent fiduciary will represent the Plan for all purposes with respect to the Sale. The amount of benefits that Plan participants are due under the Plan will not be affected by the exemption.

DATES:

Exemption date: If granted, the exemption would be in effect on the date that the grant notice is published in the **Federal Register**.

Comments due: Written comments and requests for a public hearing on the proposed exemption should be submitted to the Department by November 15, 2024.

ADDRESSES: All written comments and requests for a hearing should be submitted to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. D-12084 via email to *e-OED@dol.gov* or online through *https://www.regulations.gov*. Any such comments or requests should be sent by the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue NW, Washington, DC 20210, reachable by telephone at (202) 693-8673. See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT:

Anna Mpras Vaughan of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Comments: Persons are encouraged to submit all comments electronically without submitting paper versions. Comments should state the nature of the person's interest in the proposed exemption and how the person would be adversely affected by the exemption, if granted. Any person who may be adversely affected by an exemption can request a hearing on the exemption. A request for a hearing must state: (1) The name, address, telephone number, and email address of the person making the request; (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; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. The Department would publish a notice announcing such hearing in the **Federal Register**. The Department may decline to hold a hearing if: (1) the request for the hearing does not meet the requirements above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

Warning: All comments received will be included in the public record without change and may be made

available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment.

Additionally, the *https://www.regulations.gov* website is an "anonymous access" system, which means EBSA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EBSA without going through *https://www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Proposed Exemption

The Department is considering granting the exemption pursuant to its authority under ERISA section 408(a), and in accordance with the Department's exemption procedures.¹ This proposed exemption, if granted, does not provide relief from the requirements of, or specific sections of, any other law. Accordingly, the Applicant is responsible for ensuring compliance with any other laws applicable to the transactions covered by this proposed exemption.

Benefits of the Exemption: As described in more detail below, the Department is proposing relief based, in part, on the Applicant's representations that the Sale will permit the Plan, and its participants and beneficiaries, to earn approximately \$4,317,500 to \$4,620,000 more in net value than it would otherwise in a sale to an unrelated third party. Other benefits to the Plan are described below.

¹ 29 CFR part 2570, subpart B (75 FR 66637, 66644, October 27, 2011). For purposes of this proposed exemption, references to specific provisions of title I of ERISA unless otherwise specified, should be read to refer as well to the corresponding provisions of Code section 4975.

Summary of Facts and Representations²

The UBC

1. The United Brotherhood of Carpenters and Joiners of America (UBC) is an international labor organization with 725 local unions (UBC Local Unions) and 37 councils (the UBC Councils). As of June 20, 2023, the UBC had total assets of \$694,351,926. According to the Applicant, a UBC Local Union is chartered by and affiliated with the UBC and represents the individual members of the UBC in its geographic area. In addition, the Applicant states that each UBC Council is affiliated with a UBC Local Union and the various UBC Councils are affiliated to the UBC by the UBC Constitution. However, the Applicant states that the UBC Councils are separate legal entities from the UBC and the UBC does not control the UBC Councils affiliated with it. Further, the Applicant states that none of the trustees appointed by the UBC Councils are officers of the UBC, and no agency relationship exists between the UBC and the UBC Councils.

The Plan

2. The United Brotherhood of Carpenters Pension Fund (the Plan) is a defined benefit multiemployer pension plan, located in Las Vegas, Nevada.³ The Plan provides defined benefit pension retirement benefits to full-time officers or representatives employed by a UBC Local Union, UBC Council, other designated representatives of a UBC Local Union or UBC Council, or persons who are United States residents and

² The Summary of Facts and Representations is based on the Applicant's representations and does not reflect factual findings or opinions of the Department at all times, unless indicated otherwise. The Department notes that the availability of this exemption, if granted, is subject to the express condition that the material facts and representations contained in application D-12084 (the Application) are true and complete, and accurately describe all material terms of the transactions covered by this exemption. If there is any material change in a transaction covered by this exemption, or in a material fact or representation described in the Application, the exemption will cease to apply as of the date of such change.

³ The Applicant states that the Plan elected to become a multiemployer plan in accordance with section 3(37)(G) of ERISA and meets the legislative definition of a multiemployer plan under 3(37)(G)(vi). That section reads, "(vi) A plan is described in this clause if it is a plan sponsored by an organization which is described in section 501(c)(5) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code 1986 and which was established in Chicago, Illinois, on August 12, 1881." The United Brotherhood of Carpenters Pension Fund is sponsored by the UBC, which is a 501(c)(5) organization, tax exempt under Section 501(a) of the Code, and was established in Chicago, Illinois, on August 12, 1881.

determined to be representative of or professional, management, or confidential employees of the UBC.⁴ As of December 31, 2022, the Plan had 4,627 participants; and as of June 30, 2023, the Plan had approximately \$931,860,235 in assets. According to the Plan's annual funding notice issued in April 2022, the Plan had a funded percentage of 99.3% as of January 1, 2021.

3. The Plan is sponsored and administered by a Board of Trustees (the Board). The Board is made up of six (6) trustees who are current and former members of the UBC Executive Board (the UBC Trustees) and five (5) trustees who are appointed by officers of UBC Local Unions or UBC Councils (the Council Trustees).⁵ The UBC Trustees and the Council Trustees may be referred to collectively as the "Trustees." The Applicant represents that the UBC is an employee organization whose members are covered by the Plan, as well as an employer of employees who are covered by the Plan, and as such is a party in interest with respect to the Plan pursuant to ERISA section 3(14)(C) and (D).

The Property

4. The Plan owns the Property through its wholly-owned LLC, Bermuda Hidden Well, LLC (Bermuda LLC), a limited liability corporation incorporated by the Plan on April 19, 2001 in the State of Delaware. Bermuda LLC was originally formed to hold real property on behalf of the Plan and is managed on behalf of the Plan by Washington Capital Management, Inc. (WCM), who serves as the Plan's independent fiduciary and an "Investment Manager" under ERISA section 3(38) with respect to the holdings of Bermuda LLC.

5. The Property consists of 19.25 acres located at 6855 Bermuda Road, Las Vegas, Clark County, Nevada 89119. The Property has been specifically

⁴ Employees of the Carpenters International Training Fund, The International Labor-Management Committee for the Floor and Wall Covering Industry, the UBC National Job Corps Training Fund, The United Brotherhood of Carpenters Pension Fund, and the Carpenters Legislative Improvement Committee may also be eligible for participation in the Fund.

⁵ The Applicant represents that, unlike other multiemployer plans, the Plan is not maintained by a collective bargaining agreement and, therefore, is not a "Taft-Hartley" plan, pursuant to section 305(c)(5) of the Labor Management Relations Act. Because the Trustees of the Plan are appointed by either the UBC or UBC Local Unions and UBC Councils, none of the Trustees could be considered "employer representatives," which would be required for the plan to constitute a Taft-Hartley multiemployer plan.

developed for car rental operations and is currently improved with various structures, including an office, a car wash building with fuel area, and a shop building, along with surface and covered parking spaces and a few kiosk guard shack buildings. The total building area comprises 45,321 square feet.

6. The Property was originally a portion of a larger 30.14 acre parcel (the Original Parcel) that was acquired by the Plan on June 11, 2011, from LV-Airport Investors, LLC, an unrelated party, for a total cash price of \$10,464,126. The Original Parcel was subdivided and a 10.89 acre portion (the Adjacent Parcel) was sold to the Southwest Regional Council of Carpenters (the Southwest Council) in 2011 pursuant to PTE 2011-15.⁶

7. The UBC then acquired the Adjacent Parcel from the Southwest Council in 2017. The Applicant represents that the Adjacent Parcel abuts the Carpenters International Training Center (on the side opposite the Property), which is a UBC member-owned training facility.

8. When the Property was acquired by the Plan, it was subject to and encumbered by a lease between lessee Alamo Rent-A-Car, LLC and Lessor LV-Airport Investors, LLC, effective April 12, 2001, for an initial term of twenty (20) years, with two (2) renewal terms of five (5) years each (the 2001 Lease). The monthly basic rent under the 2001 Lease was \$75,708.33 for an annual basic rent of \$908,500.00. Since 2001, the lessee has changed over the years. Vanguard Car Rental USA, Inc. became the successor in interest to Alamo Rental (US) Inc., which was the successor in interest to Alamo Rent-A-Car, LLC. The current lessee, Enterprise Leasing Company-West, LLC (Enterprise), eventually became the successor-in-interest to Vanguard Car Rental USA, Inc. The Plan (through Bermuda LLC) became the lessor in 2011 following the purchase of the Original Parcel that included the Property.

9. The 2001 Lease was scheduled to expire in April 2021. In preparation for discussions with the current lessee over a possible renewal term, WCM engaged Valuation Consultants, Inc. to complete an appraisal and rental study of the Property (the June 2020 Appraisal). The June 2020 Appraisal demonstrated that rent escalations in Enterprise's 20-year lease had lagged far behind market rental rates. The Applicant states that considering the June 2020 Appraisal findings, any rental rate agreed to

⁶ 76 FR 49789 (August 11, 2011).

between WCM and the current lessee should be significantly higher than the rent the lessee had been paying under the 2001 Lease. Based on the rate increase, impact of the Covid pandemic on the Las Vegas economy, and its internal needs, Enterprise decided not to renew the 2001 Lease and to negotiate its gradual exit from the 2001 Lease. To this end, the Plan entered into several short-term lease extensions with Enterprise that included early right of termination clauses in favor of the Plan. Most recently, the Plan and Enterprise entered into an amendment of the 2001 Lease extending the expiration date for a portion of the Property through December 31, 2024. The Plan is permitted to terminate the 2001 Lease before December 31, 2024, upon 90 days' written notice.

Decision To Sell the Property

10. The Plan's immediate goal was to receive fair market value rental rate for the lease of the Property upon the termination of Enterprise's lease. Based on analyses by Valuation Consultants, Inc. and guidance from WCM, a new tenant was not likely to enter a long-term lease at the Property's current fair market rental value. Furthermore, the Property had been modified to specifications that suited Enterprise's operations (rental car business with attached storage and maintenance facilities). Following an evaluation process in the fourth quarter of 2020, WCM reported that it appeared unlikely that the Plan could secure another long-term lease without significantly redeveloping the Property to reposition it for a new tenant that was not in the car rental business.⁷ WCM identified that the highest and best use of the Property would be to redevelop it with light industrial buildings.

11. WCM determined that, in order to receive the most value in connection with the Plan's investment in the Property, and to avoid additional redevelopment costs and maintenance expenses, the Plan could sell the Property to the UBC.⁸ As discussed below, the UBC owns a parcel of property that is adjacent to the Property, and the Property is in close proximity to the Carpenters International Training Center. The Applicant states that no third party has inquired about purchasing the Property, and the UBC

⁷ The Applicant represents further that other car rental companies would be unlikely to enter into a long-term lease for the Property due to the land's increasing value for this limited purpose.

⁸ As described in more detail below, the Applicant states the sale to the UBC would generate an additional profit of \$3,410,000 to the Plan as compared to a sale to an unrelated third party.

does not intend to sell the Property to a third party after its acquisition from the Plan. The Applicant represents that the UBC plans to develop the Property into two light industrial buildings to accommodate the UBC's expansion of its International Training Center.

12. The Applicant represents that the UBC Trustees recused themselves and abstained from any and all discussions concerning the potential Sale of the Property to the UBC, and that only the Council Trustees participated in the decision to sell the Property to the UBC.⁹ The Council Trustees decided that the Sale to the UBC was the most appropriate approach given the Plan's goals. The Council Trustees ultimately determined that it would be appropriate to engage an independent fiduciary other than WCM to oversee and ultimately determine whether the Plan will complete the proposed Sale.

The Independent Fiduciary

13. The Plan engaged Shumaker, Loop & Kendrick LLP (Shumaker or the Independent Fiduciary) as the Plan's Independent Fiduciary with respect to the proposed Sale pursuant to an engagement agreement dated December 5, 2022. The Applicant represents that the Council Trustees engaged in a prudent process on behalf of the Plan to select Shumaker as the independent fiduciary.¹⁰

14. Scott D. Newsom and Beth M. Eckel of Shumaker were retained to carry out the independent fiduciary duties of Shumaker to the Plan.¹¹ Mr. Newsom represents that he has over 20 years of experience in employee benefits law and ERISA, primarily representing multiemployer benefit plans in all aspects of their maintenance and fulfillment of the Board of Trustees' fiduciary obligations. Ms. Eckel

⁹ A discussion of the whether the purported recusal may be effective to negate a violation of ERISA section 406(b) is found below. Further, the Department notes that the Council Trustees themselves may have an interest in the UBC that could affect their decision making as fiduciaries of the Plan.

¹⁰ The Council Trustees prepared a request for proposal for an independent fiduciary to oversee the sale of the Property pursuant to which candidates were asked, among other things, to provide: examples of similar independent fiduciary services to other clients; their knowledge and experience of the Las Vegas real estate market; their process for selecting appraisers, reviewing appraisals, and analyzing the adequacy of the appraisal methodologies; and their experience with appraisers and understanding how to oversee the appraisal process. The Department is not expressing a view whether the process followed by the Council Trustees was prudent, as such matter is outside the scope of this application.

¹¹ Unless otherwise provided, Mr. Newsom and Ms. Eckel are referred to herein collectively as "Shumaker."

represents that she has 13 years of experience as a real estate attorney focused on commercial real estate and financing matters. Ms. Eckel states she has broad experience in representing developers, owners, lenders, borrowers and large and small businesses in a wide range of transactions, including the acquisition, disposition, leasing, financing, construction and development of real property.

15. Shumaker represents that the revenue received from its engagement as Independent Fiduciary for the Plan is less than two percent of its gross revenue for the 2021 federal income tax year, and less than 3.3 percent of its gross revenue for the 2022 federal income tax year. Shumaker does not have any interest in the proposed transaction other than the compensation it will earn by serving as Independent Fiduciary for the proposed Sale. Furthermore, Shumaker represents that it (1) has not entered into, and under the terms of the proposed exemption would not at any time enter into, any agreement, arrangement, or understanding that includes any provision providing for it to be directly or indirectly indemnified or reimbursed by the Plan or any other party if Shumaker fails to adhere to its contractual obligations or those imposed by any state or Federal laws applicable to the Independent Fiduciary's work; (2) the Plan has not waived and will not waive any rights, claims, or remedies of the Plan under ERISA, state, or Federal law against Shumaker with respect to the proposed Sale.

16. Shumaker acknowledges its responsibilities under ERISA as an Independent Fiduciary acting on behalf of the Plan with respect to the Proposed Sale. The Applicant and Shumaker confirm that Shumaker will determine whether the Plan proceeds with the Sale. Further, Shumaker states that it: does not have a past or ongoing relationship with the UBC except for the services provided to the Plan as Independent Fiduciary with respect to the proposed Sale; has not had and currently does not have any relationship with any UBC Locals or any individual trustees on the board of the Plan.

17. In accordance with ERISA sections 404(a)(1)(A) and (B), Shumaker, as the Plan's Independent Fiduciary, must prudently and loyally perform the following in connection with the proposed Sale and the exemption, if granted: (i) represent the interests of the Plan in the Sale; (ii) determine that the Sale is in the interest of, and protective of the rights of, the Plan and its participants and beneficiaries; (iii) determine that the Sale price is in the

interest of, and protective of the rights of, the Plan and its participants and beneficiaries; (iv) review and approve the terms and conditions of the Sale in the Independent Fiduciary's sole discretion and further negotiate any conditions they consider to be in the interest of the Plan, in accordance with their fiduciary duties; (v) independently and prudently engage the qualified independent appraiser, Cushman & Wakefield of Nevada, Inc. (Cushman or the QIA), for the Sale; (vi) review and approve the methodology used by the QIA and ensure that such methodology is properly applied in determining the Property's fair market value on the date of the Sale; (vii) monitor the Sale throughout its duration consistent with its duties as a prudent plan fiduciary; (viii) ensure that the QIA renders an updated fair market valuation of the Property as of the date of the Sale; (ix) determine whether it is prudent to proceed with the Sale; (x) refrain from entering into any agreement, arrangement or understanding that violates ERISA section 410;¹² (xi) ensure compliance with the general terms of the proposed transaction and with the conditions of the proposed exemption; (xii) take any appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries; and (xiii) submit a written report to the Department not later than 90 days after the Sale has been completed demonstrating that each exemption condition has been met.

The QIA

18. Shumaker engaged the appraisal firm Cushman to conduct an appraisal of the Property in connection with the application in December of 2022 (the 2022 Appraisal).¹³ Shumaker states that it selected Cushman after a prudent process that considered the appraiser's reputation, expertise, and experience, and well as its familiarity with the Property and requirements of appraisals that would be utilized in connection with applications for a prohibited transaction exemption. Shumaker also evaluated Cushman's independence from the parties in interest involved in the proposed transaction and determined that Cushman had no interest in the proposed Sale of the

¹² ERISA section 410 generally provides that any provision in an agreement or instrument that purports to relieve a fiduciary for responsibility or liability for any responsibility, obligation, or duty under Part I of Title I of ERISA is void against public policy.

¹³ Shumaker and Cushman are parties to an engagement agreement dated and executed on December 26, 2022.

Property or the parties to the transaction that could affect its independence.¹⁴

19. Cushman's employee, Petra Latch (MAI) conducted the 2022 Appraisal. Ms. Latch is a certified general appraiser in Nevada. In addition to providing appraisal services, Ms. Latch serves in various positions on local Appraisal Institute and real estate industry boards.

20. Cushman represents that it has no relationship to any parties in interest or their affiliates engaging in the proposed transaction. Further, Cushman represents that it has no interest in the Property or the outcome of the transaction and certifies that the gross revenue from the Plan or any party in interest (and any of their affiliates) for 2022 is less than two (2) percent of its annual revenue based upon its income for the prior federal income tax year.

21. The QIA has not entered into, and must not at any time enter into, any agreement, arrangement, or understanding that includes any provision that provides for the direct or indirect indemnification or reimbursement of the QIA by the Plan or any other party for any failure by the QIA to adhere to its contractual obligations or those imposed by state or Federal laws applicable to the QIA's work. Additionally, the Plan has not waived and will not waive any rights, claims or remedies of the Plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the QIA with respect to the subject matter of the exemption.

The Appraisal

22. The 2022 Appraisal gave an "as is" fair market value of the Property of \$30,325,000.¹⁵ In addition, the 2022 Appraisal concluded that the Property was particularly valuable to the UBC because the UBC owned land that was adjacent to the Property. The 2022 Appraisal therefore increased the "as is" value of the Property by \$3,410,000 (the "assemblage increase").¹⁶ The 2022 Appraisal also quantified the contributory value of costs spent to date by the Plan for the proposed re-development of the Property, as

¹⁴ The Applicant notes that the QIA also performed an appraisal in January 2022 on behalf of the Plan in order to assist WCM in determining the "highest and best use" of the Property.

¹⁵ The 2022 Appraisal contains detailed analysis which is available by contacting the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue NW, Washington, DC 20210. Please reference D-12084.

¹⁶ As described above, the Original Parcel (30.14 acres previously owned by the Plan in its entirety) was subdivided into the Property (19.25 acres currently owned by the Plan) and the Adjacent Parcel (10.89 acres currently owned by the UBC).

\$270,000 (the "contributory costs"), and further increased the value of the Property by that additional amount.¹⁷

23. Shumaker reviewed the 2022 Appraisal and found that the QIA's analysis was reasonable and consistent with the type of substantive professional report that Shumaker expected when it engaged the QIA, which is an appraisal firm with a national reputation. Shumaker states that it does not have any concerns that the report was deficient, inaccurate, or not performed in accordance with the QIA's professional standards.

Relevant Sale Terms

24. The Plan's counsel negotiated the terms of the proposed Purchase and Sale Agreement and Joint Escrow Instructions (the Sale Agreement), which were reviewed and approved by the Independent Fiduciary. According to the terms of the Sale Agreement, the UBC will pay the Plan the greater of: (a) \$33,930,000, which is the sum of the Property's "as is" price (\$30,250,000), plus the "assemblage increase" (\$3,410,000), plus the Plan's "contributory costs" (\$270,000); or (b) the fair market value of the Property as established by a qualified independent appraiser in an updated appraisal of such Property on the date of the Sale.¹⁸ Further, the Plan will pay no fees, commissions or other expenses associated with the Property's Sale.

Clawback for Subsequent Sales by the UBC

25. In determining whether to propose the relief requested by the Applicant, the Applicant's representations that the UBC was an appropriate purchaser of the Property (as opposed to other third parties) due to its ownership of adjacent property and the UBC's payment of a premium in the form of an assemblage increase was an important consideration to the Department. In addition, the Applicant's representation that it did not plan to resell the Property to a third party—instead, it planned to expand its International Training Center, located adjacent to the Property—was material to the Department's consideration of whether to propose relief.

26. However, due to uncertainties about the present and future value of the Property, the Department is concerned that UBC could subsequently sell the Property for an additional profit that

¹⁷ The 2022 Appraisal provides that the total value of architect, engineer, and development studies and other activities paid for by the Plan, which add to the value of the Property if purchased by the UBC is \$270,000 (rounded).

¹⁸ The 2022 Appraisal will be updated prior to closing with a subsequent appraisal.

could have been captured by the Plan. To address this concern, the Department has included a “clawback” provision in Section III(h) of the proposed exemption that would become effective if the UBC sells the Property within 10 years after the date of the Sale for a price that is greater than the proceeds received in the Sale by the Plan. In such event, the excess of such sale price over the amount received by the Plan will be contributed in cash by the UBC to the Plan as of the end of the Plan year following the date of such subsequent sale. The clawback provision would apply if UBC sells the whole Property or subdivides and sells a portion of the Property.

27. The Department is also concerned, due to the potential future value of the Property and its location in a prime area near the Las Vegas airport and the Las Vegas Strip, that the UBC may decide in the future to monetize the Property, via lease or other means, in a manner inconsistent with its stated rationale for purchasing the Property. As described above, this proposed exemption is predicated, in part, on the representations of the parties that the UBC intends to use the Property to expand its International Training Center, and not as a means of obtaining a profit that could otherwise have redounded to the benefit of the Plan. Therefore, the exemption would require the UBC to contribute to the Plan an amount in cash equal to 51 percent of the gross revenue received from the UBC’s use of the Property in a manner or for a purpose that is inconsistent with the UBC’s stated intention to expand its International Training Center and/or provide union-related services to members of the UBC. This obligation would apply to any such revenue earned during the 10 years following the date of Sale and such amounts must be contributed by the UBC to the Plan by the end of the Plan year following the year in which such revenue is earned.

Independent Fiduciary Analysis and Conclusion

28. *Benefit to the Plan.* Shumaker states that the proposed Sale to the UBC would allow the Plan to realize a previously unrealized gain that UBC could re-invest without delay. Specifically, the Plan would receive approximately \$33,930,000 for the Property, representing a significant gain of approximately 407.43% on the \$6,686,576.50 portion of the original \$10,387,619.55 acquisition cost attributable to the Property. The Plan’s investment managers could invest the sales proceeds immediately in accordance with the Plan’s overall

investment policy statement and asset allocation strategy.

29. Shumaker also represents that the proposed Sale allows the Plan to sell the Property at a premium due to the assemblage value through the Property’s combination with the Adjacent Parcel owned by the UBC. This assemblage value adds an additional 11.27% (\$3,410,000) to the purchase price. If the Plan desired to market the Property to third parties, the 2022 Appraisal indicates that a resulting purchase price of \$30,250,000 would be anticipated. Further, the Plan would incur a commission on a sale to a third party of at least 3–4%. Assuming a sale price of \$30,250,000, the Plan would be expected to pay an additional amount of \$907,500 to \$1,210,000 in sales commissions. The proposed Sale would not require a commission to be paid to any listing or commercial real estate agent. Therefore, a sale of the Property by the Plan to an unrelated third-party at “As Is” fair market value would be anticipated to result in approximately \$4,317,500 to \$4,620,000 less than the proposed Sale (the lost assemblage value plus the otherwise avoided commissions).

30. In addition, Shumaker states that the proposed Sale to the UBC offers the Plan an opportunity to resolve its issues with the Property in an efficient and timely manner. Shumaker states that the planned expiration of the 2001 Lease means that the Plan needs to address its future plans for the Property effectively at this time to avoid the loss of income from the rental payments and the added expense of maintenance costs from an unproductive piece of property.¹⁹

31. Shumaker also states that the proposed Sale allows the Plan to avoid the expense of redeveloping the Property for sale to a third party. As determined by the 2022 Appraisal, the highest and best use of the Property would be achieved through the demolition of the buildings following the expiration of the 2001 Lease and the redevelopment of the Property with industrial use, or mixed use that includes industrial, office and supporting commercial uses. However, redevelopment to achieve such highest and best use would present risks and challenges to transition the Property. In the 2022 Appraisal, Cushman warned that “Construction costs are escalating,

¹⁹ As described above, the Applicant represents that it is unlikely other car rental companies would enter into a long-term lease due to the high rental rate that would be required for that purpose, and it was also unlikely that the UBC Pension Fund could secure a long-term lease with a tenant in another industry without significantly redeveloping the Property.

and a redevelopment plan of this size might require a three-year time period during which time there is risk related to costs.”

32. Further, Shumaker states that the proposed Sale would relieve the Plan of the risks inherent in preparing the Property for market or attempting to redevelop the Property itself. According to Shumaker, the potential lack of income or investment gain from the Property over a several year development period (compared to an assumed 7.5% return on Plan investments), the up-front cost of any development (including risk of escalating costs), and the risk of selecting the right type of redevelopment to increase the value of the Property above what would be realized by the proposed Sale, all seem unnecessary and speculative risks for the Plan to take on when compared to the availability of a one-time sale. Similarly, Shumaker suggests that the development of the Property by the Plan in accordance with the desires of the UBC or a related party for a build-to-lease type arrangement would require an ongoing business relationship between the Plan and the UBC over an extended period-of-time and compliance with an administrative exemption, which involves additional ongoing compliance and administrative burdens.²⁰

33. *Conclusion of the Independent Fiduciary.* Shumaker concludes that the proposed Sale would: provide the Plan with the opportunity to sell the Property for a significant gain above and beyond that which it would receive in a sale with an unrelated third party buyer; avoid leaving the Plan with an unproductive, passive investment asset; and eliminate the risk of loss and loss of investment opportunity associated with the necessary redevelopment of the Property and the time associated with that process if the Plan opted to lease the Property to a new lessee.

34. Shumaker states that the terms and conditions of the proposed Sale Agreement are at least as favorable to the Plan as those obtainable in an arm’s length transaction with an unrelated party. Subject to the terms of the exemption, if granted by the Department, the UBC has borne and will continue to bear the costs of the

²⁰ The Department expresses no opinion herein on whether, under these facts, any build to use leasing arrangement between the Plan and UBC would meet the requirements of Prohibited Transaction Exemption 76–1 (41 FR 12740, March 26, 1976, as corrected by 41 FR 16620, April 20, 1976), or any other administrative exemption, to qualify for exemptive relief from the prohibited transaction provisions of ERISA sections 406(a) and 407(a).

exemption application, and the Plan will bear costs for the Independent Fiduciary and the QIA. The proposed Sale would be a one-time cash transaction and would not require any additional continued oversight by the Department.

35. Lastly, to further ensure the protection of the Plan and its members, Shumaker states it will continue to monitor the Sale, enforce the final terms, and take whatever actions are necessary to protect the interests of the Plan's participants and beneficiaries through closing. Finally, as described above, Shumaker has reviewed and approved the terms and conditions of the Sale in its sole discretion and will further negotiate any conditions Shumaker concludes are in the interest of the Plan in accordance with Shumaker's fiduciary duties.

Legal Analysis of the Exemptive Relief Requested

36. The Applicant has requested an administrative exemption from the Department because the proposed Sale would violate several ERISA provisions. ERISA section 406(a)(1)(A) provides that a plan fiduciary shall not cause a plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between a plan and a party in interest. Further, ERISA section 406(a)(1)(D) prohibits a plan fiduciary from causing a plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect transfer to or use of any plan assets for the benefit of a party in interest. ERISA section 3(14)(D) defines the term "party in interest" to include an employee organization any of whose members are covered by such plan.²¹ ERISA section 3(14)(A) defines the term "party in interest" to include any fiduciary of such plan.²² Thus, the Trustees, as

²¹ ERISA section 3(4) provides, in pertinent part, that the term "employee organization" means any labor union or organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purposes in whole or in part, of establishing such a plan.

²² ERISA section 3(21)(A) provides, in pertinent part, that a person is a "fiduciary" with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any

fiduciaries to the Plan and the UBC as an employee organization whose members are covered by the Plan are parties in interest with respect to the Plan, pursuant to ERISA sections 3(14)(A) and 3(14)(D), respectively. Accordingly, the proposed Sale would constitute a violation of ERISA Section 406(a)(1)(A) and (D).

37. ERISA section 406(b)(1) provides that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account. Further, ERISA section 406(b)(2) provides that a fiduciary with respect to a plan shall not in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

38. The Applicant states that the decisions regarding the Sale and the Independent Fiduciary were made by Trustees that were appointed by the UBC Councils, because the UBC Trustees recused themselves from any such decisions.²³ The Applicant suggests that the recusal of the UBC Trustees from any decisions with respect to the proposed Sale or the hiring of the Independent Fiduciary obviates any violation for fiduciary self-dealing under ERISA section 406(b)(1) or (2), because such decisions were made by the Council Trustees.²⁴ However, the Department does not agree that the Council Trustees' decision making regarding the Sale and the Independent Fiduciary did not involve a violation of ERISA section 406(b)(1) or (2). In this regard, the record does not demonstrate that the Council Trustees are independent of the UBC or that the Council Trustees do not have an interest in the UBC that would affect the exercise of their best fiduciaries.²⁵ As described above, each UBC Council is

discretionary authority or discretionary responsibility in the administration of such plan.

²³ The Applicant represents above that the UBC Councils are not controlled by the UBC, none of the Trustees appointed by the UBC Councils are officers of the UBC, and no agency relationship exists between the UBC and the UBC Councils.

²⁴ The Department cautions that the determination as to whether the UBC Trustees' recusal from certain aspects of the proposed Sale negates a violation of ERISA section 406(b)(1) or (2) is inherently factual in nature and beyond the scope of this proposed exemption.

²⁵ The Department notes that "[the] prohibitions [of ERISA section 406(b)] are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interests of the plans for which they act. In such cases, the fiduciaries have interests in the transaction which may affect the exercise of their best judgment as fiduciaries." See DOL Reg 2550.408b-2(e)(1).

affiliated with a UBC Local Union and the various UBC Councils are affiliated to the UBC by the UBC Constitution. Further, the Council Trustees are members of the UBC and represent other members of the UBC. Accordingly, exemptive relief from ERISA sections 406(b)(1) and 406(b)(2) is being proposed because the Council Trustees' actions on behalf of the Plan in connection with the Sale, including by selecting the Independent Fiduciary, may constitute prohibited transactions, and because whether the UBC Trustees effectively recused themselves from all decision-making regarding the Sale is a factual matter outside the scope of this exemption.²⁶

39. In accordance with the above, the Department is proposing an exemption from ERISA sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2), for the Sale by the Trustees on behalf of the Plan to the UBC, only if the Independent Fiduciary is responsible for the ultimate decision to complete the Sale on behalf of the Plan, reviews and approves the terms and conditions of the Sale, and represents the interests of the Plan for all purposes in connection with the Sale; and the parties adhere to all the conditions for the exemption.

Statutory Findings

40. The proposed exemption is "Administratively Feasible." The Department has tentatively determined that the proposed exemption is administratively feasible for the Department because, among other things, the Sale would be a one-time cash transaction. Furthermore, the conditions for the exemption require the Independent Fiduciary to monitor the parties' adherence to the terms of the Sale and the conditions of the exemption throughout the transaction and submit a report to the Department Plan not later than 90 days after the Sale has been completed demonstrating that each exemption condition has been met.

41. The proposed exemption is "In the Interests of the Plan." The Department has tentatively determined that the proposed exemption is in the interests of the Plan because the proposed Sale would: (i) provide the Plan with a Sale price that significantly exceeds the Property's fair market value compared to what the Plan would

²⁶ The Department is not taking a view whether a violation of ERISA section 406 has occurred or will occur due to the actions of the Council Trustees or the UBC Trustees, as such conclusions are inherently factual in nature and are outside the scope of this proposed exemption. Exemptive relief is being provided only in the event that the actions of the Trustees constituted a violation of ERISA section 406(b).

receive in a transaction with an unrelated third party buyer due to the assemblage value; (ii) avoid the Plan's holding of an unproductive passive investment asset, and the time and expense the Plan would incur to make the Property suitable to lease or sell to a new, third party buyer or lessee that is not in the rental car business. In addition, the Plan would not pay any commissions, expenses or fees in connection with the proposed Sale nor bear the costs associated with the exemption application or notifying interested persons.

42. The proposed exemption is "Protective of the Plan." The Department has tentatively determined that the proposed exemption is protective of the rights of the Plan's participants and beneficiaries because, among other things, an Independent Fiduciary has reviewed the proposed Sale, the financial status of the Plan, the appraised value of the Property, and the terms of the Sale, and determined that the terms and conditions are protective of the rights of the Plan and its participants and beneficiaries. Further, among other things, the Independent Fiduciary would be required to provide a written report to the Department demonstrating that all of the exemption's conditions have been met within 90 days after of the proposed Sale. To further protect the rights of the participants and beneficiaries of the Plan, the exemption includes a "clawback" provision the Department designed to ensure that the Plan would recapture any profit on a subsequent sale of the Property or use of the Property by the UBC within 10 years of the date of the Sale.

Summary

43. Based on the conditions that are included in this proposed exemption, the Department has tentatively determined that the relief sought by the Applicant would satisfy the statutory requirements for an individual exemption under ERISA section 408(a).

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within fifteen (15) days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner approved by the Department and will contain the documents described therein and a supplemental statement required by 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the

pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty-five (45) days of the date of publication of this proposed exemption in the **Federal Register**. All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

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 ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404, which, among other things, require a fiduciary to discharge their duties respecting the plan solely in the interest of the plan and its participants and beneficiaries and in a prudent manner in accordance with ERISA section 404(a)(1)(B); nor does it affect the requirement of Code section 401(a) 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 ERISA section 408(a) and/or Code section 4975(c)(2), 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 exemption, if granted, would be supplemental to, and not in derogation of, any other provisions of ERISA 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 exemption, if granted, would be subject to the express

condition that the material facts and representations contained in the application are true and complete at all times and that the application accurately describes all material terms of the transactions which are the subject of the exemption.

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is proposing to grant an exemption under the authority of ERISA section 408(a) and Code section 4975(c)(2) in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). 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, this notice of proposed exemption is issued solely by the Department.

Section I. Definitions

(a) The term "Bermuda LLC" means Bermuda Hidden Well, LLC.

(b) The term "Board" means a board of trustees made pursuant to the Plan's Declaration of Trust, consisting of six (6) trustees who are current and former members of the UBC Executive Board and five (5) trustees who are appointed from officers of UBC local unions or UBC councils.

(c) The term "Independent Fiduciary" means Shumaker, Loop & Kendrick LLP;

(d) The term "Plan" means United Brotherhood of Carpenters Pension Fund;

(e) The term "Property" means the 19.25-acre parcel of improved real property owned by the Plan and located at 6855 Bermuda Road, Las Vegas, Clark County, Nevada;

(f) The term "QIA" means Cushman & Wakefield of Nevada, Inc.;

(g) The "Sale" means the one-time sale for cash of the Property by the Trustees on behalf of the Plan through its subsidiary entity, Bermuda LLC, to the UBC; and

(h) The term "UBC" means United Brotherhood of Carpenters and Joiners of America.

(i) The term "Trustees" means the six (6) trustees on the Plan's Board of Trustees who are current and former members of the UBC Executive Board and five (5) trustees who are appointed by officers of UBC Local Unions or UBC Councils.

Section II. Covered Transactions

If the proposed exemption is granted, the restrictions of ERISA sections

406(a)(1)(A) and 406(a)(1)(D), and 406(b)(1) and (b)(2), shall not apply to the Sale, effective as of the date a final exemption is published in the **Federal Register**, provided that the parties adhere to the conditions in Section III, below.

Section III. Conditions

(a) The Sale is a one-time transaction for cash that must be completed within 90 days of the effective date of the exemption;

(b) At the time of the Sale, the Plan receives the greater of (1) \$34,090,000; or (2) the fair market value of the Property as established by the QIA in an updated appraisal of such Property on the date of the Sale (the Sale Proceeds);

(c) The Plan pays no commissions, expenses, or fees associated with the Sale, and the Plan does not bear the costs of: (1) the exemption application; nor (2) notifying interested persons;

(d) The Plan fiduciaries prudently determined that the Sale of the Property is in the Plan's best interest and for no less than fair market value.

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

(f) The Independent Fiduciary, in accordance with ERISA sections 404(a)(1)(A) and (B), must prudently and loyally:

(1) represent the Plan's interests with respect to the Sale;

(2) determine that the Sale is in the interests of, and protective of, the Plan and its participants and beneficiaries;

(3) determine that the Sale price for the Property is in the interests of, and protective of, the Plan;

(4) review and approve the terms and conditions of the Sale in their sole discretion and further negotiate any conditions they consider to be in the best interest of the Plan;

(5) independently engage the QIA for the Sale;

(6) ensure that the appraisal is based on complete, current and accurate information; review and approve the methodology used by the QIA that such methodology is properly applied in determining the Property's fair market value on the date of the Sale; and that it is appropriate to rely upon the appraisal as accurately reflecting the fair market value of the Property;

(7) monitor the Sale throughout its duration consistent with its duties as a prudent plan fiduciary;

(8) ensure that the QIA renders an updated fair market valuation of the Property as of the date of the Sale in

accordance with paragraph (f)(6) of this Section;

(9) determine whether it is prudent for the Plan to proceed with the Sale and has the ultimate decision-making authority to approve the Sale on behalf of the Plan;

(10) ensures compliance with the general terms of the Sale and with the conditions of the exemption;

(11) takes any appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries; and

(12) submits a written report to the Department not later than 90 days after the Sale has been completed demonstrating that each exemption condition has been met;

(g) (1) The Independent Fiduciary must not have entered into, and must not enter into, any agreement, arrangement, or understanding that includes any provision that provides for the direct or indirect indemnification or reimbursement of the Independent Fiduciary by the Plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the Independent Fiduciary's work; the Independent Fiduciary may not seek or receive any waiver of any rights, claims, or remedies of the Plan under ERISA, state, or Federal law against the Independent Fiduciary with respect to the subject matter of the exemption; and

(2) The Independent Fiduciary has not and will not enter into any agreement, arrangement or understanding that violates ;

(h) (1) Subsequent Sale Proceeds Subject to Clawback Provision. If UBC sells the Property within 10 years after the date of the Sale, for a sale price that is greater than the Sale Proceeds, then the amount of the subsequent sale price received by UBC that exceeds the Sale Proceeds (the Excess Amount) must be contributed by the UBC to the Plan in cash before the end of the Plan year following the date of such subsequent sale. If UBC subdivides the Property and a portion of the Property is subsequently sold by UBC, then the Excess Amount would be determined by subtracting from the subsequent sale price the amount of Sale Proceeds attributable to the portion of the Property that was sold in such subsequent sale as determined by an independent appraiser. The records applicable to any subsequent sale by UBC covered by this provision, including any appraisals, must be provided to the Office of Exemption Determinations at *e-OED@dol.gov* within 90 days after the date of such sale.

(2) Revenue Share from Use of Property. If UBC earns revenue from its

use of the Property in any calendar year, including in connection with the lease of the Property to a third party, in a manner or for a purpose that is inconsistent with the UBC's stated intention to expand its International Training Center and/or the provision of union-related services permitted under the UBC's governing documents, then the UBC must contribute to the Plan an amount in cash equal to 51 percent of such gross revenue earned in each such calendar year. Such amounts must be contributed by the UBC to the Plan by the end of the Plan year following the year in which such revenue is earned. The records necessary to demonstrate that this paragraph (h)(2) has been met must be provided to the Office of Exemption Determinations at *e-OED@dol.gov* within 90 days after the end of the calendar year in which the revenue was received.

(i) Any QIA selected by the Independent Fiduciary must not have entered into, and must not enter into, any agreement, arrangement, or understanding that includes any provision that provides for the direct or indirect indemnification or reimbursement of the QIA by the Plan or any other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the QIA's work; the QIA may not seek or obtain any waiver of any rights, claims or remedies of the Plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the QIA with respect to the subject matter of the exemption; and

(j) The Board and the Independent Fiduciary maintain for a period of six (6) years from the date of Sale, in a manner that is convenient and accessible for audit and examination, the records necessary to enable the persons described in paragraph (k)(1) below to determine whether conditions of this exemption have been met, except that (i) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Board and/or the Independent Fiduciary, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest other than the Board or the Independent Fiduciary shall be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained, or are not available for examination as required by paragraph (k) below; and

(k)(1) Except as provided in Section (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of ERISA

section 504, the records referred to in paragraph (j) above shall be unconditionally available at their customary location during normal business hours to:

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

(ii) the Board or any duly authorized representative of the Board;

(iii) the Independent Fiduciary or any duly authorized representative of the Independent Fiduciary;

(iv) any participant or beneficiary of the Plan, or any duly authorized representative of such participant or beneficiary;

(2) If any party refuses to disclose information to a person on the basis that such information is exempt from disclosure, such party must provide a written notice to that person advising them of the reasons for the refusal and that the Department may request such information on their behalf by the close of the thirtieth (30th) day following the request;

(l) The Sale is not part of an agreement, arrangement or understanding designed to benefit UBC or any of its affiliates;

(m) The Board, the UBC, and/or the Independent Fiduciary must provide to the Department the records necessary to demonstrate that the conditions of this exemption, as amended, have been met, within 30 days from the date the Department requests such records; and

(n) All the material facts and representations made by the Applicant that are set forth in the Summary of Facts and Representations are true and accurate at all times.

Exemption Date: If granted, this proposed exemption will be in effect on the date that the grant notice is published in the **Federal Register**.

Signed at Washington, DC.

George Christopher Cosby,

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

[FR Doc. 2024-22468 Filed 9-30-24; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employee Retirement Income Security Act of 1974 Technical Release 1991-1

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee

Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before October 31, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202-693-6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Section 101(e) of ERISA establishes notice requirements that must be satisfied before an employer may transfer excess assets from a defined benefit pension plan to a retiree health benefit account, as permitted under the conditions set forth in section 420 of the Internal Revenue Code of 1986, as amended (the Code).

The notice requirements of ERISA section 101(e) are two-fold. First, subsection (e)(1) requires plan administrators to provide advance written notification of such transfers to participants and beneficiaries. Second, subsection (e)(2)(A) requires employers to provide advance written notification of such transfers to the Secretaries of Labor and the Treasury, the plan administrator, and each employee organization representing participants in the plan. Both notices must be given at least 60 days before the transfer date. The two subsections prescribe the information to be included in each type of notice and further give the Secretary of Labor the authority to prescribe how notice to participants and beneficiaries must be given, and how any additional reporting requirements are deemed necessary.

On May 8, 1991, the Department published ERISA Technical Release 91-1, to provide guidance on how to satisfy the notice requirements prescribed by ERISA section 101(e). The Technical Release made two changes in the statutory requirements for the second type of notice. First, it required the notice to include a filing date and the intended asset transfer date. Second, it simplified the statutory filing

requirements by providing that filing with the Department of Labor would be deemed sufficient notice to both the Department and the Department of the Treasury as required under the statute. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 5, 2024 (89 FR 7732).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL-EBSA.

Title of Collection: Employee Retirement Income Security Act of 1974 Technical Release 1991-1.

OMB Control Number: 1210-0084.

Affected Public: Private sector, Business or other for profits.

Total Estimated Number of Respondents: 14.

Total Estimated Number of Responses: 119,718.

Total Estimated Annual Time Burden: 4,011 hours.

Total Estimated Annual Other Costs Burden: \$3,744.