respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses.)

Section 104(d) of the Communications Assistance for Law Enforcement Act (CALEA) (Pub. L. 103–414, 47 U.S.C. 1001–1010) requires that, within 180 days after the publication by the Attorney General of a notice of capacity requirements pursuant to subsections 104(a) or 104(c) of CALEA, a telecommunications carrier shall submit to the Attorney General a statement identifying any of its systems or services that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the notice under such subsection. The FBI, as required by the Paperwork Reduction Act of 1995, is therefore soliciting comments from the public, including telecommunications carriers and other affected agencies on the implementation of this information collection.

Overview of this Information Collection:

(1) Type of Information Collection; NEW COLLECTION: The type of information acquired is required to be furnished by law in terms of a carrier statement, as set forth in Subsection 104(d) of the Communications Assistance for Law Enforcement Act (CALEA) (Pub. L. 103–414, 47 U.S.C. 1001–1010). A template, which is not mandatory, has been developed with the telecommunications industry to facilitate submission of the telecommunications carrier statements. Such information is quantitative and qualitative data necessary to identify any systems or services of a telecommunications carrier that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices as specified in the final capacity notice to Subsection 104(a) of CALEA.

Any relationship between capacity and capability, and the omission of equipment from the carrier statement and cost reimbursement, will be addressed in the final capacity notice to be published in the Federal Register.

(2) The title of the information collection: ''Telecommunications Carrier Statement.''

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collections; Form number: None. Sponsored by the Federal Bureau of Investigation (FBI), United States Department of Justice.

(4) Who will be asked or required to respond, as well as a brief abstract; BUSINESS OR OTHER FOR PROFIT: Telecommunications carriers, as defined in CALEA Subsection 102(8), will respond.

The collected data will be used in conjunction with law enforcement priorities and other factors to determine the specific equipment, facilities, and services that require immediate modification. The reimbursement process is not dependent exclusively on a carrier's submission of systems or services in their carrier statement. Further consultation with individual telecommunications carriers may be required to obtain supplementary information in order to better determine which individual systems and services require modification.

The amount and type of information collected will be minimized to ensure that submission of this data by telecommunications carriers will not be burdensome nor unreasonable. Each telecommunications carrier will submit a statement identifying any of its systems or services that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices as set forth in the final capacity notice.

Based on close consultation with industry, information solicited to specifically identify such systems and services and their capacity to meet the CALEA requirements will include: Common Language Location Identifier (CLLI) code or equivalent identifier, switch model or other system or service type, the derived capacity of the system or service as specified in the final capacity notice, the county name(s) that the system or service serves, and the city and state where the system or service is located. Unique information required for wireline systems and services would include the host CLLI code if the system or service is a remote. Unique information required for wireless systems and services would include the Metropolitan or Rural Service Area number(s), or the Metropolitan or Basic Trading Area number(s) served by the system or service.

Confidentiality regarding the data received from the telecommunications carriers will be protected by statute, regulation, and through nondisclosure agreements as necessary.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The FBI estimates that there are approximately three thousand (3,000) telecommunications carriers, with approximately twenty-three thousand (23,000) unique systems or services, that will be affected by this collection of information. The total amount of time required to complete the Telecommunications Carrier Statement will vary, depending upon the total number of systems and services that the telecommunications carrier deploys that provide a customer or subscriber with the ability to originate, terminate, or direct communications. The time required to read and prepare information, for one system or service is estimated at ten (10) minutes. There is also an associated startup time per carrier that is estimated at two (2) hours. This startup time consists of reading the Telecommunications Carrier Statement and determining data sources.

(6) An estimate of the total public burden (in hours) associated with the collection is 9,910 hours. These estimates were derived from close consultation with industry.

If additional information is required, contact Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street NW., Washington, DC 20530.

Dated: April 5, 1996.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 96–8842 Filed 4–9–96; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 96–23; Application Number D–09602]

Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits various transactions involving employee benefit plans whose assets are managed by in-house managers (INHAMS), provided that the conditions of the exemption are met. The

exemption affects participants and beneficiaries of employee benefit plans, the sponsoring employers of such plans, INHAMS, and other persons engaging in the described transactions.

EFFECTIVE DATE: The effective date of the exemption is April 10, 1996.

FOR FURTHER INFORMATION CONTACT: Lyssa Hall or Virginia J. Miller, Pension and Welfare Benefits Administration, Office of Exemption Determinations, U.S. Department of Labor, Washington, DC 20210, (202) 219–8971 (not a toll-free number) or Paul D. Mannina, Plan Benefits Security Division, Office of the Solicitor, (202) 219–9141 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Exemptive relief for the transactions described herein was requested in an application dated December 16, 1993 submitted by the Committee on Investment of Employee Benefit Assets (CIEBA), pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR section 2570 subpart B (55 FR 32836 August 10, 1990).

On March 24, 1995, the Department published a notice in the Federal Register (60 FR 15597) of the pendency of a proposed class exemption from certain of the restrictions of sections 406 and 407(a) of ERISA and from certain taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code.[1]

The notice gave interested persons an opportunity to submit written comments or requests for a hearing on the proposed class exemption to the Department. The Department received fourteen written comments and no requests for a public hearing. Upon consideration of all of the comments received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the major comments are discussed below.

Discussion of the Comments

A. Basic Exemption

1. INHAM as Decision Maker (Section I(a)). The proposed general exemption, set forth in Part I, permitted that portion of a plan that is managed by an INHAM to engage in all transactions described in section 406(a)(1)(A) through (D) with virtually all party in interest service providers except the INHAM or a person related to the INHAM. Under section I(a) of the proposed exemption, the INHAM must function as the decision maker for the plan in all covered transactions. Specifically, section I(a) requires that the terms of the transaction be negotiated by, or under the authority and general direction of, the INHAM and that the INHAM make the decision to enter into the transaction.

Under section I(a) of the proposal, the exemption would be available for a transaction involving an amount in excess of $5,000,000 notwithstanding the fact that the transaction that had been negotiated by the INHAM was subject to a veto or approval by the plan sponsor. A commenter suggested that section I(a) should be modified to permit the plan sponsor or its designee to retain the right to veto or approve any transaction, regardless of the size of the transaction. Although the exemption permits the retention of a veto power for large transactions, the exemption was developed based on the premise that independent decisionmaking was more likely to be assured if day to day transactions are negotiated and approved by an INHAM. Therefore, the Department has determined not to adopt the commenter's suggestion.

A commenter is concerned that the requirement under section I(a) of the proposal that the INHAM negotiate and make the decision on behalf of the plan to enter into the transaction may foreclose a transaction where an INHAM retains a QPAM to locate and negotiate the terms of a possible plan investment. According to the commenter, it is frequently advantageous for a plan to retain a QPAM to identify investment opportunities and to negotiate the terms of these types of investments, while permitting the INHAM to perform its own ''due diligence'' review of each investment opportunity presented and evaluate the appropriateness of the investment for the plan's particular investment needs. The Department does not believe that it would be appropriate in the context of this exemption proceeding to modify the INHAM exemption to, in effect, permit a transaction that was previously rejected by the Department during its consideration of the final QPAM class exemption.[2]

A commenter questioned whether Part I of the exemption would apply to ''drag along'' and similar transactions that are not actually negotiated by the INHAM. According to the commenter, when a plan makes an investment in a non-publicly traded entity, both the plan and other investors want to be able to dispose of their investment at a favorable price. In order to accomplish this objective, plans and other investors may negotiate certain rights at the time they make their initial investments. One such right would be the ability of the plan to ''tag along'' and sell out its interest at the same price as the majority investors if the majority investors sell their interests to a third party. The converse of this right would be the ability of the majority investors to ''drag along'' the plan if they sell their interest to a third party. When these rights are exercised, it may turn out that the party to whom the interests are sold is a party in interest. The commenter argues that the ''drag along'' or similar transactions should be treated as subordinate to the initial investment transaction and, therefore, subject to the authority or general direction of the INHAM for purposes of section I(a) of the exemption. The commenter represents that, while the INHAM is not involved in selecting the party to whom the plan's interest is sold, the transaction is determined by an independent party pursuant to rights negotiated by the INHAM at arm's-length at the outset of the investment transaction. The commenter further represents that these rights would be taken into account by the INHAM in determining whether the initial investment would be prudent. It is the view of the Department that section I(a) of the exemption will be deemed satisfied in the case of ''drag along'' or similar transactions that are entered into pursuant to rights that were negotiated by the INHAM as part of the primary investment transaction. The Department notes, however, that it does not interpret section I(a) as exempting a ''drag along'' or similar transaction unless such transaction is itself subject to relief under the exemption and the applicable conditions are otherwise met. In this regard, the Department expects that any determination regarding the appropriate price to be paid for the investment would reflect the effect on the value of such investment of rights which may be exercised in the future at the discretion of unrelated third persons.

One commenter requested that the Department clarify that the requirements of section I(a) would be met if an officer of the INHAM also serves as a member of the employer's investment committee or other named fiduciary under the plan. Nothing contained in section I(a) would preclude

[1] Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 F.R. 1063, January 3, 1978), generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. In the discussion of the exemption, references to sections 406 and 408 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[2] In this regard, see PTE 84–14, 49 FR 9497 (March 13, 1984).

an officer of the INHAM from also serving as a member of the employer's investment committee or other named fiduciary under the plan, provided that the INHAM otherwise meets the definition set forth in section IV(a), including the requirement that the INHAM must be a separate entity that is registered as an investment adviser.

A commenter requested that the Department clarify that the requirements of section I(a) will be satisfied notwithstanding the fact that the INHAM also manages assets of outside clients.

In the Department's view, nothing contained in the exemption would preclude the INHAM from providing services to outside clients who have no affiliation with the INHAM.

In response to a comment regarding typical investment increments used in financial transactions, the Department has revised section I(a) by replacing ''an amount in excess of $5,000,000'' to ''$5,000,000 or more'' in connection with the plan sponsor's right to veto or approve such transactions.

2. Transactions Involving Arrangements Designed to Benefit Parties in Interest (Section I(c)). Section I(c) of the proposal requires that the transaction not be part of an agreement, arrangement or understanding designed to benefit a party in interest. A commenter suggested that the Department clarify that to the extent that the INHAM's purpose in entering into a transaction is not to benefit a party in interest, so that any benefit to the party in interest is incidental to the purpose of the transaction, the transaction should not give rise to an agreement, arrangement or understanding designed to benefit a party in interest which is described in section I(c). The Department concurs with the commenter and notes that the intent of the condition in section I(c) was not to deny direct benefits to other parties to a transaction but, rather, to exclude relief for transactions that are part of a broader overall agreement, arrangement or understanding designed to benefit parties in interest.

3. Transactions with Service Providers (Section I(e)). Under section I(e) of the proposed exemption, relief was limited to transactions with party in interest service providers who do not have discretionary authority or control with respect to the assets involved in the transaction or otherwise render investment advice with respect to such assets. A commenter urged the Department to expand the scope of the final exemption to include relief for all parties in interest. The Department does not believe that a sufficient showing has been made that the safeguards contained in the proposed exemption would adequately discourage the exercise of undue influence upon the INHAM if the final exemption were expanded as requested by the commenter. Accordingly, the Department cannot conclude that further relief is warranted.

Several commenters suggested that the Department clarify that section I(e) of the proposal would not preclude a directed trustee of a plan or a trustee with discretionary authority over plan assets not involved in the transaction from engaging in transactions with the plan. In the Department's view, a nondiscretionary trustee subject to the direction of an INHAM, and that does not otherwise render investment advice with respect to the plan assets involved in the transaction may carry out proper directions that are not contrary to ERISA with respect to the transactions covered by the class exemption. Similarly, the exemption would be available for transactions with a trustee that exercises investment discretion with respect to a portion of plan assets not involved in the transaction.

Another commenter objected to the requirement in section I(e)(2) that the party in interest dealing with the plan not have discretionary authority or control with respect to the investment of the plan assets involved in the transaction and not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets. According to the commenter, the first part of this condition regarding discretionary authority or control is unnecessary in view of the requirement under section I(a) that the terms of the transaction must be negotiated by the INHAM, and that the INHAM make the decision on behalf of the plan to enter into the transaction. The commenter further believed that the requirement contained in section I(e)(2) that the party in interest dealing with the plan not render ''investment advice'' would create uncertainty and is unnecessary in view of the limited scope of relief provided. Accordingly, the commenter requests that the Department eliminate this requirement from the final exemption.

This class exemption was developed, and is being granted by the Department, based on the essential premise that broad exemptive relief from the prohibitions of section 406(a) of ERISA can be afforded for all types of service provider transactions in which a plan engages only if the INHAM independently negotiates the transaction and makes the decision on behalf of the plan to enter into the transaction. The limitations contained in section I(e)(2) were included in the proposal in order to further emphasize that the INHAM must be the decision-maker in order for transactions to be covered by the class exemption. In addition, the Department believes that, if exemptive relief were to be provided where the party in interest renders investment advice to the plan, with respect to the transaction at issue, the potential for decision making with regard to the plan assets that would inure to the benefit of a party in interest would be increased. For these reasons, the Department believes that a separate condition is warranted and has determined not to revise the exemption as requested by the commenter.

4. Fiduciary Audit (Section I(g)). Section I(g) of the proposed exemption required that an independent auditor conduct an annual fiduciary audit to determine whether the written procedures adopted by the INHAM are designed to assure compliance with the conditions of the exemption. Section IV(f) defined fiduciary audit as including: (1) a determination by the auditor as to whether or not the plan has developed adequate internal policies and procedures designed to assure compliance with the terms of the exemption; (2) a test of a representative sample of the plan's transactions to determine operational compliance with such policies and procedures; (3) a determination as to whether the INHAM meets the definition of INHAM set forth in the exemption; and (4) a written report describing the steps performed by the auditor during the course of its review and the auditor's findings and recommendations.

Several commenters requested that the Department clarify the types of ''policies and procedures'' that the INHAM is required to adopt for purposes of sections I(g) and IV(f) of the proposal, and the criteria the independent auditor should apply in conducting the audit. Another commenter recommended that the audit be conducted in accordance with standards established by the American Institute of Certified Public Accountants (AICPA), and that the Department establish criteria against which the independent auditor can make a determination that the procedures are designed to operate in the manner contemplated by the exemption. In this regard, a commenter raised a related question concerning whether the proposed audit condition would require that the policies and procedures include substantive criteria regarding expected risk, gross return and expenses of a proposed transaction that the INHAM should consider. One commenter

suggested that the scope of the audit should be expanded to include a determination by the auditor regarding compliance with section 404(a) of ERISA. Lastly, a commenter urged the Department to delete this requirement entirely.

As noted in the preamble to the proposed exemption, the Department proposed the audit requirement in order to address the lack of independence of the INHAM. The Department continues to believe that an annual fiduciary audit is necessary to address this lack of independence and, accordingly, has determined not to delete this requirement. In this regard, it was the Department's intent that the role of the auditor would be limited to determining whether the written procedures adopted by the INHAM are designed to assure compliance with the conditions of the exemption. Since the sole purpose of the audit requirement is to assure compliance with the exemption, the Department does not believe that it would be appropriate to expand the scope of this requirement to include either determinations under section 404 of the Act or determinations regarding the appropriateness of investments entered into under the exemption. In response to the comment concerning the adoption of AICPA standards as part of the audit requirement, the Department does not believe that it would be appropriate to adopt a definition that would require compliance with standards developed by certain professional organizations. However, in consideration of the concerns expressed by the commenters, the Department has adopted a new section I(g) which specifically requires that the INHAM adopt written policies and procedures designed to assure compliance with the conditions of the exemption. (The fiduciary audit requirement, set forth in section I(g) of the proposal, has been renumbered as section I(h) under the final exemption.) The Department has also adopted a new definition, under section IV(g), that contains a list of the objective requirements of the exemption that must be described in the written policies and procedures and that must be reviewed by the auditor.[3] In addition, the Department notes that, although the exemption provides flexibility with respect to the specific procedures adopted by the INHAM, it expects such procedures to be designed in a manner that assures that the INHAM's operations are consistent with the requirements of the exemption.

On a related issue, another commenter noted that the role of the auditor under the exemption should be limited to determining compliance with policies and procedures designed by the INHAM and should not include a determination by the auditor as to whether the plan has developed adequate policies and procedures as required under section IV(f) of the proposal. According to the commenter, having the auditor review the adequacy of the procedures would expand the auditor's role beyond the typical role of an independent auditor. In response to the commenter, the Department has determined to modify section IV(f) to delete the requirement that the auditor make a determination regarding the adequacy of the policies and procedures adopted by the INHAM. Under the revised section IV(f)(1), the auditor would be required to review the policies and procedures for consistency with the objective requirements of the exemption. In light of the decision to revise section (IV)(f)(1), the Department has also determined to expand section IV(f)(2) to require the auditor to test for compliance with both the written policies and procedures adopted by the INHAM and the objective requirements of the exemption. In the Department's view, this revised condition will help to assure that the INHAM properly carries out its responsibilities under the exemption.

A commenter noted that the proposal did not make clear the consequences on existing transactions of an unsatisfactory audit. In response to the comment, the Department notes that an adverse finding in the auditor's report would not, in itself, render the exemption unavailable for any transaction engaged in by the INHAM on behalf of the plan.[4] However, if a transaction did not meet a condition of the exemption (e.g., because relief was not available for transactions with the party with whom the INHAM dealt), the exemption would not be available for that transaction, but the exemption would continue to be available for those transactions that did satisfy its conditions. Conversely, a failure to comply with the general terms of the exemption applicable to all transactions would render the exemption unavailable, regardless of whether the failure is identified in the audit. Thus, if the INHAM failed to adopt policies and procedures that complied with the requirements of section I(g) or if no audit were conducted, the exemption would not cover transactions engaged in on behalf of the plan by the INHAM.

Several commenters were concerned that the exemption could be interpreted to mean that only financial accounting firms or auditing firms could conduct the fiduciary audit required under section I(g) of the proposal. According to the commenters, other types of financial service organizations may well be capable of conducting a fiduciary audit. The Department did not intend to limit eligibility to serve as independent auditors under the exemption solely to accounting or auditing firms. Accordingly, any person who otherwise possesses the requisite technical training and proficiency with ERISA's fiduciary responsibility provisions may conduct a fiduciary audit.

A number of commenters also requested that we clarify the requirement that the person performing the fiduciary audit must be ''independent''. In the Department's view, whether an auditor is independent for purposes of the exemption would depend on the particular facts and circumstances of each case. However, the Department would not view an auditor as independent under circumstances where the auditor has a financial interest, including an ownership interest, in the INHAM , the employer, any parties dealing with the plan under the exemption, or any affiliates thereof, or otherwise receives more than a *de minimis* amount of its compensation from the INHAM, the employer, its affiliates, or the plan.

One commenter questioned whether the auditor performing the fiduciary audit can be an entity or individual who provides other services to the plan, e.g., the firm that audits the plan in connection with preparation of the plan's annual report (Form 5500). In the Department's view, the provision of other services would not, in itself, preclude a firm from meeting the requirement under the exemption that the person performing the fiduciary audit must be independent. However, the Department notes that the provision of other services could raise questions regarding the independence of the auditor if the aggregate services result in the auditor deriving more than a de minimis amount of its compensation from the INHAM, the employer, its affiliates, or the plan.

[3] Although the Department has limited the auditor's responsibilities under the final exemption to making findings on the INHAM's compliance with the objective requirements of the exemption, the INHAM remains responsible for assuring compliance with all of the conditions of the exemption. Accordingly, the failure of the INHAM to comply with a condition of the exemption not described in section IV(g) would render the exemption unavailable.

[4] The Department cautions that the failure of the INHAM to take appropriate steps to address any adverse findings in an unsatisfactory audit would raise issues under ERISA's fiduciary responsibility provisions.

One of the commenters expressed concern about how the audit requirement would apply to the condition, contained in section I(b), that the transaction not be described in certain specified class exemptions. The commenter suggested that the auditor's role regarding this condition should be limited to a finding as to whether the transaction is of the type described in the specified class exemptions, rather than a finding regarding compliance with the terms and conditions of such class exemptions. The Department concurs with this comment. The Department believes, however, that it is the ongoing responsibility of the INHAM to determine whether a transaction is covered by one of the specified class exemptions or the INHAM exemption.

A commenter suggested that the Department revise the requirement under section I(g) of the proposal that the independent auditor must have appropriate technical training and proficiency with ERISA's fiduciary responsibility provisions. According to the commenter, the most likely candidates to conduct an audit are people who have experience with ERISA's fiduciary responsibility provisions rather than technical training. On the basis of this comment, the Department has determined to modify section I(g) to provide that the independent auditor must have appropriate technical training or experience, and proficiency with ERISA's fiduciary responsibility provisions. Another commenter urged the Department to delete this requirement entirely. In response to this comment, the Department believes that the requirement that the auditor be familiar with ERISA's fiduciary responsibility provisions provides an additional protection under the class exemption. Therefore, the Department has determined not to further revise this condition.

According to a commenter, the language in section IV(f)(4) of the proposal, which provides that the auditor must make recommendations in its written report, would require the auditor to go beyond its auditing role of providing findings regarding compliance. The Department concurs with this comment and, accordingly, has deleted the words ''and recommendations'' from section IV(f). In response to a related comment, the Department has deleted the words ''among other things'' from the definition of fiduciary audit in order to clarify that the definition sets out the specific steps for a fiduciary audit. The Department cautions that the auditor would be responsible for taking any actions necessary to adequately perform the steps described in the definition of fiduciary audit.

A commenter suggested that the Department modify sections I(g) and IV(f) by deleting the word ''fiduciary'' from ''fiduciary audit'' wherever it appears in those sections and substituting the word ''exemption'' to reflect the fact that the auditor's role is to assure compliance with the policies and procedures established for purposes of the exemption and does not otherwise involve examining for compliance with ERISA's fiduciary responsibility provisions. The Department concurs with the commenter's suggestion and has modified the exemption accordingly.

The following examples illustrate the types of transactions which would be covered by Part I of the exemption:

(1) Corporation C designates INHAM X to manage a portion of Plan P's assets. Assume that X meets the criteria for an INHAM under the exemption. X uses Plan P assets to purchase a building from Y, a wholly-owned subsidiary of a broker-dealer that provides services to the Plan. Absent this exemption, the purchase of the building from Y, a party in interest described in ERISA section 3(14)(G), would violate the restrictions contained in section 406(a)(1)(A), and the transaction could not proceed until exempted by the Department. The general exemption set forth in Part I would allow such transaction if the conditions contained therein are met.

(2) INHAM X invests part of a pension fund's assets to acquire a parcel of unimproved real property from the president of the employer sponsoring the Plan. Part I does not provide an exemption for the purchase of the property since relief is limited under that Part to transactions with service providers and their affiliates. In addition, no relief would be provided under the exemption for the act of self-dealing described in section 406(b)(1) arising in connection with X's use of the fund's assets in a transaction that benefits a person in whom X has an interest that may affect the exercise of its best judgement as a fiduciary.

(3) Corporation C is the named fiduciary of Plan P. C chooses INHAM X to manage the portion of P's assets allocated for real estate investments. X, using its discretionary authority, locates and negotiates the purchase for $6 million of a commercial building in New York that is being offered for sale by Corporation Z. Z provides accounting services to Plan P. Pursuant to its arrangement with C, X is required to seek the approval of C for all real estate transactions involving amounts of $5 million or more. On the basis of X's recommendation, C approves the transaction. Despite the retention of approval power by C, Part I of the exemption would be available for the purchase of the building provided there is no arrangement with C that requires X to buy the building from Z and the conditions of Part I are otherwise met.

(4) Corporation C allocates part of the assets of its Plan P to a master trust managed by INHAM X. X uses master trust assets to purchase an office building that is subsequently leased to M. M provides administrative services to Plan P. During the term of the lease, M becomes a wholly-owned subsidiary of Corporation C. Although M is no longer a party in interest with respect to Plan P solely by reason of providing services to such Plan, Part I will continue to be available for the entire lease term since, at the time the transaction was entered into (as defined in section IV(e)), M was not affiliated with the plan sponsor and its relationship to Plan P was solely that of a service provider.

(5) INHAM X retains Broker-Dealer B to provide brokerage services to Plan P. In a separate transaction, X uses Plan P assets to purchase corporate bonds directly from B. The bonds were originally issued by Corporation Z, an investment manager for a portion of the Plan's assets that are not controlled by INHAM X. Since the Department expects that, as part of its fiduciary responsibilities, the INHAM would have analyzed the terms of the bonds prior to purchase, the relief provided by Part I could extend to both the acquisition of the bonds and the underlying extension of credit. Thus, Part I could cover a subsidiary transaction with a party in interest if such transaction is itself subject to relief under the exemption and the applicable conditions are otherwise met.

(6) Corporation C designates INHAM X to manage a portion of Plan P's assets. X uses plan assets to purchase an office building that is subsequently leased to Broker-Dealer BD, a non-party in interest with respect to Plan P. During the term of the lease, BD becomes a service provider to Plan P. Although BD was not a party in interest service provider at the time the lease was executed, section IV(e) provides that Part I of the exemption would be available for the entire lease term provided that the remaining conditions of the exemption were met at the time the transaction was entered into. Alternatively, section IV(e) provides that Part I of the exemption would be available to exempt the transaction if

the conditions of the exemption were met as of the time the transaction would have become prohibited.

B. Specific Exemptions for Employers

A commenter urged the Department to expand the relief provided under Part II of the proposal to permit an INHAM to select an affiliate to provide telecommunications related goods and services to any real property that may be considered an asset of the plan or to an entity in which the plan owns a controlling interest and that is managed by an INHAM. While the commenter has identified the need for exemptive relief, the Department does not believe that it has sufficient information on the record at this time to provide additional relief for a class of transactions that would otherwise violate section 406(b) of ERISA. Finally, the Department believes that adoption of the commenter's suggestion would arbitrarily favor one specific industry over another under similar circumstances.

C. Definitions

1. INHAM (Section IV(a)). A commenter requested that the definition of an INHAM be revised to include a division or group within the employer's management structure. The Department believes that an INHAM that is organized as a separate legal entity, is separately managed, and is subject to oversight by the Securities and Exchange Commission as a result of registration as an investment adviser under the Investment Advisers Act of 1940 provides an important safeguard under the exemption. Therefore, the Department cannot conclude that further relief is warranted.

Another commenter suggested that the Department modify the definition of INHAM to permit a majority-owned subsidiary of an employer, or a direct or indirect majority-owned subsidiary of a parent organization of such an employer to serve as an INHAM. The Department does not believe that a sufficient showing has been made that the requirement that the INHAM be wholly-owned under the proposal would raise compliance problems for those persons intending to use the exemption. Accordingly, the Department has determined not to revise the final exemption as requested.

Several commenters urged the Department to expand the definition of an INHAM to include an entity established by a multiemployer plan or its plan sponsor. A commenter further noted that the definition of an affiliate of the INHAM contained in sections IV(a) and IV(b) of the proposal should be broadened to include families of multiemployer plans. The Department notes that the exemption application requested relief for transactions involving the assets of single employer plans managed by in-house managers. Accordingly, the Department does not believe that it has sufficient information regarding the operation and management of multiemployer plans to make the findings necessary to grant exemptive relief. Moreover, the Department does not believe that a sufficient showing has been made by the commenters that the conditions contained in the exemption would adequately protect the interests of participants and beneficiaries of internally managed multiemployer plans. Of course, the Department would be prepared to consider additional relief upon proper demonstration that the findings can be made under section 408(a) of ERISA with respect to such plans.

A commenter requested that the Department clarify that the relief provided for employee benefit plans whose assets are managed by INHAMs extends, not only to plans sponsored by affiliates of the INHAM, but also includes plans sponsored by the INHAM itself. According to the commenter, the INHAM may establish a stand-alone plan to cover its employees, or its employees may participate in a plan established and maintained by an affiliate of the INHAM. Therefore, the commenter urged that the Department adopt a definition of ''plan'', which would include plans maintained by the INHAM or an affiliate of the INHAM. In consideration of the concerns raised by the commenter, the Department has determined to adopt a definition of plan under section IV(h) that includes plans maintained by the INHAM and affiliates of the INHAM. The commenter further requested that the requirements under section IV(a) that the INHAM have $50 million of plan assets under management and control, and that plans maintained by affiliates of the INHAM have $250 million of aggregate plan assets also should be modified to clarify that these requirements are not intended to exclude any plan maintained by the INHAM. The requirement that the INHAM be affiliated with a plan sponsor (or group of related plan sponsors) whose plan(s) hold in the aggregate assets of at least $250 million, $50 million of which is under the direct management and control of the INHAM was imposed because the Department believes that INHAMs of large plans are more likely to have an appropriate level of expertise in financial and business matters. In this regard, the Department believes that the requirement that the INHAM have a significant dollar amount of assets under its management and control attributable to plans maintained by affiliates which are separately accountable for the operation of their respective plans provides an additional safeguard under the exemption. Accordingly, the Department has determined not to revise the $50 million requirement. However, the Department has determined that it would be appropriate to include the assets of plans maintained by the INHAM in determining compliance with the $250 million standard.

Finally, a commenter requested that the $50 million requirement be revised to permit the $50 million threshold to be met during the INHAM's first fiscal year as a separate legal entity. According to the commenter, the requirement that the INHAM have in excess of $50 million of plan assets under its management and control as of the last day of its most recent fiscal year could unintentionally prevent the exemption from being immediately available for an employer's in-house management group in its first year as a separate wholly-owned subsidiary of the employer. In response to this comment, the Department has revised section IV(a)(2) to specify that an existing asset management group that is newly-incorporated as a separate subsidiary of the employer may satisfy the $50 million requirement in its initial fiscal year if the requirement is met as of the date during its initial fiscal year as a separate legal entity that responsibility for the management of such assets in excess of $50 million was transferred to it from the employer.

2. Continuing Transactions (Section IV(e)). A commenter asserted that the last sentence of section IV(e), which deals with transactions which are continuing in nature, is unclear. This sentence addresses the issue of whether a continuing transaction that is not prohibited and, therefore, not subject to the exemption at the outset, may become covered by the exemption during the course of the transaction if it later becomes prohibited. According to the commenter, certain of the conditions of the exemption can be met only at the time the transaction is entered into, such as the condition in section I(d) dealing with arms-length terms. Conversely, the requirements of section I(e)(1) dealing with the party in interest relationships permitted under the exemption can only be determined at the time the transaction would have become prohibited. It is the view of the

Department that section I(d) will be deemed satisfied in the case of a continuing transaction that later becomes prohibited if the transaction negotiated by the INHAM satisfied such section at the time the transaction was entered into. The Department notes that it does not interpret section IV(e) as exempting a continuing transaction that becomes prohibited subsequent to a renewal or modification that required the consent of the INHAM, unless the renewal or modification otherwise met the arm's-length requirement of section I(d). Lastly, the Department has modified section IV(e) to clarify that in determining compliance with the conditions of the exemption at the time that the transaction was entered into, section I(e) will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

D. Miscellaneous

1. In response to a comment, the Department has added section IV(d)(3) to the exemption in order to define ''control'' for purposes of determining whether or not an INHAM is ''related'' to a party in interest under section IV(d).

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 section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and 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 require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests 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) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interests of plans and of their participants and beneficiaries and protective of the rights of participants and beneficiaries;

(3) The exemption is supplemental to, and not in derogation of, any other provisions of the Act and 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 exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

Exemption

Accordingly, the following exemption is granted 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, August 10, 1990).

Part I—Basic Exemption

Effective April 10, 1996, the restrictions of section 406(a)(1) (A) through (D) of the Act and the taxes imposed by Code section 4975 (a) and (b) of the Code, by reason of 4975(c)(1) (A) through (D), shall not apply to a transaction between a party in interest with respect to a plan (as defined in section IV(h)) and such plan, provided that an in-house asset manager (INHAM) (as defined in section IV(a)) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) The terms of the transaction are negotiated on behalf of the plan by, or under the authority and general direction of, the INHAM, and either the INHAM, or (so long as the INHAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the INHAM, makes the decision on behalf of the plan to enter into the transaction. Notwithstanding the foregoing, a transaction involving an amount of $5,000,000 or more, which has been negotiated on behalf of the plan by the INHAM will not fail to meet the requirements of this section I(a) solely because the plan sponsor or its designee retains the right to veto or approve such transaction;

(b) The transaction is not described in—

(1) Prohibited Transaction Exemption 81–6 (46 FR 7527; January 23, 1981) (relating to securities lending arrangements),

(2) Prohibited Transaction Exemption 83–1 (48 FR 895; January 7, 1983) (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Exemption 88–59 (53 FR 24811; June 30, 1988) (relating to certain mortgage financing arrangements);

(c) The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the INHAM, the terms of the transaction are at least as favorable to the plan as the terms generally available in arm's length transactions between unrelated parties;

(e) The party in interest dealing with the plan: (1) is a party in interest with respect to the plan (including a fiduciary) solely by reason of providing services to the plan, or solely by reason of a relationship to a service provider described in section 3(14) (F), (G), (H), or (I) of ERISA; and (2) does not have discretionary authority or control with respect to the investment of the plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(f) The party in interest dealing with the plan is neither the INHAM nor a person related to the INHAM (within the meaning of section IV(d));

(g) The INHAM adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption; and

(h) An independent auditor, who has appropriate technical training or experience and proficiency with ERISA's fiduciary responsibility provisions and so represents in writing, conducts an exemption audit (as defined in section IV(f)) on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the plan presenting its specific findings regarding the level of compliance with the policies and procedure adopted by the INHAM in accordance with section I(g).

Part II—Specific Exemptions

Effective April 10, 1996, the restrictions of sections 406(a), 406(b)(1), 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of Code section 4975(c)(1) (A) through (E), shall not apply to:

(a) The leasing of office or commercial space owned by a plan managed by an INHAM to an employer any of whose employees are covered by the plan or an affiliate of such an employer (as defined in section 407(d)(7) of the Act), if—

(1) The plan acquires the office or commercial space subject to an existing lease with an employer, or its affiliate as a result of foreclosure on a mortgage or deed of trust;

(2) The INHAM makes the decision on behalf of the plan to foreclose on the mortgage or deed of trust as part of the exercise of its discretionary authority;

(3) The exemption provided for transactions engaged in with a plan pursuant to section II(a) is effective until the later of the expiration of the lease term or any renewal thereof which does not require the consent of the plan lessor;

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building or the commercial center; and

(5) The requirements of sections I(c), I(g) and I(h) are satisfied with respect to the transaction.

(b) The leasing of residential space by a plan to a party in interest if—

(1) The party in interest leasing space from the plan is an employee of an employer any of whose employees are covered by the plan or an employee of an affiliate of such employer (as defined in section 407(d)(7) of the Act);

(2) The employee who is leasing space does not have any discretionary authority or control with respect to the investment of the assets involved in the lease transaction and does not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(3) The employee who is leasing space is not an officer, director, or a 10% or more shareholder of the employer or an affiliate of such employer;

(4) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the INHAM, the terms of the transaction are not less favorable to the plan than the terms afforded by the plan to other, unrelated lessees in comparable arm's length transactions;

(5) The amount of space covered by the lease does not exceed five percent (5%) of the rentable space of the apartment building or multi-unit residential subdivision [townhouses or garden apartments], and the aggregate amount of space leased to all employees of the employer or an affiliate of such employer does not exceed ten percent (10%) of such rentable space; and

(6) The requirements of sections I(a), I(c), I(d), I(g) and I(h) are satisfied with respect to the transaction.

Part III—Places of Public Accommodation

Effective April 10, 1996, the restrictions of sections 406(a)(1) (A) through (D) and 406(b) (1) and (2) of ERISA and the taxes imposed by Code section 4975 (a) and (b), by reason of Code section 4975(c)(1) (A) through (E), shall not apply to the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by a plan and managed by an INHAM to a party in interest with respect to the plan, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

Part IV—Definitions

For the purposes of this exemption:

(a) The term ''in-house asset manager'' or ''INHAM'' means an organization which is—

(1) either (A) a direct or indirect wholly-owned subsidiary of an employer, or a direct or indirect wholly-owned subsidiary of a parent organization of such an employer, or (B) a membership nonprofit corporation a majority of whose members are officers or directors of such an employer or parent organization; and

(2) an investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has under its management and control total assets attributable to plans maintained by affiliates of the INHAM (as defined in section IV(b)) in excess of $50 million; provided that if it has no prior fiscal year as a separate legal entity as a result of it constituting a division or group within the employer's organizational structure, then this requirement will be deemed met as of the date during its initial fiscal year as a separate legal entity that responsibility for the management of such assets in excess of $50 million was transferred to it from the employer.

In addition, plans maintained by affiliates of the INHAM and/or the INHAM, must have, as of the last day of each plan's reporting year, aggregate assets of at least $250 million.

(b) For purposes of sections IV(a) and IV(h), an ''affiliate'' of an INHAM means a member of either (1) a controlled group of corporations (as defined in section 414(b) of the Code) of which the INHAM is a member, or (2) a group of trades or businesses under common control (as defined in section 414(c) of the Code) of which the INHAM is a member; provided that ''50 percent'' shall be substituted for ''80 percent'' wherever ''80 percent'' appears in section 414(b) or 414(c) or the rules thereunder.

(c) The term ''party in interest'' means a person described in Act section 3(14) and includes a ''disqualified person'' as defined in Code section 4975(e)(2).

(d) An INHAM is ''related'' to a party in interest for purposes of section I(f) of this exemption if the party in interest (or a person controlling, or controlled by, the party in interest) owns a five percent or more interest in the INHAM or if the INHAM (or a person controlling, or controlled by, the INHAM) owns a five percent or more interest in the party in interest. For purposes of this definition:

(1) The term ''interest'' means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation.

(B) The capital interest or the profits interest of the entity if the entity is a partnership, or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise;

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest; and

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

(e) For purposes of this exemption, the time as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after April 10, 1996, or any renewal that requires the consent of the INHAM occurs on or after April 10, 1996, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this paragraph shall be construed as exempting a transaction entered into by a plan which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have

become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, section I(e) will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(f) Exemption Audit. An ''exemption audit'' of a plan must consist of the following:

(1) A review of the written policies and procedures adopted by the INHAM pursuant to section I(g) for consistency with each of the objective requirements of this exemption (as described in section IV(g)).

(2) A test of a representative sample of the plan's transactions in order to make findings regarding whether the INHAM is in compliance with (i) the written policies and procedures adopted by the INHAM pursuant to section I(g) of the exemption and (ii) the objective requirements of the exemption.

(3) A determination as to whether the INHAM has satisfied the definition of an INHAM under the exemption; and

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.

(g) For purposes of section IV(f), the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by the INHAM to assure compliance with each of these requirements:

(1) The definition of an INHAM in section IV(a).

(2) The requirements of Part I and section I(a) regarding the discretionary authority or control of the INHAM with respect to the plan assets involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the plan to enter into the transaction.

(3) That any procedure for approval or veto of the transaction meets the requirements of section I(a).

(4) For a transaction described in Part I:

(A) that the transaction is not entered into with any person who is excluded from relief under section I(e)(1), section I(e)(2), to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or section I(f), and

(B) that the transaction is not described in any of the class exemptions listed in section I(b).

(5) For a transaction described in Part II:

(A) If the transaction is described in section II(a),

(i) that the transaction is with a party described in section II(a);

(ii) that the transaction occurs under the circumstances described in section II(a) (1) and (2);

(iii) that the transaction does not extend beyond the period of time described in section II(a)(3); and

(iv) that the percentage test in section II(a)(4) has been satisfied or

(B) If the transaction is described in section II(b),

(i) that the transaction is with a party described in sections II(b)(1);

(ii) that the transaction is not entered into with any person excluded from relief under section II(b)(2) to the extent such person has discretionary authority or control over the plan assets involved in the lease transaction or section II(b)(3); and

(iii) that the percentage test in section II(b)(5) has been satisfied.

(h) The term ''plan'' means a plan maintained by the INHAM or an affiliate of the INHAM.

Signed at Washington, DC, 4th day of April 1996.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 96–8841 Filed 4–9–96; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Commonwealth Edison Company; Notice of Partial Denial of Amendment to Facility Operating Licenses and Opportunity for Hearing

[Docket Nos. STN 50–454, STN 50–455, STN 50–456, STN 50–457]

The U.S. Nuclear Regulatory Commission (the Commission) has partially denied a request by Commonwealth Edison Company (ComEd, the licensee) for an amendment to Facility Operating License Nos. NPF–37, NPF–62, NPF–72 and NPF–77, issued to the licensee for operation of Byron Station, Units 1 and 2, located in Ogle County, Illinois and Braidwood Station, Units 1 and 2, located in Will County, Illinois. Notice of Consideration of Issuance of this amendment was published in the Federal Register on February 28, 1996 (61 FR 7547).

The purpose of the licensee's amendment request was to revise the Technical Specifications (TS) to replace the existing scheduling requirements for overall integrated and local containment leakage rate testing with a requirement to perform the testing in accordance with 10 CFR Part 50, Appendix J, Option B. As part of its submittal, ComEd proposed to revise the TS regarding the testing of valves with resilient seal material. The scope of the staff's revisions to 10 CFR Part 50, Appendix J, did not include changes to testing of such valves and ComEd's submittal did not include sufficient information for the staff to evaluate the proposed change independently of the others. Therefore, the staff has concluded that that portion of the licensee's request can not be granted. The licensee was notified of the Commission's partial denial of the proposed change by a letter dated April 4, 1996.

By May 10, 1996, the licensee may demand a hearing with respect to the partial denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date.

A copy of any petitions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendment dated December 6, 1995, as supplemented February 27, 1996, and March 28, 1996, and (2) the Commission's letter to the licensee dated April 4, 1996.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at: for Byron, the Byron Public Library District, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; for Braidwood, the Wilmington Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Dated at Rockville, Maryland, this 4th day of April 1996.