

(b) The authorizing Plan fiduciary is furnished with a summary of the information required under this paragraph 4(a) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following: (i) a description of the total amount of Plan assets involved in cross-trade transactions during the period; (ii) a description of BlackRock's cross-trade practices, if such practices have changed materially during the period covered by the summary; (iii) a statement that the Plan fiduciary's authorization of cross-trade transactions may be terminated upon receipt by BlackRock of the fiduciary's written notice to that effect; and (iv) a statement that the Plan fiduciary's authorization of the cross-trade transactions will continue in effect unless it is terminated.

6. The cross-trade transaction does not involve assets of any Plan established or maintained by BlackRock or any of its affiliates.

7. All Plans that participate in the cross-trade program have total assets of at least \$25 million.

8. BlackRock receives no fee or other compensation (other than its agreed upon investment management fee) with respect to any cross-trade transaction.

9. BlackRock is a discretionary investment manager with respect to Plans participating in the cross-trade program.

10. For purposes of this exemption:

(a) "Cross-trade transaction" means a purchase and sale of securities between accounts for which BlackRock or an affiliate is acting as an investment manager;

(b) "Affiliate" means any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with BlackRock;

(c) "Plan Account" means an account holding assets of one or more employee benefit plans that are subject to the Act, for which BlackRock acts as a fiduciary.

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 June 7, 1995, at 60 FR 30111.

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 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 accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 26th 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-09783 et al.]

#### Proposed Exemptions; Texas Commerce Bank National Association

**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

All interested persons are invited to submit written comments or request for

a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and 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, N.W., Washington, D.C. 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, D.C. 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.

**Texas Commerce Bank National Association (Texas Commerce) Located in Houston, TX**

[Application No. D-09783]

**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) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the leasing, since September 15, 1993, of certain office space in a building (the Building) owned by the Maritime Association—I.L.A. Pension Fund (the Pension Plan) to Texas Commerce, a party in interest with respect to the Pension Plan.

This proposed exemption is conditioned on the following requirements:

(a) The trustees of the Pension Plan (the Trustees), who are independent of Texas Commerce, believe that the leasing of office space in the Building by the Plan to Texas Commerce is and will continue to be in the best interest of the Pension Plan and its participants and beneficiaries.

(b) The decision by the Pension Plan to enter into and continue leasing office space in the Building to Texas Commerce has been made and will continue to be made by the Trustees in consultation with an independent property manager and an independent fiduciary.

(c) The terms of the lease have remained and will remain at least as favorable to the Pension Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) The rental charged by the Pension Plan under the lease has been based and will continue to be based upon arm's length negotiations with unrelated parties.

(e) The Trustees, in conjunction with the independent fiduciary, have and will continue to (i) monitor the terms and conditions of the lease as well as the terms and conditions of the

exemption and (ii) take all actions that are necessary and proper to safeguard the interests of the Pension Plan and its participants and beneficiaries.

(f) The subject lease has involved and will continue to involve less than 25 percent of the Pension Plan's total assets.

Effective Date: If granted, this proposed exemption will be effective September 15, 1993.

**Summary of Facts and Representations**

1. The Pension Plan is a multiemployer, Taft-Hartley plan that has been established and maintained in accordance with section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, between the South Atlantic and Gulf Coast District International Longshoremen's Association (the Union) and the West Gulf Maritime Association (the Association). The Pension Plan is administered by a board of 16 trustees, one-half of whom are appointed by the Association and one-half of whom are appointed by the Union. The principal offices of the Pension Plan are located in Houston, Texas. Investment decisions for the Pension Plan are made by the Trustees and various investment consultants. As of September 30, 1994, the Pension Plan had net assets of \$409,325,675. As of August 4, 1994, the Pension Plan had 6,069 participants.

2. The Union and its affiliated locals represent longshoremen from Lake Charles, Louisiana to Brownsville, Texas. There are 31 affiliated locals in this geographic area.

3. The Association is a Texas nonprofit corporation exempt from taxation under section 501(c)(6) of the Code. Its members include business organizations engaged in the shipping industry from Lake Charles, Louisiana to Brownsville, Texas. Approximately 35 members of the Association contribute to the Plan.

4. Texas Commerce is a national banking association with locations in Houston and other Texas cities. It is a wholly owned subsidiary of Texas Commerce BancShares, Inc., which is a wholly owned subsidiary of the New York City-based Chemical Banking Corporation. Texas Commerce provides a full range of banking and trust services to its customers. It currently serves as a fiduciary to the Pension Plan but it has no investment discretion with respect to the Pension Plan's real estate assets including the subject Building described herein.

5. First City Bank Texas (First City) was a national banking association with locations in Houston and other Texas cities. During 1979, First City entered

into a lease agreement under which it leased space in a building located at 11550 Fuqua, Houston, Texas. The Building is a five-story office building containing 88,678 square feet of gross space and 83,636 square feet of net rentable space. It is situated on an approximately 3.5 acre tract of land. The owner of the Building was Crow-Southpoint #1, Ltd. (Crow), a Texas limited partnership. First City used the office space in the Building as a bank lobby.

6. In October 1982, the Plan purchased a 60 percent interest in the Building from Crow for \$3.9 million. This transaction, together with a loan and lease agreement were covered by Prohibited Transaction Exemption (PTE) 85-79, (50 FR 18945), an administrative exemption that was granted by the Department on May 3, 1985. PTE 85-79, which was retroactive to October 27, 1982, provided for the formation of a joint venture (the Joint Venture) between the Pension Plan and Crow. Upon the formation of the Joint Venture, Crow became a party in interest with respect to the Pension Plan.

The terms of the Joint Venture were negotiated and approved by Mr. John D. O'Connell of O'Connell and O'Connell, Inc., a real estate consultant, who was designated by the trustees of the Pension Plan to serve as the independent fiduciary on behalf of the Pension Plan. Mr. O'Connell renders investment advice to the Pension Plan with respect to real estate transactions and supervises the making of real estate investments on behalf of the Pension Plan.

The terms of the Joint Venture were as follows: (a) Crow would be the managing general partner of the Joint Venture; (b) Crow would contribute the Building, a 3.5 acre site improved with a five-story office building to the Joint Venture in return for a 40 percent ownership interest; (c) the Pension Plan would be required to make a \$3.9 million capital contribution to the Joint Venture in return for a 60 percent ownership interest; (d) the Pension Plan would be required to make a loan of \$2 million to Crow at 11.25 percent interest only for a 15 year term, with interest payable annually on the anniversary date of the loan and principal due upon maturity; (e) the loan would be secured by Crow's 40 percent ownership interest in the Joint Venture and would be used to clear complete title to the Building and to repay Crow the funds it expended for the acquisition of the Building; (f) net cash flow from the operations of the Joint Venture would be distributed 60 percent to the Pension Plan and 40 percent to Crow; (g) Crow

would be appointed by the Joint Venture as manager of the Building receiving from the Joint Venture both a management fee and leasing commissions pursuant to a Management Agreement between Crow and the Joint Venture; (h) the Pension Plan would be required to approve leases in excess of 10,000 square feet or for terms in excess of five years and any capital expenditure in excess of \$50,000 would have to be submitted to the Pension Plan for approval; and either (i) partner in the Joint Venture could cause a sale of the project subject to a right of first offer to the other partner.

Aside from the formation of the Joint Venture, PTE 85-79 provided specific exemptive relief that permitted the Pension Plan to make the \$2 million loan to Crow under the terms specified above. PTE 85-79 also allowed Crow to receive lease commissions paid by the Joint Venture pursuant to the terms of the Management Agreement.

7. Also commencing in October 1982, the Pension Plan began occupying office space in the Building for its administrative offices and also leasing space therein to the Maritime Association—I.L.A. Welfare Fund (the Welfare Plan) and the Maritime Association I.L.A. Vacation Plan (the Vacation Plan). The Welfare Plan and the Vacation Plan are not parties in interest with respect to the Pension Plan but they do have common trustees. The applicant represents that the leasing arrangement between the Pension Plan, the Welfare Plan and the Vacation Plan satisfies the terms and conditions of PTE 77-10 (42 FR 33918, July 1, 1977).<sup>1</sup>

8. In October 1992, two events occurred involving the Pension Plan. First, Ameritrust Texas, N.A. (Ameritrust), a national banking association with locations in Houston and other Texas cities, began providing custodial, investment management and securities lending services to the Pension Plan as well as to the Welfare Plan and the Vacation Plan. At that time, Ameritrust had no relationship to First City or to Texas Commerce. Second, First City was taken over by the Federal Deposit Insurance Corporation (the FDIC) due to First City's insolvency.

9. In December 1992, the Pension Plan acquired the 40 percent interest in the Building that was held by Crow as a result of Crow's default, in October 1991, on the \$2 million loan and failure to cure the event of default. The Pension

Plan then foreclosed on Crow's interest in the Joint Venture. The Joint Venture was dissolved and the Pension Plan assumed exclusive ownership of the Building. The Pension Plan incurred no loss in connection with the assumption of the Building.

10. In February 1993, Texas Commerce acquired all of the assets of First City from the FDIC. The office space became a bank lobby for Texas Commerce and Texas Commerce executed a new lease with the Pension Plan effective April 18, 1993. The applicant represents that no administrative exemptive relief was requested because Texas Commerce was not a party in interest at the time of the execution of the lease.

11. The terms of the Texas Commerce lease provide for a primary term of five years with an option to renew and extend for up to three successive five year terms of five years each. The rentable area is 15,713 square feet of space. The rental amount includes base rent of \$14.67 per square foot or \$230,509.58 per year (\$19,209.14 per month) and an operating expense of \$6.67 per square foot or \$104,805.71 per year. Thus, the total rent is \$21.34 per square foot or \$335,315.39 per year. The lease also includes an alteration allowance of \$50,000.<sup>2</sup> In the event of a default, Texas Commerce is required to reimburse the Pension Plan on demand for all costs reasonably incurred by the Pension Plan on demand for all costs reasonably incurred by the Pension Plan in connection therewith, including attorney's fees, court costs and related costs plus interest thereon at an annual rate equal to the prime rate charged by Texas Commerce to its most creditworthy borrowers for short-term commercial loans. The same default provisions also apply in the event of a default by the Pension Plan.

12. The trustees of the Pension Plan utilized the services of Mr. Brint Davis of Trammel Crow Houston, Inc., an

independent building property manager and Mr. O'Connell, the independent fiduciary for the Pension Plan in PTE 85-79, to represent the interests of the Pension Plan in negotiating the lease with Texas Commerce. The applicant represents that neither Mr. O'Connell nor Mr. Davis are employees, officers, or directors of Texas Commerce nor is there any other relationship or connection between these individuals and Texas Commerce. Mr. Davis's employer is the exclusive leasing agent and property manager for the Building. Mr. O'Connell reviews all leases in the Building on behalf of the Pension Plan to ascertain that the leases are comparable in terms to the conditions prevailing in the market. Mr. O'Connell states that he has advised the Pension Plan on real estate matters for more than 15 years.

13. In negotiating the terms of the lease for which Texas Commerce pays a base rent of \$14.67 per square foot on an "as is basis," Mr. O'Connell represents that the subject Building is located in an isolated area with very few comparables and no comparable bank leases. He explains that office space in this unique area enjoys almost 100 percent occupancy so that rents, if and when available, are about \$16 per square foot. He further explains that the closest areas that might be considered comparable to the Building are the Clearlake area and the Hobby Airport area where rents are approximately \$12 per square foot.

14. On September 15, 1993, Texas Commerce acquired 100 percent of the stock of Ameritrust. This event caused the existing lease to become a prohibited transaction in violation of the Act but not under the Code. Also effective as of September 15, 1993, Ameritrust was renamed Texas Commerce Trust Company, National Association (Texas Commerce Trust). Texas Commerce Trust continued to provide to the Plans the same services initially provided by Ameritrust.

On December 17, 1993, Texas Commerce Trust was dissolved and merged into the Trust Department of Texas Commerce. As a result of the merger, the lease became a prohibited transaction under the Code as well as under the Act.<sup>3</sup>

<sup>3</sup> According to the applicant, Texas Commerce was a party in interest with respect to the Pension Plan under section 3(14)(H) of the Act because it was a 10 percent or more shareholder of Texas Commerce Trust, which was a service provider to the Pension Plan. Because section 4975 of the Code does not include 10 percent shareholders of service providers in the list of disqualified persons, the applicant represents that the lease transaction was not subject to the excise tax provisions under

<sup>1</sup> The Department expresses no opinion herein on whether the leasing arrangement between the Pension Plan, the Welfare Plan and the Vacation Plan complies with PTE 77-10.

<sup>2</sup> Article 9.01 of the Texas Commerce lease allows the lessee to move, relocate or demolish interior walls inside the leased space and to paint or finish the walls as the lessee may choose. The lessee is also permitted to add cabinets and fixtures as needed for its business and to select floor coverings for the area.

Notwithstanding the alteration allowance provision set forth in the lease, it is represented that the Trustees of the Pension Plan did not allow the office space currently occupied by Texas Commerce to be altered in such a manner that such space could be leased only to certain types of lessees. The applicant states that the original buildout of the subject space was pursuant to a 1979 lease between Crow and First City. The applicant further represents that the 1979 lease was negotiated at arm's length by unrelated parties and had a primary term of 20 years. The applicant notes that the Pension Plan did not acquire an equity interest in the Building until 1982.

Neither First City, Texas Commerce, Ameritrust, Texas Commerce Trust, nor any of their affiliates have ever had any relationship to the Pension Plan other than as a result of the lease and the services provided by Ameritrust and its successors, Texas Commerce Trust and Texas Commerce.

15. Currently, Texas Commerce provides the same custodial, investment management and securities lending services to the Pension Plan, the Welfare Plan, the Vacation Plan and certain miscellaneous accounts (the Accounts) that were provided by Ameritrust and Texas Commerce Trust. The fees associated with custodial services totaled \$126,100 for the Plans and the Miscellaneous Accounts for the year ending December 31, 1994. Also for the year ending December 31, 1994, the fees associated with investment management services totaled \$106,660, excluding the Building. Further, the fees associated with securities lending services provided the Plans and the Miscellaneous Accounts by Texas Commerce and its predecessors totaled \$48,000 for the period, October 1, 1993 through July 31, 1994.

16. Since the inception of the lease, Texas Commerce has continued to pay rent to the Pension Plan in a timely manner without default or rental delinquencies. However, the applicant is aware of the fact that a prohibited transaction occurred in violation of the Act on September 15, 1993. Therefore, the applicant has requested exemptive relief with respect to the past and continued leasing of office space in the Building by the Pension Plan to Texas Commerce. If granted, the proposed exemption will be retroactive to September 15, 1993.<sup>4</sup>

17. Mr. O'Connell notes that the space presently leased to Texas Commerce was originally leased to First City. In the course of time, he states that Texas Commerce acquired most of the assets of First City which resulted in a duplication or overlap of banking facilities in many areas of Harris County including the area in which the

section 4975 of the Code until the merger of Texas Commerce Trust into Texas Commerce in December 1993. At that time, Texas Commerce became a service provider to the Plan by reason of section 4975(e)(2)(B) of the Code.

<sup>4</sup> It is represented that once the Trustees and Texas Commerce realized that a prohibited transaction had occurred, the parties caused an exemption application to be prepared in January 1994 and subsequently finalized in July 18, 1994. It is also represented that the Trustees and Texas Commerce did not initially realize that the acquisition by Texas Commerce of Ameritrust made the lease a prohibited transaction. Further, the applicant notes that the exemption request was not filed as a result of an investigation by either the Department or the Internal Revenue Service.

Building is situated. Mr. O'Connell further notes that he, the Pension Plan Trustees and Mr. Davis, determined that Texas Commerce was the most attractive lessee given the failure of First City, the relative proximity of Texas Commerce and the substantial cost that would be incurred to renovate the space to a non-bank lessee since the space had been originally configured for a bank tenant. Mr. O'Connell also represents that the Texas Commerce lease has required no improvements or alterations by the lessee and has provided immediate income to the Pension Plan with no out-of-pocket costs. Moreover, he states that the presence of the city's largest bank has been a valuable enhancement to the Building. Given these factors, Mr. O'Connell represents that the rental charged for the subject space is above fair market value and that the lease continues to be a valuable asset of the Pension Plan.

Mr. O'Connell also confirms that his firm has continuously monitored rental rates for other properties comparable to the Building over the past five years. Further, during this period, he represents that his firm has continuously monitored the terms and conditions of all leases involving the Building. Without qualification, he represents that the terms and conditions of the lease between the Plan and Texas Commerce have, at all times, been at arm's length and have provided the Plan with fair market value rent since the inception of the subject lease to present, including September 15, 1993 when the lease became a prohibited transaction.

18. In addition to Mr. O'Connell's review of the lease, the Trustees of the Pension Plan have reviewed the investment needs of the Pension Plan and the terms and conditions of the Texas Commerce lease. Based upon their consideration of such matters, the Trustees believe the lease is in the best interest of the Pension Plan. The Trustees, in conjunction with Mr. O'Connell, are monitoring the lease on behalf of the Pension Plan, enforcing the payment of rent and the proper performance of all other obligations of Texas Commerce thereunder. In addition, the Trustees have the obligation to assess the prudence of the continued ownership by the Pension Plan of the Building and to negotiate, when appropriate, favorable terms with respect to the sale, lease or other disposition of the Building. Further, the Trustees are also responsible for ensuring that all terms and conditions of the exemption are, at all times, satisfied.

19. In summary, it is represented that the transactions satisfy the criteria for

an administrative exemption under section 408(a) of the Act because:

(a) The Trustees believe that the leasing of office space in the Building by the Plan to Texas Commerce is and will continue to be in the best interest of the Pension Plan and its participants and beneficiaries.

(b) The decision by the Pension Plan to enter into and continue leasing office space in the Building to Texas Commerce has been made and will continue to be made by the Trustees in consultation with an independent property manager and an independent fiduciary.

(c) The terms of the lease have remained and will remain at least as favorable to the Pension Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) The rental charged by the Pension Plan under the lease has been based and will continue to be based upon arm's length negotiations with unrelated parties.

(e) The Trustees, in conjunction with the independent fiduciary, have and will continue to (i) monitor the terms and conditions of the lease as well as the terms and conditions of the exemption and (ii) take all actions that are necessary and proper to safeguard the interests of the Pension Plan and its participants and beneficiaries.

(f) The subject lease has involved and will continue to involve less than 125 percent of the Pension Plan's total assets.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### **Retirement Plan for Employees of Automobile Club of New York, Inc. (the Plan) Located in Garden City, New York**

[Application No. D-09882]

#### **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 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to: (1) the purchase (the Purchase) by the Plan of a certain office building (the Building) from Automobile Club of New York, Inc. (the Club), a sponsor of the Plan and a party

in interest with respect to the Plan; (2) a subsequent leaseback (the Lease) of the Building by the Plan to the Club; and (3) the potential future exercise of (a) a repurchase option (the Repurchase Option) between the Club and the Plan; and (b) a make whole obligation (the Make Whole Obligation) whereby the Club will pay the Plan the difference between the original acquisition price paid by the Plan for the Building, and the price received by the Plan upon the sale of a Building to a purchaser other than the Club; provided that the following conditions are satisfied:

(1) all terms and conditions of the Purchase, the Lease, the Repurchase Option, and the Make Whole Obligation are and will be at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party;

(2) the Lease will have an initial term of fifteen years with three five-year renewal options, and will be a triple net lease under which the Club as the tenant is obligated for all operating expenses, including real estate taxes, insurance, repairs, maintenance, electricity and other utilities;

(3) the fair market value of the Building has been determined by an independent qualified appraiser, and will be updated as of the date of purchase by the Plan;

(4) with respect to the Lease, the fair market rental amount has been and will be determined by an independent qualified appraiser, which amount will never be below the initial fair market annual rental amount of \$470,000;

(5) with respect to the Lease, appraisals of the Building will be performed at three-year intervals during the initial fifteen-year term of the Lease, and at five-year intervals with respect to the three renewal periods for purposes of updating the fair market rental amount to be received by the Plan;

(6) the fair market value of the Building will not exceed 25% of the Plan's total assets. Notwithstanding this condition, if the 25% limitation is ever exceeded the Club will have 60 days to comply with the 25% limit. In the event the 25% limit cannot be met within the 60 days, the Plan will undertake an orderly disposition of the Building in such manner as to cure the violation within nine (9) months of the date when the 25% limit was initially exceeded. If at any time during the 9-month disposition period, the Building exceeds 30% of the Plan's total assets, the exemption, if granted, will no longer be available;

(7) an independent fiduciary will be appointed to review, approve and monitor the transactions described

herein, and the fees received by the independent fiduciary for serving in such capacity, combined with any other fees derived from the Club or related parties, will not exceed 1% of its annual income for each fiscal year that it continues to serve in the independent fiduciary capacity with respect to these transactions;

(8) U.S. Trust, as the independent fiduciary, will evaluate the transactions described herein and deemed them to be administratively feasible, protective and in the interest of the Plan;

(9) U.S. Trust, as the independent fiduciary, will monitor the terms and the conditions of the exemption and the Lease throughout its initial term plus the three renewal periods, and will take whatever action is necessary to protect the Plan's rights;

(10) U.S. Trust, as the independent fiduciary, will monitor the net subleasing amount received by the Club during any annual period under the Lease. If such subleasing amount results in a profit to the Club, the Club will contribute this profit to the Plan; and

(11) the Plan will bear no costs or expenses with respect to the transactions described herein.

#### Summary of Facts and Representations

1. The Plan is a defined benefit plan established in 1965. As of December 31, 1993, the Plan had approximately 703 participants. As of May 31, 1995, the market value of the Plan's total assets was \$24,185,650. The Plan administrator is the retirement committee which is appointed by the Board of Directors of the Club. United States Trust Company of New York (U.S. Trust) is the Plan trustee and the independent fiduciary with respect to the transactions described herein. The Club, established in 1934, is a not for profit subchapter "C" corporation organized under New York State Law. The Club is affiliated with the American Automobile Association, and is in the business of providing certain travel services to its members. The named fiduciary under the Plan is the Club.

2. The applicant proposes to enter into the following transactions. First, the Plan will purchase the Building from the Club at fair market value and hold the title to the Building through a tax exempt 501(c)(2) corporation. U.S. Trust represents that this will insulate the Plan's other assets from liabilities associated with owning the Building. Subsequently, the Club will lease the Building from the Plan at fair market rental, and sublease certain portions of the Building to parties unrelated to the Plan.

3. The Building was initially appraised (Initial Appraisal) as of October 19, 1993, by Martin B. Levine, MAI (Mr. Levine) and Paul Leprohon (Mr. Leprohon, collectively, the Appraisers). Messrs. Levine and Leprohon are qualified independent Appraisers with Koepfel Tener Rigaldi, Inc. (KTR), a national real estate appraisal and consulting firm. Mr. Levine is a director of the New York appraisal division of KTR. In the Initial Appraisal, the Appraisers determined the fair market value of the leased fee interest of the Building to be \$4,700,000. In this regard, it is represented that \$32,500 is payable directly to the Club by the operator of the adjacent Harkness property as a result of a certain air rights lease, and that this income was a factor in determining the value of the Building.<sup>5</sup> Because the Building is a multi-tenanted income producing facility, the Appraisers primarily relied on the income capitalization approach supported by the sales comparison approach. The Building is the property located at 1881 Broadway, New York, New York, and it is situated at the northwest corner of Broadway and West 62nd Street. The Building is a 4 story plus basement, class "B" office building, with retail space on the grade floor. The Building contains approximately 24,005 square feet of gross leasable area, of which 8,405 square feet is retail space comprised of 3,405 square feet at grade level and 5,000 square feet of finished, non-selling, below grade space.

4. In the Initial Appraisal, the Appraisers also established a fair market rental for the Building. The Appraisers analyzed recent lease transactions within the Building itself in conjunction with leases recently signed within competing buildings which are located on the West Side of Midtown Manhattan. As such, the Appraisers concluded that the market rent for the Building's office component is \$20.00 per square foot. For the retail component, the market rent is estimated to be \$85.00 for grade floor space and \$12.75 per square foot for below grade space.

5. On January 10, 1995, the Appraisers prepared a limited scope appraisal of the Building (Updated Appraisal) as an update to the Initial Appraisal. In the Updated Appraisal, the Appraisers also relied on the income

<sup>5</sup> The air rights income, in the amount of \$32,500 per year, is the rent due under the air rights lease, which permitted air rights over 1881 Broadway (i.e., the Building) to be used to erect a larger building than would otherwise be possible on 1887 Broadway site. The air rights lease expires in 86 years.

capitalization and sales comparison approaches, and concluded that as of December 31, 1994, the free and clear market value of the leased fee interest in the Building, including the income from the air rights lease, is \$5,200,000. This increase in the fair market value is due to the market conditions improving in the year 1994, as evidenced by declining vacancy rate and concessions in the form of free rent, large tenant improvement allowances and favorable below-market renewal options becoming less common.

In the Updated Appraisal, the Appraisers stated that the market rent for the Building's office component is \$21 per square foot, and the market rent for the retail component is estimated to be \$90 per square foot for the grade floor space and \$13.50 per square foot for the below grade space. Therefore, in establishing the fair rental value of the Building, the Appraisers determined that as of December 31, 1994, the fair market rental of the Building under a triple net lease is \$470,000 for the first year, and that this figure includes the \$32,500 income from leasing the air rights for the next 84 years. The Appraisers also stated that based upon their market analysis, they project that all retail and basement rents will increase by 4% per year, and office rents will increase by 4% per year for renewal purposes.

6. Once the Plan purchases the Building from the Club, the Plan will lease (the Lease) the Building back to the Club, and the Club will sublease portions of the Building to unrelated, third parties. The Lease will be a triple net lease and will be net of all operating expenses, including real estate taxes, insurance, repairs, maintenance, electricity and other utilities.<sup>6</sup> The Lease will have an initial term of fifteen (15) years, with three renewable options of five years each at the discretion of U.S. Trust. Renewal periods of the Lease will occur upon the Club, as the lessee, notifying the Plan, as lessor, in writing no later than ten months before the end of the expiring term. The rental rate will be determined by reference to an independent qualified appraiser retained by the Plan as the lessor. The fair market rent will be binding upon the Club as the lessee, unless the Club disputes it in thirty days. In the case of such a dispute, the matter would go to arbitration, which according to U.S. Trust, is customary in commercial lease agreements. If the arbitrators cannot

<sup>6</sup>The applicant represents that the Lease will provide that any fees that may be incurred by the Plan in connection with the Lease, the Building or the transactions described herein, will be reimbursed to the Plan and/or paid by the Club.

reach an agreement between themselves within fifteen days, they shall appoint a third independent appraiser. For purposes of the Lease, appraisals of the Building are scheduled at 3 year intervals during the initial 15 year term of the Lease, and at five year intervals with respect to the three renewal periods. Annual appraisals will be required, however, to determine the annual funding obligation for the Plan, Form 5500 financial statements and to monitor compliance with the 25% limitation.

7. The Lease provides that the annual base rent (Base Rent) during the initial 15 year term shall be the higher of the annual rental rate for the preceding three year period, or the appraised rental value. Therefore, once the Base Rent is established for the first 3 years of the term of the Lease, the rental rate cannot fall below that amount, it can only go higher. During the three renewal periods, the Base Rent will be adjusted every five years and will be increased at least 10% during each Renewal period. The applicant further represents that rental amounts under the Lease will never be below the initial fair market annual rental amount of \$470,000, as established by the Appraisers. The Lease also provides for a security deposit (Security Deposit) to be paid by the lessee to the lessor, and U.S. Trust represents that the Security Deposit will be  $\frac{1}{6}$  of the Base Rent payable in a given year. The Lease also provides for certain additional rent, which is expenses related to the Building that will be borne by the Club as the tenant. U.S. Trust represents that this is more protective of the rights and remedies available to the landlord (i.e., the Plan) in the event of nonpayment of rent. The Club will also obtain a fire and hazard/casualty insurance policy for the Building. The Plan will be the beneficiary and loss payee with respect to the hazard and liability insurance on the Building.

8. The applicant also represents that if during any annual period of the Lease, the net subleasing amount received by the Club results in a profit to the Club, the Club will contribute this profit to the Plan. In this regard, the total subleasing amounts will be subject to an annual audit by an independent auditor which is currently Peat Marwick. Specifically, upon performing annual audits of the Club's books, Peat Marwick will submit accounting to U.S. Trust, showing total rents collected from subleases, including recoverables,<sup>7</sup> and

<sup>7</sup>Recoverables means any amounts collected over and above basic rents, such as escalations for light, power, taxes and maintenance, etc.

total operating expenses for the Building during that year.<sup>8</sup> U.S. Trust has agreed to provide necessary oversight in this matter.

9. The Plan will also have the right to require the Club to repurchase the Building, at a price which will be the greater of the Building's fair market value or the Plan's purchase price (the Repurchase Option). The Repurchase Option can be exercised under certain circumstances under discretion of U.S. Trust as the independent fiduciary, including, material misrepresentations regarding the Building in the contract for sale; the Building's fair market value exceeding 25% of the Plan's assets; at the expiration of the Lease; upon the breach of the Lease by the Club; if the Club defaults on the Lease; to satisfy the cash needs of the Plan; and, in the event of a material loss to the Building by fire, condemnation, etc. It is also represented that the Repurchase Option can be exercised at the end of the initial 15 year term of the Lease, and at the end of each renewal period. In the event the Club fails to repurchase the Building under the Repurchase Option, the Plan has the following remedies. If the Plan has to sell the Building to a third party for an amount less than payable by the Club under the Repurchase Option, the Club is obligated to pay the Plan any difference. Furthermore, the calculation of the difference between the price paid by the third party and the price payable by the Club will include the fact that the Club is obligated to pay all costs and expenses associated with the purchase of the Building, while in a sale to a third party, the Plan may have to pay certain expenses related to that sale, as is customary for a seller in a commercial transaction. In this regard, the applicant represents that the Club will pay the Plan the fair market rental for the entire Building, as well as for the space it occupies within the Building.

10. In the event the Club fails to repurchase the Building within sixty (60) days of the Building being put to it by the Plan under the Repurchase Option, the Club will pay the Plan the difference (if any) between the original acquisition price paid by the Plan for the Building and the price received by the Plan on the sale of the Building to a purchaser other than the Club (the "Make Whole Obligation"). In this regard, U.S. Trust has examined the Club's financial statements and held discussions with the Club's management, and concluded that the

<sup>8</sup>Annual operating expenses for the Building include real estate taxes, building maintenance and repairs, security, insurance, air conditioning, power, electricity, carting, water and sewer, etc.

Club currently has sufficient net worth to satisfy the Repurchase Agreement and the Make Whole Obligation by either repurchasing the Building, or paying the difference between the price paid by the Plan for the Building and the price realized on the sale of the Building by the Plan. U.S. Trust will continue to monitor the Club's financial condition before it finalizes the purchase of the Building by the Plan. It is also represented that if the Building is to be sold to another party in interest with respect to the Plan, as defined by section 3(14) of the Act, the applicant will seek exemptive relief from the Department prior to the consummation of the sale.

11. The independent fiduciary for the Purchase, the Lease, the Repurchase Option and the Make Whole Organization will be U.S. Trust, a bank and trust company formed under the laws of New York and an experienced employee benefits trust fiduciary with approximately \$31 billion in assets under management, and custodial assets of \$397 billion.<sup>9</sup> U.S. Trust and its wholly owned subsidiary, U.S. Trust Company of California, N.A. have extensive experience serving as fiduciaries for ERISA plans. U.S. Trust also represents that it has considerable experience in monitoring ownership interests relating to leases for large pension plans.

12. U.S. Trust represents that it has the following relationships to the Plan and the Club. U.S. Trust was appointed trustee (the Trustee) of the Plan on November 4, 1965. Under the terms of the Trust Agreement, U.S. Trust, as the Plan Trustee, has full discretion to invest the Plan's assets within the framework of the general investment guidelines provided by the Club. As the Trustee for the Plan, U.S. Trust may determine the value of any Plan's assets for which there is no publicly quoted price, and U.S. Trust manages approximately \$24 million of assets for the Plan. In addition to the Plan Trustee role, U.S. Trust manages approximately \$1,200,000 in a cash fund for the Club, which represents 0.004% of the total assets managed by U.S. Trust.<sup>10</sup> U.S.

<sup>9</sup>In this regard, the applicant makes a request regarding a successor independent fiduciary. Specifically, if it becomes necessary in the future to appoint a successor independent fiduciary (the Successor) to replace U.S. Trust, the applicant will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have responsibilities, experience and independence similar to those of U.S. Trust.

<sup>10</sup>In this regard, U.S. Trust represents that the \$1.2 million do not represent assets of the Club managed by U.S. Trust as the Plan trustee, but that they are assets managed by U.S. Trust in a separate capacity.

Trust also maintains that the income received by it for serving in the independent fiduciary capacity in these transactions, combined with any other fees derived from the Club or related parties will not exceed 1% of its annual income for each fiscal year that U.S. Trust continues to serve in the independent fiduciary capacity with respect to the transactions described herein.

13. In its capacity as the independent fiduciary, U.S. Trust has reviewed the condition of the Building, the financial condition of the Club, the Plan's current investment portfolio and its general investment guidelines. U.S. Trust represents that it has been advised by legal counsel of its ERISA fiduciary responsibilities. U.S. Trust represents that it will have the following responsibilities under the Lease and the renewal periods. In this regard, the triple net Lease places upon the Club, as the tenant, all responsibility with respect to the Building; its repair, maintenance, etc., and all costs and expenses related thereto, including without limitation, those costs related to real estate taxes and insurance. U.S. Trust will monitor the collection of rent from the Club as the tenant, the Club's compliance with other Lease obligations, the value of the Plan's assets to make sure the value of the Building does not exceed 25% of the total Plan assets, and assure periodic valuations of the Building by an independent appraiser.

14. U.S. Trust has concluded that the transactions described herein should be structured as follows. The Building purchase price to the Plan should not exceed fair market value. The base payments under the triple net Lease should at least equal the Building's fair rental value. The fair market value and the fair rental value should be determined by an independent qualified appraiser, and negotiated by the parties at arm's length. In this regard, U.S. Trust represents that it reserves the right to negotiate a purchase price below the appraised fair market value of the Building and with respect to the Lease, and to negotiate a Base Rent above the fair market rent as established by an appraiser. U.S. Trust represents that this approach would benefit the Plan. U.S. Trust also states that the Plan will achieve at least an 11% return on its investment (the Rate of Return), which will be based on the purchase price the Plan pays for the Building. The Plan will also receive the return due to any appreciation in the market value of the Building. This Rate of Return will exceed the Plan's historical rate of return which ranged from 9.3% to 9.6%.

The applicant states that the Rate of Return will have an effect on the fair market rent paid by the Club to the Plan under the Lease. For example, the Updated Appraisal gives the fair market value of the Building as \$5,200,000, and as such a minimum return of 11% would require that the annual net payment under the Lease by the Club to the Plan be at least \$572,000. However, the Rate of Return can increase when another appraisal of the Building is done at closing, and U.S. Trust analyzes the prevailing market conditions and the Club's financial condition.

15. U.S. Trust compared the risk and rate of return on the Building with other investments (including real estate investments) available to the Plan, the expenses and liabilities associated with the acquisition and ownership of the Building, the Club's financial condition and prospects, and its ability to satisfy its obligations under the Lease. U.S. Trust represented that the Plan has sufficient liquidity to acquire the Building, and that none of the Plan's assets are currently invested in real property. U.S. Trust also stated that the Club should have the financial resources to satisfy either the Repurchase Option or the Make Whole Obligation. U.S. Trust concluded that the transactions described herein are more favorable to the Plan than similar transactions with an unrelated party, and are inherently protective of the Plan.

16. U.S. Trust has evaluated the Plan's total investment portfolio and the safeguards for this investment, including the Repurchase Option and the Make Whole Obligation, as well as the Club's ability to satisfy these obligations. U.S. Trust has determined that the acquisition of the Building by the Plan will not impair the Plan's ability to pay benefits and expenses. U.S. Trust has concluded that the acquisition of the Building by the Plan is consistent with the diversification requirements of section 404(a)(1) of the Act, as the Building will represent approximately 21.5% of the Plan's assets.

17. U.S. Trust proposes to monitor that the Building does not exceed 25% of the Plan's assets in several ways. The Plan will obtain annual appraisals of the Building's fair market value at the end of the Plan's fiscal year (December 31) for purposes of complying with the 25% limitation. U.S. Trust represents that the total plan assets may be subject to periodic scrutiny for purposes of determining compliance with the 25% of plan assets' limitation. The Club will have sixty (60) days to cure any violation of the 25% limitation. In this

regard, U.S. Trust can request the Club to take one of several remedial actions. The Club can make additional cash contributions to the Plan, it can prepay rent to the Plan, it can purchase the Building from the Plan under the Repurchase Option; or the Club can take other measures as may be acceptable to U.S. Trust.<sup>11</sup> Failing these remedies, from the date the 25% limitation is first exceeded the Plan will undertake an orderly disposition of the Building in such manner as to cure the violation within 9 months (the Disposition Period).

18. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(1) all terms and conditions of the Purchase, the Lease, the Repurchase Option, and the Make Whole Obligation are and will be at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party;

(2) the Lease will have an initial term of fifteen years with three five year renewal options, and will be a triple net lease under which the Club as the tenant is obligated for all operating expenses, including real estate taxes, insurance, repairs, maintenance, electricity and other utilities;

(3) the fair market value of the Building has been determined by an independent qualified appraiser, and will be updated as of the date of purchase by the Plan;

(4) with respect to the Lease, the fair market rental amount has been and will be determined by an independent qualified appraiser, which amount will never be below the initial fair market annual rental amount of \$470,000;

(5) with respect to the Lease, appraisals of the Building will be performed at three year intervals during the initial fifteen year term of the Lease, and at five year intervals with respect to the three renewal periods for purposes of updating the fair market rental amount to be received by the Plan;

(6) the fair market value of the Building, generally, will not exceed 25% of the Plan's total assets;

(7) an independent fiduciary will be appointed to review, approve and monitor the transactions described

herein, and the fees received by the independent fiduciary for serving in such capacity, combined with any other fees derived from the Club or related parties, will not exceed 1% of its annual income for each fiscal year that it continues to serve in the independent fiduciary capacity with respect to these transactions;

(8) U.S. Trust, as the independent fiduciary, will evaluate the transactions described herein and deemed them to be administratively feasible, protective and in the interest of the Plan;

(9) U.S. Trust, as the independent fiduciary, will monitor the terms and the conditions of the exemption and the Lease throughout its initial term plus the three renewal periods, and will take whatever action is necessary to protect the Plan's rights;

(10) U.S. Trust, as the independent fiduciary, will monitor the net subleasing amount received by the Club during any annual period under the Lease. If such subleasing amount results in a profit to the Club, the Club will contribute this profit to the Plan; and

(11) the Plan will bear no costs or expenses with respect to the transactions described herein.

#### Notice to Interested Persons

The applicant represents that, within five (5) days of the publication of the notice of proposed exemption (the Notice) in the **Federal Register**, all interested persons will receive a copy of the Notice, the beginning and ending information that appears with the Notice, and a copy of the supplemental statement, as required, pursuant to 29 CFR 2570.43(b)(2), either by posting on bulletin boards at locations at which employees covered under the Plan are employed, or by first class mail to the last known address to all other interested persons, including retirees, separated vested employees and beneficiaries of deceased participants. Comments and hearing requests on the proposed exemption are due thirty-five (35) days after the date of publication of this proposed exemption in the **Federal Register**.

For Further Information Contact: Ekaterina A. Uzlyan, U.S. Department of Labor, telephone (202) 219-8883. (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 that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 26th day of July, 1995.

**Ivan Strasfeld,**

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

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#### NUCLEAR REGULATORY COMMISSION

[Docket No. 50-382]

#### Entergy Operations, Inc., Waterford Steam Electric Station, Unit No. 3; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption

<sup>11</sup> The Department notes that if at any time during the 9 month Disposition Period, the Building exceeds 30% of the Plan's total assets, the exemption, if granted, will no longer be available. The Department further notes that it expects U.S. Trust, consistent with its fiduciary responsibilities under Title I of the Act, to periodically monitor the financial condition of the Club in order to take a remedial action not requiring the disposition of the Building.