

agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 22, 1995 at 60 FR 27132.

The Department notes that this exemption is included within the meaning of the term "Underwriter Exemption" as it is defined in section V(h) of the grant of the Class Exemption for Certain Transactions Involving Insurance Company General Accounts, for which the notice of proposed exemption was published on August 22, 1994 at 59 FR 43134.

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

#### General Information

The attention of interested persons is directed to the following:

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

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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and

accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 7th day of July, 1995.

**Ivan Strasfeld,**

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

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[Application No. D-09824, et al.]

#### Proposed Exemptions; PMS Profit Sharing and Retirement Savings Plan and Trust (the Plan)

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

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

#### Written Comments and Hearing Requests

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this **Federal Register** Notice. Comments and request for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and request for a hearing (at least three

copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue NW., Washington, DC 20210.

#### Notice to Interested Persons

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

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

#### PMS Profit Sharing and Retirement Savings Plan and Trust (the Plan), Located in Cleveland, Ohio

[Exemption Application No. D-09824]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32826, 32847, August 10, 1990). If the exemption is granted, the

restrictions of sections 406(a), 406(b) (1) and (2) and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the proposed sale (the Sale) of a certain parcel of improved real property (the Property) from the Plan to M. A. Hanna Company (Hanna), a party in interest with respect to the Plan provided that the following conditions are met:

- (1) The fair market value of the Property is established by a qualified and independent real estate appraiser;
- (2) Hanna pays the greater of \$990,800 or the current fair market value of the Property;
- (3) The Sale is a one time transaction for cash;
- (4) The Plan pays no fees or commissions related to the Sale; and
- (5) Hanna pays any excise taxes to the Internal Revenue Service owed pursuant to section 4975(a) of the Code resulting from Hanna's lease of the Property from the Plan through the date of publication in the **Federal Register** of the final grant of the exemption within 90 days of such date.

#### Summary of Facts and Representations

1. Hanna is a Delaware Corporation with its principal office and place of business in Cleveland, Ohio. In November 1987, Hanna acquired all of the outstanding capital stock of PMS Consolidated, Inc. The Hanna/PMS Consolidated, Inc. merger was effective April 1, 1993. PMS Consolidated is the original plan sponsor.

2. The Plan is a defined contribution pension plan. As of April 1, 1995, the Plan had 706 participants and total assets of \$14,240,928. Wells Fargo Bank has served as Plan trustee since January 1, 1992. The PMS Committee for Employee Benefits Administration is the Plan fiduciary responsible for selecting the Plan's investments. Currently, only one individual serves on this committee. He is an employee and officer of the PMS Division of Hanna.

3. In November of 1968, the Plan acquired the Property as undeveloped land from PMS Consolidated for \$10,050, and subsequently built the building for \$550,887. The Plan has invested a total of \$560,937 in the Property. The Property is located in Coral Springs, Florida. In July 1969, the Plan leased the Property to PMS Consolidated. (the Lease). The Lease was last renewed on January 1, 1989 for a five year period, and currently is on a month to month basis. All property taxes and insurance costs were paid by PMS Consolidated for the duration of the Lease. PMS Consolidated also has

incurred \$509,967 in leasehold improvements over the term of the lease.<sup>1</sup> At the time the Hanna/PMS Consolidated merger became effective, Hanna became aware of the Lease. Unsuccessful efforts were made to sell the Property to an unrelated third party. As a result the Plan proposes to sell the Property to Hanna.<sup>2</sup>

4. The Property was appraised by two independent qualified appraisers. Both appraisers utilized the market value approach which is defined as the most probable price which the appraised property will bring in a competitive market under all conditions requisite to a fair sale. On October 24, 1994, C.R. Johnson & Associates, Inc., certified MAI real estate appraisers determined the value of the Property to be \$706,000. AMH Appraisal Consultants appraised the Property at \$850,000 as of November 2, 1994.

The rental rate under the Lease was at fair market rental rates. The rental rate under the Lease was \$5.78 per square foot. In developing a value for the Property, AMH considered four comparable properties which had rental rates ranging from \$3.50 to \$6.00 per square foot. C.R. Johnson considered six properties, noting that one property was the "most comparable." The rental rate for this property was \$5.75 per square foot.

5. The Plan proposes to sell the Property for \$990,800. This purchase price, which reflects Hanna's internal valuation of the Property, is substantially in excess of appraisals referred to above. Hanna has agreed to pay \$990,800 in order to ensure that Plan participants and beneficiaries are not disadvantaged by reason of the Plan's previous holding of the Property or the Sale of the Property. The Sale will be for cash, and the Plan will pay no fees or commissions with regard to the transaction.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (1) the Sale is a one-time transaction for cash, and no commissions will be paid upon the Sale;

<sup>1</sup> The terms of the lease provides that leasehold improvements revert to the Plan upon the termination of the lease.

<sup>2</sup> The applicant recognizes that the lease by the Plan of the Property to Hanna constitutes a prohibited transaction under section 406(a) of the Act and section 4975 of the Code. Accordingly, Hanna has filed a form 5330 with the Internal Revenue Service and paid the Internal Revenue Service the excise taxes that are applicable under section 4975(a) of the Code through the date on which the application was filed. Further, Hanna represents that it will pay the additional excise taxes due through the date of the grant of final exemption within 90 days of its publication in the **Federal Register**.

(2) the Plan will be receiving at least fair market value for the Property as determined by an independent qualified real estate appraiser; and (3) Hanna will pay all applicable excise taxes which are due by reason of the Lease within 90 days of the publication in the **Federal Register** of the exemption proposed herein.

#### Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and therefore must be examined under applicable provisions of the Code including sections 401(a)(4), 404 and 415.

For Further Information Contact: Allison Padams of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

#### Apartment Laundries, Inc., Profit Sharing Plan (the Plan), Located in Tulsa, Oklahoma; Proposed Exemption

[Application No.: D-09835]

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CAR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the lease (the Lease) of improved property (the Property) by the individual account of James L. Sharp (the Account) in the Plan to Apartment Laundries, a party in interest with respect to the Plan provided that the following conditions are met: (1) the terms of the Lease are and will remain at least as favorable as the Plan could obtain in an arm's length transaction with an unrelated party; (2) the fair market rental value has been and will continue to be determined on an annual basis by a qualified, independent appraiser; and (3) the fair market value of the Property, as determined by a qualified, independent appraiser, represents no more than 25% of value of the assets in the Account.

#### Summary of Facts of Representations

1. Apartment Laundries (the Employer) is an Oklahoma corporation

engaged in the business of furnishing coin-operated laundry machines to apartment complexes. James L. Sharp is the sole shareholder of the Employer. The Plan is a profit sharing plan having 49 participants and assets valued at \$658,839 as of October 31, 1994. The Plan's trustee is Mr. Sharp. As of October 31, 1994, the Account's balance equaled \$251,243, but Mr. Sharp represents that he will roll over from his individual retirement account into the Account an amount so that the fair market value of the Property will not exceed 25% of the value of the Account's assets.

2. On July 1, 1991, the Account purchased the Property from an unrelated third party for \$131,221. The Property consists of a warehouse building situated on .71 acres. The Property is contiguous to property which Mr. Sharp personally owns and presently leases to the Employer.<sup>3</sup> The Account proposes to lease the Property to the Employer. The proposed lease will be for one year with annual renewals. The Employer will pay monthly rent in the amount of \$1310, and the Account shall have the right to terminate the Lease at any time on thirty days notice.

3. The Property was appraised by Gene Meazell, a certified general appraiser, of Appraisers Unlimited on October 2, 1993. Mr. Meazell determined that the fair market value of the Property was \$140,000, and the fair market rental value of the Property is \$1,070 per month. Mr. Meazell updated his appraisal on August 14, 1994 and determined that fair market value and fair market rental value remained unchanged. Naifef, Weikel and Rouse, independent certified public accountants calculated that the value of the Property to the Employer is enhanced by 20 to 25% because it is adjacent to the Employer's warehouse. Using this assumption, the fair market monthly rental rate for the Employer would be between \$1,284 and \$1,337. Thus, the proposed rental rate of \$1,310 would be at fair market value.

4. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (1) the terms of the Lease are and will remain at least as favorable as the Plan could obtain in an arm's length transaction with an unrelated party; (2) the fair market rental value has been and will continue to be determined on an annual basis by a qualified, independent appraiser; and

(3) the fair market value of the Property, as determined by a qualified, independent appraiser, will represent no more than 25% of value of the assets in the Account.

Notice to Interested Persons: Because Mr. Sharp is the only participant in the Plan whose individual account will be affected by the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Therefore, written comments and requests for a public hearing are due 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

For Further Information Contact: Allison Padams, of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

**Adel E. Zaki Money Purchase Pension Plan (the Plan) Located in Los Angeles, California**

[Exemption Application No. D-09883]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of section 406(a), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code<sup>4</sup> shall not apply to the proposed cash sale of a parcel of improved real property (the Property) by the Plan to Adel E. Zaki, M.D. (Dr. Zaki), a party in interest with respect to the Plan; provided that (1) the sale will be a one-time transaction for cash; (2) as a result of the sale, the Plan receives in cash the greater of \$710,000 or the fair market value of the Property, as determined by an independent, qualified appraiser, as of the date of the sale; (3) the Plan pays no commissions, fees, or other expenses as a result of the transaction; and (4) the terms of the sale are no less favorable to the Plan than those it would have received in similar circumstances when negotiated at arm's length with unrelated third parties.

**Summary of Facts and Representations**

1. The Plan is a tax-qualified defined contribution profit sharing plan sponsored by Adel E. Zaki M.D., A

Professional Corporation (the Employer). As of October 24, 1994, there were four (4) participants and beneficiaries in the Plan, including Dr. Zaki. As of the same date, the assets of the Plan totaled approximately \$1,745,500. It is represented that Dr. Zaki's account in the Plan consists of approximately 99 percent (99%) of the assets of the Plan with the remaining one percent (1%) allocated among the other three participants. The Plan's assets are invested in the Property and cash or cash equivalents, such as bank certificates of deposit. It is represented that, as of October 24, 1994, the Property constituted approximately 41 percent (41%) of the assets of the Plan. Dennis Mehringer serves as contract administrator for the Plan. Dr. Zaki serves as trustee and fiduciary for the Plan with discretion over the assets of the Plan affected by the proposed transaction and is an officer and the sole shareholder of the Employer. The Employer engages in the private medical practice in general surgery from an office located at 1233 North Vermont Avenue in Los Angeles, California.

2. On June 26, 1985, Dr. Zaki, acting as trustee, purchased the Property as an investment for the Plan from A.M.S. Partnership, an unrelated third party, at a purchase price of \$1,200,000, plus escrow closing costs of \$2,183. It is represented that most of the assets of the Plan, plus some or all of the rollover assets from a Keogh plan and a terminated defined benefit plan, were used to acquire the Property. Further, in 1995 through 1996, the Plan made additional improvements to the Property at a cost of \$28,228. Since the acquisition of the Property by the Plan, Dr. Zaki has managed the Property and leased it to unrelated third party tenants. It is represented that the capital investment in the Property has been returned to the Plan. It is further represented that the value of the Property, as reported yearly on forms 5500-C/R, steadily increased to a high of \$1,496,676 in 1991. However, in April of 1992, the riots in Los Angeles caused property damage in the neighborhood around the Property. While the Property did not suffer extensive damage, it is represented that the riots caused many merchants to leave the area, the rental rates to decrease, and the property values to decline. Consequently, the value of the Property dropped to \$1,250,000 in 1992. In 1993, Los Angeles County Tax Assessor estimated the value of the Property to be \$932,410. As of the end of 1993, the Plan had total assets of \$1,937,410 of which the value of the

<sup>3</sup>The Department is expressing no opinion as to whether or not the acquisition of the Property violated section 404 of the Act.

<sup>4</sup>For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Property constituted approximately 48 percent (48%).<sup>5</sup>

3. The Property is described as one story L-shaped strip shopping center on a corner lot at the intersection of Vermont and Lexington Avenues in Los Angeles, California. The Property consists of 14,300 square feet of land improved by a retail center that contains 7,747 square feet of rentable space divided into seven units. The Property has fifteen (15) parking spaces which is represented to be an existing legal non-conforming use. The Property is located at 1183-1193 North Vermont Avenue and is situated across Lexington Avenue one half block from the Employer's office. Dr. Zaki represents that the Property is not contiguous with his medical office as the two are separated by Lexington Avenue and has no bearing on his practice. For this reason, Dr. Zaki maintains that no premium value is created by the proximity of the Property to his medical office.

4. This exemption is requested to permit the Plan to sell the Property to Dr. Zaki for the greater of \$710,000 or the appraised fair market value of the Property on the date of sale.

Dr. Zaki represents that since 1992 he has attempted to sell the Property to unrelated third parties but has received no offers, because banks are reluctant to finance commercial properties in neighborhoods subject to crime and riots. Further, it is represented that the Property is in need of substantial improvements, especially in the area of tenant security. In Dr. Zaki's opinion it would be inappropriate for the Plan to expend additional capital for such improvements.

It is represented that the proposed transaction is feasible in that it involves a one-time sale of the Property for cash. In addition, the proposed transaction is in the interest of the Plan in that the price offered by Dr. Zaki could not be obtained otherwise. In this regard, Dr. Zaki maintains that his offer is a highly advantageous one for the Plan, as the Property continues to decline in value. Further, the Plan will be able to sell the Property without incurring the expense of searching for a buyer and without paying brokerage commission, fees, or other expenses as a result of the transfer. It is represented that the proportionate

<sup>5</sup> The Department notes that the decision of Dr. Zaki, acting as fiduciary on behalf of the Plan, in connection with the acquisition and holding of the Property are governed by the fiduciary responsibility requirements of part 4, subpart B, of Title I. The Department expresses no opinion herein, as to whether any of the relevant provisions of part 4, subpart B, of title I have been violated regarding the Plan's investment in and subsequent holding of the Property, and no exemption from such provisions is proposed herein.

share of the proceeds from the sale of the Property will be allocated to the accounts of each of the participants in the Plan. Then once the Property is sold, it is represented that the Plan can invest such cash proceeds in a more conservative investment mix in the future.

In the opinion of Dr. Zaki, the proposed transaction is necessary to protect the participants and beneficiaries of the Plan from the deteriorating real estate market. It is represented that selling the Property to Dr. Zaki will put an end to the continued loss of benefits to participants in the Plan that result from the continuing decline in the value of the Property.

Further, in addition to purchasing the Property from the Plan, Dr. Zaki proposes to personally indemnify the accounts of the other participants of the Plan against past losses. Specifically, simultaneous with his purchase of the Property from the Plan, Dr. Zaki will make a one-time non-tax deductible personal payment to the Plan.<sup>6</sup> It is represented that a proportionate amount of such payment (approximately \$4,086 in the aggregate) will be allocated to the accounts of each of the participants, other than Dr. Zaki, in order to restore the cumulative loss through December 31, 1994, of such participants' accounts in the Plan to their share of the highest appraised value of \$1,496,676 for the Property, as reported on the forms 5500-C/R for the calendar year 1991, and to credit such participants' accounts with interest on such highest appraised value through December 31, 1994, at the average certificate of deposit rates of the Bank of America during the period from the highest appraisal date to December 31, 1994. It is further represented that such interest on the balance due to participants, other than Dr. Zaki, will continue to accrue at the same rate from December 31, 1994, through the actual date of the closing on the transactions. In this way only Dr. Zaki's account in the Plan will suffer the loss that results from the proposed transaction.

6. An appraisal of the Property was prepared by Donald P. Condit, Jr. (Mr. Condit) SRPA, SRA and Stuart D. Holtzmann of The Condit Appraisal Company, located in Santa Monica, California. It is represented that the appraisers have the appropriate knowledge and experience to complete the appraisal assignment competently,

<sup>6</sup> It is represented that note of the transactions will cause the participants to exceed their section 415 limitations. It is represented that the restoration of value will be done proportionately without discrimination and will not exceed the limits of contribution under section 415 of the Code.

in that they are both California State certified general real estate appraisers, and in that Mr. Condit is a member of professional organizations. It is represented that the appraisers are independent in that they have no present or prospective interest in the Property and have no personal interest or bias with respect to the participants in the transaction. The appraisers represent that neither their employment nor compensation was conditioned upon the appraisal producing a specific value or a value within a given range. After physically inspecting the Property, and reconciling values for the Property established by the cost approach, income approach, and sales comparison approach, the appraisers determined that the fair market value of the leased fee interest in Property was \$710,000, as of September 8, 1994.

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

(a) the sale of the Property will be a one-time transaction for cash; (b) as a result of the sale, the Plan will receive in cash the *greater of* \$710,000 or the fair market value of the Property, as determined by an independent, qualified appraiser, as of the date of the sale; (c) the Plan will pay no commissions, fees, or other expenses as a result of the transaction; (d) the terms of the sale will be no less favorable to the Plan than those it would have received in similar circumstances when negotiated at arm's length with unrelated third parties; (e) the Plan will be able to invest the proceeds from the sale of the Property in more profitable assets; (f) the Plan will be able to dispose of the Property which continues to decline in value; and (g) with the exception of Dr. Zaki, the accounts of the participants in the Plan will be compensated for any losses which resulted from the decline in value of the Property.

For Further Information Contact: Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

**The Bank of New York (the Bank)  
Located in New York, New York**

[Application No. D-10030]

**Proposed Exemption**

*Section I—Exemption for the Acquisition, Holding and Disposition of BNY Stock*

The restrictions of sections 406(a)(1)(D), 406 (b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the

Code by reason of section 4975(c)(1) (D) and (E) of the Code, shall not apply to the acquisition, holding or disposition of the common stock of the Bank's parent corporation, The Bank of New York Company, Inc. (BNY Stock), by Index or Model-Driven Funds, if the following conditions and the General Conditions of Section II are met:

(a) The Index or Model-Driven Fund is based on an index which represents the investment performance of a specific segment of the public market for equity securities in the United States and/or foreign countries. The organization creating and maintaining the index must be (1) engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients, (2) a publisher of financial news or information, or (3) a public stock exchange or association of securities dealers. The index must be created and maintained by an organization independent of the Bank and its affiliates. The index must be a generally accepted standardized index of securities which is not specifically tailored for the use of the Bank or its affiliates.

(b) The acquisition or disposition of the BNY Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based.

(c) All acquisitions comply with Rule 10b-18 of the Securities and Exchange Commission, including the limitations regarding the price paid or received for such stock.

(d) Aggregate daily purchases of BNY Stock constitute no more than the greater of: (1) 10 percent of the stock's average daily trading volume for the previous five days; or (2) 10 percent of the stock's trading volume on the date of the transaction.

(e) If the necessary number of shares of BNY Stock cannot be acquired within 10 business days from the date of the event which causes the particular Index or Model-Driven Funds to require BNY Stock, the Bank appoints a fiduciary which is independent of the Bank and its affiliates to design acquisition procedures and monitor the Bank's compliance with such procedures.

(f) All purchases and sales of BNY Stock are executed on the national exchange on which BNY Stock is primarily traded.

(g) No transactions involve purchases from, or sales to, the Bank or any affiliate (including officers, directors and employees of the Bank, as defined in Section III(c) below), or any party in interest with respect to a plan which has

invested in an Index or Model-Driven Fund.

(h) No more than five (5) percent of the total amount of BNY Stock issued and outstanding at any time is held in the aggregate by the Index and Model-Driven Funds.

(i) BNY Stock constitutes no more than two (2) percent of the value of any independent third-party index on which the investments of an Index or Model-Driven Fund are based.

(j) A plan fiduciary independent of the Bank and its affiliates authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds BNY Stock.

(k) A fiduciary independent of the Bank and its affiliates directs the voting of the BNY Stock held by an Index or Model-Driven Fund on any matter in which shareholders of BNY Stock are required or permitted to vote.

#### Section II—General Conditions

(a) The Bank maintains or causes to be maintained for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of the exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Bank, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than the Bank shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975 (a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

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

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer with respect to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (b)(1) (B) through (D) shall be authorized to examine trade secrets of the Bank, any of its affiliates, or commercial or financial information which is privileged or confidential.

#### Section III—Definitions

(a) Index Fund—Any investment fund, account or portfolio sponsored, maintained and/or trusted by the Bank, or an affiliate of the Bank, in which one or more investors invest which is designed to replicate the capitalization-weighted composition of a stock index which satisfies the conditions of Section I (a) and (i).

(b) Model-Driven Fund—Any investment fund, account or portfolio sponsored, maintained and/or trusted by the Bank, or an affiliate of the Bank, in which one or more investors invest which is based on computer models using prescribed objective criteria to transform an independent third-party stock index which satisfies the conditions of Section I(a) and (i).

(c) Affiliate—Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or a sister of such person; and any corporation or partnership of which such person is an officer, director, or partner.

#### Summary of Facts and Representations

1. The Bank is the principal subsidiary of The Bank of New York Company, Inc., the 16th largest bank holding company in the United States, with total assets of approximately \$49 billion at the end of 1994. The Bank is one of the largest commercial banks in the country, and with its sister bank and trust company subsidiaries is one of the largest providers of securities processing, money management and other administrative and management services to institutional investors, including employee benefit plans subject to the Act.

2. In furnishing investment management services, the Bank acts as a fiduciary to its employee benefit plan customers. A principal vehicle employed by the Bank in furnishing investment management services is its Collective Trust. The Collective Trust accepts investment from employee benefit plans subject to the Act as well

as governmental plans and governmental units not subject to the Act. The Collective Trust is exempt from federal income taxation pursuant to IRS Rev. Rul. 81-100.

The Collective Trust consists of a series of separate investment funds, each with a separate investment objective and portfolio of assets. It is possible for a plan to invest solely in one, or in several but less than all, of the investment funds, as selected and in such amounts as determined by the plan's named fiduciary. The value of a plan's investment in any given fund depends solely on the investment performance of that fund, unrelated to the investment performance of the other funds within the Collective Trust.

3. Among the new funds established within the Collective Trust early in 1994 is the Bank's Mid Cap Index Fund, whose objective is to replicate as closely as may be practicable the performance of the Standard & Poor's (S&P) MidCap 400 Index. The Bank initially requested an exemption to permit the acquisition, holding and disposition of BNY Stock by the Bank's Mid Cap Index Fund because the BNY Stock was included in the S&P MidCap 400 Index. However, effective March 30, 1995, the BNY Stock was added to the S&P 500 Index. Since the Bank also maintains within the Collective Trust a large S&P 500 Index Fund, the Bank now requests an exemption to permit the acquisition, holding and disposition of BNY Stock by the Bank's S&P 500 Index Fund.

4. The S&P 500 Index is an index of 500 stocks that are traded on the New York Stock Exchange (NYSE), the American Stock Exchange, and the NASDAQ National Market System. It is a market value-weighted index, multiplying shares outstanding times stock price, in which each company's influence on index performance is directly proportional to its market value. The 500 companies chosen by the S&P Index Committee for the index are not the 500 largest companies but, instead, are the companies that tend to be leaders in key industries within the U.S. economy, as determined by the Committee.

The Bank's S&P 500 Index Fund was established in 1989. Its objective is to track as closely as possible the total return of the S&P 500 Index. The Fund currently has total assets of approximately \$554 million as of May 9, 1995 and approximately 16 employee benefit plan investors.

5. The Bank requests that the exemption cover the acquisition, holding and disposition of BNY Stock by any Index or Model-Driven Fund sponsored, maintained and/or trustee

by the Bank or an affiliate. The Bank represents that such Index Funds will include any investment fund, account or portfolio in which one or more investors invest which is designed to replicate the capitalization-weighted composition of an independent third-party stock index. In addition, the Bank represents that such Model-Driven Funds will include any investment fund, account or portfolio in which one or more investors invest which is based on computer models using prescribed objective criteria to transform an independent third-party stock index. All independent third-party stock indexes used by the Bank for an Index or Model-Driven Fund will represent the investment performance of a specific segment of the public market for equity securities in the United States and/or foreign countries. The organization creating and maintaining the index will be: (a) engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients; (b) a publisher of financial news or information; or (c) a public stock exchange or association of securities dealers. The index will be created and maintained by an organization independent of the Bank and its affiliates. The index will be a generally accepted standardized index of securities which is not specifically tailored for the use of the Bank or its affiliates.

6. With respect to Model-Driven Funds, the Bank represents that the portfolio of such a Fund would be determined by the details of a computer model, which would examine structural aspects of the stock market, rather than the underlying stock values. An example of a Model-Driven would include a fund which "transforms" the S&P 500 Index, making investments according to a computer model which uses such data as the following: (a) earnings, dividends and price-earnings ratios for common stocks in the S&P 500 Index; (b) current yields on corporate bonds and money market instruments; and (c) historical standard deviations and correlations of and between asset classes. However, like Index Funds, the Model-Driven Funds would be passively managed, in that decisions of which stocks to buy or sell would not be the result of active evaluation of the investments by an investment manager, but would be determined in accordance with a predetermined computer model.

The Bank states that it does not currently maintain any Model-Driven Funds of the type described above, but is considering establishing such funds in the future. Prior to May 1, 1995, the Bank maintained a South Africa

Constrained Index Fund, whose objective was to track the S&P 500 Index by excluding certain stocks of companies that had direct equity investment in the Republic of South Africa and were not signatories to a Statement of Principles for South Africa as of April 28, 1994. However, the South Africa Constrained Index Fund was discontinued by the Bank as of April 28, 1995.

7. With respect to the proposed purchase of BNY Stock by the Funds, the Bank states that all such acquisitions will comply with Rule 10b-18 of the Securities and Exchange Commission (SEC), including the limitations regarding the price paid or received for such stock. SEC Rule 10b-18 provides a "safe harbor" for issuers of securities from section 9(a)(2) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 (which generally prohibits persons from manipulating the price of a security and engaging in fraud in connection with the purchase or sale of a security).

The Bank states that the conditions imposed by Rule 10b-18 for purchases of BNY Stock would be as follows: (a) all purchases would be made from or through only one broker on any single day; (b) no purchases would constitute the opening transaction in BNY Stock; (c) purchases would not occur within one-half hour before the scheduled close of trading on the NYSE; (d) the price would not be higher than the current independent bid quotation or the last independent sale price on the exchange, whichever is higher; and (e) if the purchases of BNY Stock are not block purchases as defined by Rule 10b-18(b)(4), the total amount of purchases on any one day would not exceed the higher of one round lot or the number of round lots closest to 25 percent of the trading volume for BNY Stock on that day.

However, notwithstanding the restrictions of Rule 10b-18, the Bank states that aggregate daily purchases of BNY Stock will constitute no more than the greater of: (a) 10 percent of the stock's average daily trading volume for the previous five days; or (b) 10 percent of the stock's trading volume on the date of the transaction.

8. The Bank states that all purchases and sales of BNY Stock will be executed on the national exchange on which BNY Stock is primarily traded. In addition, no transactions will involve purchases from, or sales to, the Bank or any affiliate (including officers, directors and employees of the Bank, as defined in Section III(c) above), or any party in interest with respect to a plan which has invested in an Index or Model-Driven

Fund. The Bank states further that no more than five (5) percent of the total amount of BNY Stock issued and outstanding at any time will be held in the aggregate by the Index and Model-Driven Funds. Finally, the Bank represents that it will ensure that BNY Stock does not constitute more than two (2) percent of the value of any independent third-party index on which the investments of an Index or Model-Driven Fund are based. In this regard, the weight currently assigned to BNY Stock in the S&P 500 Index is approximately 0.169 percent. Prior to the addition of the BNY Stock to the S&P 500 Index, the Bank states that the BNY Stock comprised approximately 1.27 percent of the S&P MidCap 400 Index.

9. The Bank states that if the necessary number of shares of BNY Stock cannot be acquired within 10 business days from the date of the event which causes the particular Index or Model-Driven Funds to require BNY Stock, the Bank will appoint a fiduciary which is independent of the Bank and its affiliates to design acquisition procedures and monitor the Bank's compliance with such procedures. In addition, the Bank states a fiduciary independent of the Bank and its affiliates will direct the voting of the BNY Stock held by an Index or Model-Driven Fund on any matter in which shareholders of BNY Stock are required or permitted to vote. Finally, the Bank represents that a plan fiduciary independent of the Bank and its affiliates will authorize the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds BNY Stock.

10. With respect to acquisitions of BNY Stock by the Funds, the independent fiduciary and its principals will be completely independent from the Bank and its affiliates and will be experienced in developing and operating investment strategies, including index funds. The independent fiduciary will be responsible for accurately representing that during the operation of any trading program based upon acquisition procedures developed by the fiduciary, no principal employee of the fiduciary nor the fiduciary itself will engage in any trading of any kind in BNY Stock. Furthermore, the independent fiduciary will not act as the broker for any purchases or sales of BNY Stock and will not receive any commissions as a result of the trading program.

In connection with the initial acquisition of BNY Stock by the Bank's S&P 500 Index Fund, the Bank calculates that the number of shares that

would have to be bought by such Fund would not exceed 28,000. This estimate is based on the figures for the size of the Bank's S&P 500 Index Fund and the weight assigned to BNY Stock in the S&P 500 Index.

The Bank states that based on recent figures for the high, low and average daily trading volume for the BNY Stock on the NYSE, the initial requirements of the Bank's S&P 500 Index Fund could be met by the Bank placing a market-on-close order on the NYSE on a single business day—or at the most two successive business days. Under the established rules of the NYSE, the price on such an order would be set automatically, permitting no discretion on the part of the order placing party. The Bank represents that the impact of such purchases on the market for BNY Stock would be minimal, and that under such circumstances the full and proper protection of the interests of plan investors would not require or warrant the retention of an independent fiduciary to develop a trading program for the initial acquisitions of BNY Stock.

11. With respect to the voting of BNY Stock, the independent fiduciary chosen by the Bank will be a firm knowledgeable and experienced in corporate governance issues and proxy voting on behalf of public and private pension funds, banks, trust companies, money managers, insurance companies and other institutional investors with large equity portfolios. The independent fiduciary will develop, and supply to the Bank, written material dealing with corporate ownership, which will act as a guideline to the voting of proxies by institutional fiduciaries, and their current voting guidelines. The Bank will provide the independent fiduciary with all necessary information regarding the Funds that hold BNY Stock, the amount of BNY Stock held by such funds on the record date for shareholder meetings of The Bank of New York Company, Inc., and all proxy and consent materials for BNY Stock. The independent fiduciary will maintain records of its activities as an independent fiduciary on behalf of the Funds, including the number of shares of BNY Stock voted, the manner in which they were voted, and the rationale for the vote if it was not consistent with the independent fiduciary's corporate ownership material and current voting guidelines in effect at the time of the vote. The independent fiduciary will supply the Bank with the information after each shareholder meeting and will acknowledge that it will be acting as a fiduciary with respect to the plans that invest in the Funds which own BNY Stock, when voting such stock.

12. In summary, the applicant represents that the proposed transactions will satisfy the criteria of section 408(a) of the Act for the following reasons: (a) the acquisition, holding and disposition of BNY Stock will occur solely to maintain strict quantitative conformance by an Index or Model-Driven Fund to its underlying index or model; (b) all acquisitions and dispositions of BNY Stock will occur in the open market and will comply with SEC Rule 10b-18; (c) aggregate daily purchases of BNY Stock will constitute no more than the greater of either 10 percent of the stock's average daily trading volume for the previous five days, or 10 percent of the stock's trading volume on the date of the transaction; (d) no more than 5 percent of the total outstanding shares of BNY Stock will be held in the aggregate by the Funds; (e) BNY Stock will constitute no more than 2 percent of the value of any independent third-party index on which the investments of an Index or Model-Driven Fund are based; (f) if the necessary number of shares of BNY Stock cannot be acquired within 10 business days from the date of the event which causes the particular Index or Model-Driven Funds to require BNY Stock, the Bank will appoint a fiduciary which is independent of the Bank and its affiliates to design acquisition procedures and monitor the Bank's compliance with such procedures; (g) a fiduciary independent of the Bank and its affiliates will direct the voting of any BNY Stock held by the Funds; and (h) a plan fiduciary independent of the Bank and its affiliates will authorize the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds BNY Stock.

For Further Information Contact: Mr. E.F. Williams of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a

prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 7th day of July, 1995.

**Ivan Strasfeld,**

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

[FR Doc. 95-17074 Filed 7-11-95; 8:45 am]

BILLING CODE 4510-29-P

[Prohibited Transaction Exemption 95-47  
Exemption Application No. D-09519, et al.]

#### **Grant of Individual Exemptions; Westinghouse Pension Plan, et al.**

**AGENCY:** Department of Labor, Pension and Welfare Benefits Administration.

**ACTION:** Notice of typographical corrections.

**SUMMARY:** This document contains a notice of typographical corrections of Prohibited Transaction Exemptions (PTE) 95-46 through PTE 95-54 (60 FR

32992-33010, June 26, 1995). As a result of typographical errors, the PTE numbers for nine (9) individual exemptions were incorrectly published. This document contains the corrections for those PTE numbers. In addition, the original heading also contained a typographical error which is corrected below.

#### **Correction**

In 60 FR published at page 32992 on June 26, 1995, in the second column, the fourth line in the original heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-47].

#### **Westinghouse Pension Plan (the Plan) Located in Pittsburgh, Pennsylvania**

[Prohibited Transaction Exemption 95-46;  
Application No. D-09519]

#### **Correction**

In 60 FR published at page 32992 on June 26, 1995, in the third column, the third line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-47].

**FOR FURTHER INFORMATION CONTACT:** Mr. E.F. Williams of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

#### **Mellon Bank, N.A. Located in Pittsburgh, Pennsylvania**

[Prohibited Transaction Exemption 95-47;  
Application No. D-9523]

#### **Correction**

In 60 FR published at page 32995 on June 26, 1995, in the second column, the third line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-48].

**FOR FURTHER INFORMATION CONTACT:** Mr. E.F. Williams of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

#### **Norwest Bank Minnesota, N.A., Located in Minneapolis, MN**

[Prohibited Transaction Exemption 95-48;  
Application No. D-09595]

#### **Correction**

In 60 FR published at page 33000 on June 26, 1995, in the first column, the third line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-49]

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

#### **Paloma Securities L.P. (Paloma) and Boston Global Advisors, Inc. (BGA) Located in Boston, Massachusetts**

[Prohibited Transaction Exemption 95-49;  
Application No. D-09660]

#### **Correction**

In 60 FR published at page 33003 on June 26, 1995, in the second column, the fourth line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-50]

**FOR FURTHER INFORMATION CONTACT:** Louis Campagna of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

#### **The First National Bank of Boston and Its Affiliates (Collectively, the Bank) Located in Boston, Massachusetts**

[Prohibited Transaction Exemption 95-50;  
Application No. D-09682]

#### **Correction**

In 60 FR published at page 33004 on June 26, 1995, in the second column, the fourth line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-51]

**FOR FURTHER INFORMATION CONTACT:** Mr. E.F. Williams of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

#### **AT&T Corporation (AT&T), and AT&T Investment Corporation (ATTIMCO) Located in New York, New York**

[Prohibited Transaction Exemption 95-51  
Exemption Application Nos. D-09716 & D-09717]

#### **Correction**

In 60 FR published at page 33007 on June 26, 1995, in the first column, the fourth line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-52].

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

#### **Toyota Motor Sales, U.S.A., Inc. Money Purchase Pension Plan for Bargaining Unit Employees (the Plan) Located in Torrance, California**

[Exemption Application No. D-09875  
Prohibited Transaction Exemption 95-53]

#### **Correction**

In 60 FR published at page 33008 on June 26, 1995, in the third column, the fifth line in the heading is hereby corrected to read as follows:

[Prohibited Transaction Exemption 95-53].

**FOR FURTHER INFORMATION CONTACT:** Mr. C.E. Beaver of the Department,