

Signed at Washington, DC, this 18th day of June, 1997.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 97-33;
Exemption Application No. D-10011]

Grant of Individual Exemption to Make Permanent as Modified Prohibited Transaction Exemption (PTE) 91-8 Involving Equitable Life Assurance Society of the United States and its Affiliates (Equitable) and Equitable Real Estate Management, Inc. (ERE)¹, Located in New York, New York

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

ACTION: Grant of individual exemption
to make permanent as modified PTE
91-8, which involves Equitable and
ERE.

SUMMARY: This document contains a
final individual exemption to make
permanent as modified the temporary
relief provided by PTE 91-8 (56 FR
1411/1419, January 14, 1991). PTE 91-
8 is a temporary exemption which
expired January 13, 1996. This
exemption makes permanent as
modified PTE 91-8 and provides relief
for the provision of property
management and/or leasing services by
ERE to an Account (as defined in
Section IV below), provided that the
conditions set forth in Section II are
met.

EFFECTIVE DATE: The Department of
Labor is extending the temporary
exemptive relief provided under PTE
91-8 until the date the final exemption
is published in the **Federal Register**.
However, effective January 13, 1996
until the date the final exemption is
published in the **Federal Register**,
Equitable and ERE have a period of up
to 90 days after the end of each calendar
year to prepare the annual report

¹ By letter dated April 23, 1997, the applicants
have informed the Department that Equitable has
agreed to sell ERE to Lend Lease Corporation
Limited, effective on or about June 10, 1997. Lend
Lease Corporation Limited is an Australian-based
real estate and financial management company with
substantial business operations in the United States.
Also, see the comment submitted by Equitable and
ERE regarding the status of ERE under this
exemption.

required by this exemption pursuant to
Section II(4)(a).

Thereafter, PTE 91-8, as modified and
made permanent, is effective on the date
the final exemption is published in the
Federal Register.

FOR FURTHER INFORMATION CONTACT:

Ekaterina A. Uzlyan, Office of
Exemption Determinations, U.S.
Department of Labor, telephone (202)
219-8883. (This is not a toll-free
number.)

SUPPLEMENTARY INFORMATION:

On September 6, 1996, the Department of
Labor (the Department) published in the
Federal Register (61 FR 47205/47214) a
notice of proposed exemption to make
permanent as modified PTE 91-8 (the
Notice). PTE 91-8 provides an
exemption from the restrictions of
section 406(a), 406(b)(1) and 406(b)(2) of
the Employee Retirement Income
Security Act of 1974 (the Act) and from
the sanctions resulting from the
application of section 4975 of the
Internal Revenue Code of 1986 (the
Code), by reason of section 4975(c)(1)
(A) through (E) of the Code.

This exemption to make permanent
PTE 91-8 was requested in an
exemption application by Equitable and
ERE pursuant to 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).
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. Accordingly, this exemption to
make permanent PTE 91-8 is being
issued solely by the Department.

The Notice gave interested persons an
opportunity to comment on the
proposed exemption and to request a
hearing. The Department received five
written comments. Three comments and
an additional clarifying comment were
filed by the representatives of certain
pension plans that currently participate
in one or more of the Accounts to which
ERE provides property management
and/or leasing services as described
herein. The comments generally raised
issues about certain aspects of the
Notice, and were subsequently sent by
the Department to Equitable and ERE for
their response. Set forth below in
paragraph 2 is a list of each of the points
made by the commentators together
with the responses to those points from
Equitable and ERE and Jackson Cross
Company as the Independent Fiduciary
for the transactions described herein.

The fourth and fifth comment were
filed by Equitable and ERE and
generally request clarifications and
modifications to the Notice.

Accordingly, upon consideration of
the entire record, including the written
comments, the Department has
determined to grant the exemption
subject to certain modifications. For a
more complete statement of the facts
and representations supporting the
Department's decision to grant this
exemption refer to the Notice published
on September 6, 1996 at 61 FR 47205/
47214.

A summary description of PTE 91-8
and this exemption; a discussion of the
comments; and the Department's
modifications are addressed below.

1. Description of PTE 91-8 and of this exemption

This exemption makes permanent as
modified PTE 91-8. PTE 91-8 was a
temporary individual exemption which
permits the provision of certain real
estate property management and, in
some instances, leasing services by
EREIM², affiliates of EREIM and
Tishman Speyer Properties³, to various
real estate separate accounts (the
Accounts) in which employee benefit
plans participate. The Accounts are
managed by Equitable, EREIM or
subsidiaries thereof. PTE 91-8 also
permitted the provision, by the law
department of Equitable, of certain legal
services to the Accounts required in
connection with individual properties
held by the Accounts⁴. This exemption
to make permanent as modified PTE 91-
8 was requested by Equitable and ERE
pursuant to Paragraphs IX and X of the
notice of proposed exemption relating to
PTE 91-8 that was published in the
Federal Register on February 28, 1990
at 55 FR 7057/7069. Furthermore,
pursuant to Paragraphs IX and X of the
notice of proposed exemption relating to
PTE 91-8, the application for a

² At the time PTE 91-8 was granted, ERE or
Equitable Real Estate Investment Management, Inc.
was known as EREIM, and was an indirect wholly
owned subsidiary of Equitable.

³ In the Notice, Equitable represented that
Tishman Speyer Properties (TSP), a partnership in
which Equitable had a 50 percent ownership
interest at the time PTE 91-8 was issued, is no
longer affiliated with Equitable, and requested that
this exemption be inapplicable to TSP.
Accordingly, the Department determined that this
exemption will not apply to TSP.

⁴ In the Notice, Equitable represented that under
PTE 91-8 the exemption for the provision of legal
services to the Accounts by Equitable's in-house
law department was never implemented. Therefore,
Equitable requested that this exemption eliminate
reference to the relief for the provision of legal
services by the law department to the Accounts.
Accordingly, in this exemption the Department
eliminates relief for the provision of legal services
by the law department to the Accounts.

permanent exemption was to include a report from the Independent Fiduciary expressing such fiduciary's views and rationales with respect to making PTE 91-8 permanent, and whether the Independent Fiduciary under PTE 91-8 believes that cost savings have been achieved for the Accounts. In this regard, Jackson Cross Company (Jackson Cross), as the Independent Fiduciary for property management and leasing services under PTE 91-8, prepared a report regarding cost savings achieved by the Accounts (the Report). In the Report, Jackson Cross stated that the property management and leasing services rendered by Compass Management and Leasing and Compass Retail, two wholly-owned subsidiaries of ERE, to the Accounts resulted in substantial savings for the benefit of the Accounts.

As stated briefly above, this exemption will permit, on a permanent basis, the provision of property management and/or leasing services by ERE to an Account, provided that the conditions set forth in Section II are met. These conditions require extensive structural safeguards intended to ensure that the transactions described in this exemption operate in the interests of the Accounts and the plans participating therein.

Although PTE 91-8 expired on January 13, 1996, the Department has determined to extend the temporary exemptive relief provided under PTE 91-8 from January 13, 1996, until the date the final exemption is published in the **Federal Register**. Thereafter, PTE 91-8, as modified and made permanent, is effective on the date the final exemption is published in the **Federal Register**.

2. Discussion of the Comments

a. Annual Reconfirmation of the Independent Fiduciary

One of the modifications to PTE 91-8 proposed by the Department provided for a procedure pursuant to which authorizing fiduciaries of the plans participating in the Accounts which do not vote in the annual reconfirmation of the Independent Fiduciary would be deemed to support continuation of that Independent Fiduciary. The commentators assert that "the right to vote in favor or against reconfirmation is an important investor privilege," but add that the right to vote "should not be given up simply by the passage of time." Consequently, the commentators urge that a lack of a timely response from investors (within 30 days) should not be interpreted as a vote in favor of

reconfirmation of the Independent Fiduciary.

Equitable and ERE agree that the annual reconfirmation procedure is an important protective element of this exemption, but do not believe that a requirement for an affirmative vote is needed to preserve the integrity of this procedure. In administering the multiple services program under PTE 91-8, Equitable and ERE have learned that the authorizing fiduciaries sometimes delay returning, or simply fail to return, the ballot for reconfirmation even though they do not object, and in fact support, the continued service of the Independent Fiduciary. This can be detrimental not only to the plan represented by such an authorizing fiduciary, but also to all the other plans that participate in the Accounts. An authorizing fiduciary's failure to respond to the reconfirmation request by returning the ballot in a timely fashion creates uncertainty as to whether the exemption will continue to be available for ERE and its affiliates to continue providing property management and leasing services to the Accounts. Therefore, in the event Equitable and ERE do not receive a requisite number of affirmative votes, there is a risk that the multiple services program will have to be discontinued and, accordingly, the savings to the Accounts will be lost. It is the view of Equitable and ERE that the commentators have not given sufficient attention to this risk.

Equitable and ERE believe that there is an acceptable alternative to the affirmative reconfirmation procedure envisioned by the commentators. Equitable and ERE propose instituting additional procedures to assure that each authorizing fiduciary has an opportunity to vote and that the implications of a vote or a failure to vote are made clear. These procedures would include: (i) A requirement that each authorizing fiduciary be provided a ballot by certified mail (or another method of delivery pursuant to which confirmation of receipt is provided); (ii) a requirement that the ballot clearly indicate that the authorizing fiduciary may vote for or against continuation of the Independent Fiduciary; (iii) a requirement that the ballot must be accompanied by a statement that failure to return the ballot within 45 days after receipt of the ballot will be counted as a "for" vote; and (iv) a requirement that 30 days after Equitable or ERE mails the ballot to the authorizing fiduciary, Equitable and ERE must make at least one follow-up contact with the authorizing fiduciary that has not previously returned the ballot prior to

treating the unreturned ballot as a "for" vote. If Equitable or ERE does not receive a response from the authorizing fiduciary within 15 days after initiating contact with the authorizing fiduciary, Equitable and ERE may treat the unreturned ballot as a vote for reconfirmation. The reconfirmation would be effective on the earlier of the date affirmative ballots are obtained from the holders of a majority of the units of beneficial interests in the Accounts, or 45 days following the authorizing fiduciaries' receipt of the ballots (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation).

Therefore, to address the commentators' concern regarding the right to vote and the integrity of the voting process, Equitable and ERE believe that the following paragraph should be substituted in place of the language that is currently in paragraph (b) at the end of Section II(4), such that the new Section II(4)(b) should read as follows:

"Equitable or ERE implements procedures to ensure each authorizing fiduciary has an opportunity to vote on the reconfirmation of the Independent Fiduciary. These procedures require that Equitable or ERE: (i) Provide each authorizing fiduciary with a ballot by certified mail (or another method of delivery pursuant to which confirmation of receipt is provided); (ii) ensure that the ballot clearly indicates that the authorizing fiduciary may vote for or against continuation of the Independent Fiduciary; (iii) ensure that the ballot must be accompanied by a statement that failure to return the ballot within 45 days following the authorizing fiduciaries' receipt of the ballots will be counted as a "for" vote (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation); and (iv) 30 days after Equitable and ERE mails the ballot to the authorizing fiduciary, Equitable and ERE must make at least one follow-up contact with the authorizing fiduciary that has not previously returned the ballot prior to treating the unreturned ballot as a "for" vote. If Equitable or ERE does not receive a response from the authorizing fiduciary within 15 days after initiating contact with the authorizing fiduciary, Equitable and ERE may treat the unreturned ballot as a vote for reconfirmation. The reconfirmation will become effective on the earlier of the date affirmative ballots are obtained from the holders of a majority of the units of beneficial interests in the Accounts, or 45 days following the

authorizing fiduciaries' receipt of the ballots (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation.)"

In this way, it will be confirmed that each of the authorizing fiduciaries has received a hard copy of the ballot, and that each authorizing fiduciary has the right to exercise its voting power if it so desires.

The Department concurs with this suggestion and has incorporated the language stated above into a new paragraph (b) at the end of Section II(4) of this exemption.

b. The 90-day Annual Reporting Time Frame

The Notice specified that Equitable and ERE would have a period of up to 90 days after the end of each calendar year to prepare the annual report required by this exemption. The commentators object to this modification, although they recognize Equitable and ERE's need for additional time to produce the annual report, and therefore indicate that they are less averse to " * * * some additional time for this type of special report (e.g., 60 days after quarter end) * * *".

Equitable and ERE note that with respect to the annual reports previously prepared, Equitable had to frequently rely on estimated, rather than actual data. When Equitable relied only on estimated data it could meet the 45-day time frame provided by PTE 91-8. However, Equitable and ERE believe it would be in the interest of the Accounts and the plans participating therein, to receive an annual report which is based on actual financial information.⁵

Equitable and ERE believe that it would be appropriate for the Accounts to wait a modest amount of time in order to obtain a more accurate annual report. However, in response to the commentators' concerns, the applicants propose that Equitable and ERE would have a period of 75 days after the end of each calendar year to prepare the annual report required by this exemption. The 75-day period is necessary because: (i) The preparation of the annual report involves two different entities, ERE and the Independent Fiduciary, which have manually-intensive computation responsibilities; and (ii) the extensive financial information that ERE must compile is a major part of an annual report, and such information is not

generally available until sometime early in the second month following year-end. Thus, Equitable and ERE cannot even initiate the process for preparing an annual report containing actual data until after that time.

Furthermore, ERE's responsibilities include preparing a separate package of information with respect to each property. This package includes information extracted from the property's year-end financial results, budget projections, an analysis of market conditions, ERE's internal valuations, and projections for management and leasing fees. At this stage, the appropriate ERE manager reviews for accuracy the data compiled manually for each package and tests overall property and portfolio limitations. ERE then finalizes each package of information by including additional property-specific information.

In this regard, the Department concurs with Equitable and ERE's arguments as set forth herein, and has determined to modify Section II(4)(a) of the Notice by substituting "75 days" for "90 days", such that Section II(4)(a) of this exemption should read, in relevant part: " * * * with the Annual Report containing the information described in this paragraph, not less frequently than once a year and not later than 75 days following the end of the period to which the report relates."

c. Increase of Investment Limitation for Equitable In-House Plans

The Notice proposed to increase the investment limitation for Equitable in-house plans from 5 percent to 10 percent, and thus, Equitable in-house plans may invest up to 10 percent of its assets in any Accounts covered by PTE 91-8. The commentators approve of the increase, but maintain that Equitable in-house plans should not receive the same voting rights as those granted to the other investors.

In their response to these comments, Equitable and ERE state that the commentators recognize that " * * * the right to vote * * * is an important investor privilege." (See discussion at 2.a., above). Accordingly, Equitable and ERE maintain that Equitable in-house plans, and the participants and beneficiaries of such plans, should not be denied their right to vote on issues affecting operation of such plans simply because of their relationship with Equitable.

Moreover, Equitable and ERE propose and represent that Equitable's in-house plans continue to have voting rights equivalent to other non-Equitable plan investors. However, to address the

concerns of the commentators, Equitable and ERE represent that the votes of Equitable's in-house plans will not be taken into account if such votes are outcome-dispositive with respect to any issue, including the annual reconfirmation of the Independent Fiduciary, a matter that was of particular concern to the commentators. Therefore, Equitable and ERE propose that the following language be added as a new paragraph(d) in Section II(10) of this exemption:

"Equitable in-house plans shall have the same voting rights as those given to non-Equitable plan investors. However, the votes of Equitable in-house plans shall be disregarded if such votes are outcome-dispositive with respect to any issue."

The Department concurs with this suggestion and has modified Section II(10) of this exemption by adding new paragraph (d).

d. Proposed Increase in Maximum Leasing Commission

The Notice proposes an increase in the fee ceiling amount to ERE for leases involving outside brokers from 1 percent to 2.75 percent of the lease amount. The commentators suggest that "the proposed fee increase is substantial and the maximum fee appears high." The commentators also maintain that because leasing structures vary by market, they desire to review the leasing commission survey prepared by Equitable to evaluate the reasonableness of the proposed threshold.

The preamble to the Notice explained that Equitable and ERE have determined that the 1 percent limitation was not consistent with the current practice of establishing leasing commissions for transactions involving outside brokers. Equitable and ERE further determined that in most leasing markets, such co-broker leasing fees for the project leasing broker are computed at fifty percent (50%) of the normal new or renewal lease commission fee, which is typically between four (4%) and seven (7%) percent of the total lease payments. Before requesting an increase in the fee limitation, Equitable and ERE obtained an opinion from Jackson Cross, the Independent Fiduciary for property management and leasing services. Accordingly, Mr. Charles F. Seymour, CRE, MAI and chairman of Jackson Cross, stated that based on their experience and studies, leasing fees vary with building size and the competitive situation in individual markets. In most markets, the project leasing broker received 50% of the normal new or releasing commission. Jackson Cross concluded that because the normal full

⁵ However, the annual report would still contain some information garnered from estimated data, but such information would be minimal and in conformance with standard accounting procedures.

leasing commission is typically in the range of 4% to 7% of the one year lease amount, the project leasing broker usually received 2% to 3.5% of the annual lease amount. Accordingly, Jackson Cross concluded that restricting ERE to a maximum fee of 1% does not provide adequate compensation and that a higher fee may be required to adequately compensate the responsible agent. Jackson Cross recommended that this ceiling be raised to 2.75%,⁶ still subject to the requirement that the Independent Fiduciary must certify an economic benefit to the Accounts before the terms of each contract for leasing and management services are approved. Mr. Seymor of Jackson Cross explained that the proposed maximum 2.75% fee is ample enough to provide adequate incentive to ERE for co-brokered transactions, while providing an economic advantage to the Accounts, when viewed against market data. Furthermore, Jackson Cross reviewed their own and outside contractual fees negotiated for leasing services, derived from data covering 92 properties in 33 separate markets in 24 states. Also, Jackson Cross reviewed additional relevant market data and consulted with established real estate professionals in the relevant market areas. However, to address the commentators' concerns, the applicants represent that during regular business hours, the Independent Fiduciary will provide access to, or copies of, the survey prepared by Equitable to the authorizing fiduciaries upon their request. The Independent Fiduciary may assess a reasonable charge to the authorizing fiduciaries for costs associated with providing access to, or copies of, the survey.

Furthermore, Mr. Seymor reiterates, as alluded to in the Notice, that Jackson Cross as the Independent Fiduciary, will certify that an economic advantage to the Accounts exists before the terms of any leasing or management service contract is approved (61 FR 47210). Equitable and ERE also emphasize herein that the fee limitation of 2.75% is merely a ceiling, and the Independent Fiduciary would consider a fee up to this ceiling only in cases where the market conditions dictate that a fee higher than 1% would be warranted.

To clarify this point, Equitable and ERE suggest that the following new language be added at the end of Section II(13)(b)(3):

“(The Independent Fiduciary must certify that an economic advantage to the Accounts exists before

consummation of any leasing or management service contract).”

The Department concurs with this suggestion and has added this new language at the end of Section II(13)(b)(3) of this exemption.

e. Property Management and Leasing Fees

In the notice of proposed exemption relating to PTE 91-8 published in the **Federal Register** on February 28, 1990 (55 FR 7057/7069), Equitable represented that property management and leasing fees charged by the unaffiliated property management firms generally ranged from 4 to 5 percent of gross receipts and average approximately 4.5 percent of the gross receipts. Paragraph X of the notice of proposed exemption relating to PTE 91-8 provided that Equitable, in a future application to the Department for a permanent exemption, demonstrate that the aggregate annual property management and leasing fees charged to each Account (including the allocable cost of the Independent Fiduciary under the exemption) were less than 4.5 percent of the gross receipts earned during each year that ERE or TSP has provided property management and leasing services pursuant to the exemption.⁷ Also, the notice of proposed exemption relating to PTE 91-8 specifically stated that if such fees are less than 4.5 percent of the gross receipts, Equitable believes the Department can be assured that the exemption has operated in the best interest of the Accounts. In this regard, the Independent Fiduciary's cost savings report submitted to the Department in the exemption application to make PTE 91-8 permanent demonstrated that the fees charged to the Accounts under PTE 91-8 were in fact less than the 4.5 percent benchmark (61 FR 47207).

Two commentators suggest that the Department should not rely on the 4.5% threshold which was established in the notice of proposed exemption relating to PTE 91-8. Alternatively, the commentators would prefer to see separate thresholds established for property management and leasing fees because these fees are typically calculated off different bases (i.e., leasing commissions are generally based on the total lease payments, and property management fees are based on gross property revenues). Additionally, the commentators desire to review the survey of leasing commissions and property management fees to evaluate the reasonableness of these thresholds.

In the notice of proposed exemption relating to PTE 91-8, a 4.5 percent benchmark was the test for the initial period following the grant of PTE 91-8. This reviewing standard was subject to change during the period PTE 91-8 was in effect. However, under this exemption, the 4.5 percent benchmark will not, necessarily, be the standard for periods after the expiration of PTE 91-8. The Notice proposes certain cost saving procedures (Cost Saving Procedures) to assure continued savings to the Accounts. Pursuant to the Cost Saving Procedures, the Independent Fiduciary will be required to determine a typical range of annual fees for property management and leasing services for the Accounts. The Independent Fiduciary will also establish a new benchmark rate for comparison for each subsequent five-year period following the grant of this exemption.

Equitable and ERE state in their response that the approach reflected in the Cost Saving Procedures is appropriate for arriving at a reasonable range of property management and leasing fees, and, ultimately, a new benchmark. In fact, as noted in the notice of proposed exemption relating to PTE 91-8 (55 FR 7065), these procedures are rather conservative because a zero dollar value is assigned to the quality of property management and leasing services provided by ERE, even when the Independent Fiduciary is mandated to take the anticipated quality of services into account in approving ERE to provide property services.

Furthermore, the Cost Saving Procedures require the Independent Fiduciary to determine and document whether the Accounts have received an economic benefit during each five-year period. In the event the Independent Fiduciary concludes that such a benefit has not been achieved for the Accounts, it will not approve any additional service arrangements pursuant to the property services policy until Equitable and ERE have demonstrated to the Independent Fiduciary that policies to assure cost savings to the Accounts have been implemented by Equitable and ERE (61 FR 47208 and 47213).

The Independent Fiduciary explains that, as part of its responsibilities, it has surveyed (and as required by the Cost Saving Procedures will continue to periodically survey) management and leasing fees. Such surveys will be based upon a review of market information, property performance, and outside leasing and management fees. Additionally, each year the Independent Fiduciary reinspects approximately one-third of the properties, and compares

⁶It is represented that 2.75% is the median point between the typical project leasing broker commission range of 2% to 3.5%.

⁷4.5 percent is the median point in the range.

contract leasing and management fees to other fees in the market area. In this regard, the Independent Fiduciary acknowledges that it has fiduciary responsibilities directly to the Accounts and the plans participating therein.

However, Equitable and ERE and the Independent Fiduciary state that they will meet, if requested, with the representatives of any affected plan to answer any questions and explain the basis for the Independent Fiduciary's conclusions. Furthermore, during regular business hours, the Independent Fiduciary will provide access to, or copies of, the survey prepared by Equitable to the authorizing fiduciaries upon their request. The Independent Fiduciary may assess a reasonable charge to the authorizing fiduciaries for costs associated with providing access to, or copies of, the survey.

f. Original PTE 91-8

The commentators noted that a copy of PTE 91-8 was not provided in the materials distributed with the investor notification pursuant to the Notice. Equitable has since provided each of the commentators with a copy of PTE 91-8.

g. Data on Benchmark Fees

As stated above, the Notice contains the Cost Saving Procedures which require ERE to prepare a survey of property management and leasing fees for the properties that have similar geographic location and property types to those held by the Accounts. The survey will include data regarding the fees that have been charged to the Accounts by real estate investment management firms that are unaffiliated with Equitable and ERE. The Independent Fiduciary will review ERE's internal survey, and will verify the accuracy of the data by independently reviewing a sampling of the properties to which such fees apply.

The commentators express concern over Equitable and ERE establishing a benchmark amount against which its own activities will be judged. Alternatively, the commentators suggest that Equitable and ERE use independent data obtained from the Internal Revenue Service (IRS) transfer pricing database or certain national real estate organizations.

In this regard, Equitable and ERE state that the transfer pricing database referred to by the commentators, relates to the pricing of goods and services between related and commonly controlled entities, and would not be helpful in determining property management and leasing fees that are described in the Notice. Furthermore,

the Independent Fiduciary confirms that there is no publicly available standard similar to the transfer pricing database for Equitable and ERE to use for leasing and property management service fees.

In its response, the Independent Fiduciary explained that it relies on ERE to gather data with respect to property management and leasing fees. However, the gathering of additional data and the verification and interpretation of all data are the responsibility of the Independent Fiduciary. Also, the Independent Fiduciary represents that it knows of no public resources which provide adequate independent benchmarks similar to the IRS's transfer pricing database against which to judge fees for property management and leasing services. In fact, individual practitioners are prohibited from sharing this information with competitors to avoid any action which might be construed to restrict free market competition for fees and charges. National real estate organizations do not have this information. The response submitted by the Independent Fiduciary concludes that it does not believe that it would be appropriate to limit itself to one source of data but, instead, use its own professional resources to obtain additional market data and to verify and interpret all the data received.

In addition, the exemption contains comprehensive safeguards, including a qualified Independent Fiduciary to oversee the transactions related thereto. Equitable and ERE therefore represent that these safeguards effectively eliminate any risk that services provided to the Accounts and fees charged under the exemption would be excessive or unnecessary.

The Department concurs with the argument set forth by Equitable, ERE and the Independent Fiduciary and has determined that no modification is necessary regarding data on benchmark fees.

3. Discussion of Equitable's and ERE's Comments

a. Sale of ERE to the Lend Lease Corporation Limited

By letter dated April 23, 1997, Equitable and ERE have notified the Department that on April 10, 1997, Equitable has agreed to sell ERE to Lend Lease Corporation Limited (Lend Lease), an Australian-based real estate and financial management company with substantial business operations in the United States (the Sale). The Sale is expected to close on or about June 10, 1997. The transaction is contingent on the receipt of various regulatory approvals and the satisfaction of various

conditions. As part of the Sale, Lend Lease will also purchase Compass Management and Leasing, Inc. and Compass Retail, Inc. (collectively; Compass), wholly-owned subsidiaries of ERE. As a result of the Sale, ERE will cease to be a wholly-owned subsidiary of Equitable.

After consummation of the Sale, Equitable anticipates that ERE will continue to serve as investment advisor to Equitable in connection with the performance by Equitable of its duties as investment manager for the Accounts as described herein. Thus, the responsibilities of Equitable and ERE with respect to the Accounts will be unchanged in all material respects after consummation of the Sale. The exemption is still needed because Equitable will continue to rely on ERE to select persons to provide property management and related services permitted by the exemption, and in many cases, ERE may determine that ERE or an affiliate is best suited to provide those services. As is presently the case, ERE may be considered to be acting as a fiduciary in these circumstances and, therefore, could be viewed as engaging in certain prohibited transactions under the Act with respect to such selections unless the exemption is granted.

Although Equitable and ERE are bringing the Sale to the Department's attention in order to assure that the record in this exemption proceeding is complete, they believe that the Sale will have absolutely no effect on the standards and conditions established by the Notice. The potential prohibited transactions that would be covered by the exemption remain the same and the scope of the exemption remains the same. The Independent Fiduciary will continue to be responsible for the selecting the property managers and for monitoring the extent to which, and in the manner which, ERE makes use of the exemption to provide additional services to the Accounts.

After the Sale, each covered service provision will still be reviewed and approved by the Independent Fiduciary whose appointment is confirmed by the plans participating in the Accounts, the Independent Fiduciary will still be required to certify that the multiple service transactions result in the savings to the Accounts, each affected plan will continue receiving reports describing the multiple services transactions and will continue to be given the opportunity to object to the continued provision of multiple services pursuant to this exemption.

Equitable and ERE also note that PTE 91-8 was granted, and this exemption is

proposed to be granted to both Equitable and ERE. Therefore, no significant restructuring of the Notice will be required on the account of the Sale. This exemption should continue to be applicable to both Equitable and ERE because it must cover the period retroactive to January 13, 1996 through the date of closing of the Sale and beyond.⁸

In this regard, Equitable and ERE suggest that the Department eliminate any identification of ERE as Equitable's wholly-owned subsidiary, and include the following language (or language substantially similar) in this exemption:

"The applicants have informed the Department that Equitable has agreed to sell ERE to the Lend Lease Corporation, effective on or about June 10, 1997."

The Department concurs with this comment and has added this language to this exemption. The Department also eliminated any identification of ERE as Equitable's wholly-owned subsidiary in this exemption.

b. Equitable's and ERE's Comments Regarding the Notice

In another written comment submitted to the Department, Equitable and ERE have requested that certain aspects of the Notice be clarified. The requested clarifications are as follows:

a. Page 47206 of the Notice contained a section titled PTE 91-8. The first sentence of the second paragraph of that section should have read, "Equitable is a stock life insurance company organized under the laws of the State of New York".

While Equitable was a mutual life insurance company at the time PTE 91-8 was originally issued, pursuant to a plan of reorganization adopted by Equitable on November 27, 1991, Equitable became a stock life insurance company. The Department concurs with this comment.

b. Pages 47207/47208 of the Notice contain a section titled Permanent Exemption for Transactions Under PTE 91-8, which describes how the Cost Saving Procedures will be carried out. Page 47213 of the Notice in Section II—Conditions also contains the Cost Saving Procedures as condition (12). The Cost Saving Procedures require, among other things, that, at the end of each five year period during which property management and leasing services are performed under the exemption, Equitable and ERE demonstrate to the Independent Fiduciary that the aggregate fees charged to each Account for the provision of

property management and leasing services are less than the fees that would have been charged using a benchmark rate established at the beginning of the five-year period. In order to determine the benchmark pursuant to which cost savings will be determined, the Notice states that the Cost Saving Procedures require, in relevant part, that "After the fifth anniversary of the grant of the exemption, and after the beginning of each subsequent five-year period, ERE will prepare a survey of property management and leasing fees for the properties * * *"

Equitable and ERE comment that the literal application of this language will allow ERE a five-year grace period before the Cost Saving Procedures are required to be applied. Equitable and ERE believe that such a grace period was unintended by the Department and, accordingly, Equitable and ERE propose that the language be modified to ensure that the Cost Saving Procedures will be initiated shortly after the final exemption is issued by the Department. In order to ensure this result, Equitable and ERE request that the following language, "Within one-year of the grant of this exemption * * *" be substituted for "After the fifth anniversary of the grant of this exemption * * *" at the beginning of condition 12(a). The Department concurs with this comment, and has modified condition 12(a) in Section II of this exemption accordingly.

c. Equitable and ERE also comment that the definition of Accounts which is contained in the Notice in Section IV—Definitions on page 47214 should not include Separate Account Nos. 16-IV and 16-VII and Separate Accounts Nos. 136, 141, 149 and 174 for the IBM Retirement Plan, as being covered by the exemption. In this regard, Equitable and ERE state that these accounts either are not covered by the Employee Retirement Income Security Act of 1974, or Equitable and ERE do not provide services to these accounts pursuant to the exemption. In order to clarify this point, Equitable and ERE propose that the definition of Accounts be modified as follows:

"The Accounts—The Accounts are Equitable's Separate Account No. 8, Separate Account No. 16-I, Separate Account No. 16-II, Separate Account No. 16-III, Investment Management Account No. 230 for the Westinghouse Electric Corporation Pension Plan; and such other pooled or single-customer accounts, joint ventures, general or limited partnerships or other real estate investment vehicles that may be established by Equitable for the investment of employee benefit plan

assets in real estate related investments to the extent disposition of its assets is subject to the discretionary authority of Equitable."

The Department concurs with this comment and has modified definition of Accounts in Section IV—Definitions in this exemption accordingly.

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 to the extent jurisdiction exists under Title I of the Act, 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 requirements of section 401(a) of the Code, e.g., the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of proposed exemption, the Department makes the following determinations:

(a) The exemption set forth herein is administratively feasible;

(b) It is in the interest of the plans investing in the Accounts and their participants and beneficiaries; and

(c) It is protective of the rights of participants and beneficiaries of the plans.

(4) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describe all material terms of the transactions which are the subject of this exemption;

(5) The availability of this exemption is subject to the express condition that the summary of facts and representations set forth in the notice of proposed exemption relating to PTE 91-8 (40 FR 7057/7069), as amended by a notice of proposed exemption to make

⁸ It is represented that there is a slight possibility that the Sale might not be completed.

permanent as modified PTE 91-8 (61 FR 47205/47214) accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption;

(6) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. 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

(7) This exemption is applicable to particular transactions only if the transactions satisfy the conditions specified in the exemption.

Exemption

Accordingly, the following exemption is hereby 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).

Section I—Covered Transactions

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the provision of property management and/or leasing services by ERE⁹ to an Account (as defined in Section IV), provided that the conditions set forth in Section II are met.

Section II—Conditions

(1) The arrangement under which the covered transactions are performed is subject to the prior authorization of an independent plan fiduciary with respect to each plan whose assets are invested in an Account, following disclosure of information in the manner described in paragraph (2) below. For plans which have previously authorized their participation in the Accounts under PTE 91-8, no reauthorization will be required.¹⁰ In the case of a plan whose assets are proposed to be invested in an Account subsequent to implementation of the property management and leasing services (the Property Services Policy), the plan's investment in the Account is subject to the prior written authorization of an independent plan

fiduciary following disclosure of the information described in paragraph (2). The requirement that the authorizing fiduciary be independent of Equitable shall not apply in the case of plans maintained by Equitable on behalf of its employees.

(2) In the event Equitable proposes to implement the Property Services Policy for any additional Account, not less than 45 days prior to the implementation of the Property Services Policy, Equitable or ERE shall furnish the authorizing plan fiduciary with any reasonably available information which Equitable or ERE believes to be necessary to determine whether such approval should be given, as well as such information which is reasonably requested by the authorizing plan fiduciary. Such information will include: a description of the services to be performed by ERE; identification of properties for which services will be required; an estimate of the fees that would be paid to ERE if it is selected to provide such services; an explanation of the potential conflicts of interest involved in selecting ERE; an explanation of the selection process; and a description of the terms upon which a plan may withdraw from an Account.

(3) In the event an authorizing plan fiduciary of any plan whose assets are invested in an Account submits a notice in writing to Equitable or ERE at least 15 days prior to implementation of the Property Services Policy, objecting to the implementation of the Property Services Policy, the plan on whose behalf the objection was tendered will be given the opportunity to terminate its investment in the Account, without penalty. With the exception of a plan which has invested in a closed-end Account under which the rights of withdrawal from the Account may be limited as provided in the plan's written agreement to invest in the Account, if written objection to the Property Services Policy is submitted to Equitable or ERE any time after 15 days prior to implementation of the Property Services Policy (or after implementation), the plan must be able to withdraw without penalty, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. However, Equitable or ERE need not discontinue operating pursuant to the Property Services Policy, once implemented, by reason of a plan electing to withdraw after 15 days prior to the scheduled implementation date of the Property Services Policy. Any plan which has a discretionary asset

management arrangement with Equitable may terminate such arrangement and withdraw from an Account at any time.

(4)(a) Equitable or ERE shall furnish the authorizing plan fiduciary and the Independent Fiduciary acting on behalf of the plans participating in the Account with the Annual Report containing the information described in this paragraph, not less frequently than once a year and not later than 75 days following the end of the period to which the report relates. Such Annual Report shall disclose the total of all fees incurred by the Account during the preceding year under contracts with ERE; include a description of the properties and the services that have been performed by ERE for an Account; and delineate the fees that are anticipated to be paid to ERE in the coming year for services provided by these entities in connection with properties held by an Account. The Annual Report will contain a description of a method for the termination of the multiple services arrangement (see Section II(5)), and for the confirmation and/or removal of the Independent Fiduciary by investing plans in the Accounts. The Annual Report will also contain a ballot regarding reconfirmation of the Independent Fiduciary, which is to be returned to Equitable. In this respect, at the time of delivery of each Annual Report, Equitable will specifically indicate to each plan that the Independent Fiduciary may be terminated by a vote in favor of such termination by the holders of a majority of the units of beneficial interests in the Account and will request such plan to confirm the Independent Fiduciary's appointment. Following a plan's receipt of the Annual Report, Equitable may treat a plan's failure to return the ballot within forty five (45) days after receipt of a request for reconfirmation as a vote in favor of continued retention of the Independent Fiduciary (see procedures described in Section II(4)(b)).

(b) Equitable or ERE implements procedures to ensure each authorizing fiduciary has an opportunity to vote on the reconfirmation of the Independent Fiduciary. These procedures require that Equitable or ERE: (i) Provide each authorizing fiduciary with a ballot by certified mail (or another method of delivery pursuant to which confirmation of receipt is provided); (ii) ensure that the ballot clearly indicates that the authorizing fiduciary may vote for or against continuation of the Independent Fiduciary; (iii) ensure that the ballot must be accompanied by a statement that failure to return the ballot within 45 days following the

⁹ See Footnote 1, *supra*.

¹⁰ However, during the notification of interested persons period, Equitable provided to all interested parties, including the plans participating in the Accounts, a copy of the notice of the proposed exemption. Accordingly, the plans were given the opportunity to submit written comments on the pending exemption during the comment period.

authorizing fiduciaries' receipt of the ballots will be counted as a "for" vote (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation); and (iv) 30 days after Equitable or ERE mails the ballot to the authorizing fiduciary, Equitable and ERE must make at least one follow-up contact with the authorizing fiduciary that has not previously returned the ballot prior to treating the unreturned ballot as a "for" vote. If Equitable or ERE does not receive a response from the authorizing fiduciary within 15 days after initiating contact with the authorizing fiduciary, Equitable and ERE may treat the unreturned ballot as a vote for reconfirmation. The reconfirmation will become effective on the earlier of the date affirmative ballots are obtained from the holders of a majority of the units of beneficial interests in the Accounts, or 45 days following the authorizing fiduciaries' receipt of the ballots (unless holders of a majority of the units of beneficial interests in the Accounts have voted against reconfirmation.)

(5) The multiple services arrangement for an Account shall be subject to annual confirmation following receipt of the Annual Report, pursuant to which the arrangement shall be terminated by a vote in favor of such termination by the holders of a majority of the units of beneficial interests in the Account. In the event of a vote to terminate the arrangement, Equitable shall cease submitting to the Independent Fiduciary (as defined in Section IV) any new proposals to engage in covered transactions and Equitable will not renew or extend any covered transactions. Moreover, within 180 days after the vote of the contract holders, Equitable shall cease engaging in any existing covered transactions.

(6)(a) Each transaction shall be reviewed and approved by an Independent Fiduciary. However, prior to proposing a transaction to the Independent Fiduciary, Equitable or ERE shall first determine that such transaction is in the best interests of the Account.

(b) The Independent Fiduciary shall negotiate the contracts for the provision of services by ERE. The Independent Fiduciary shall also consider the cost to the Account of such fiduciary's involvement in connection with its consideration of whether to approve the particular transaction.

(c) The Independent Fiduciary shall review, as applicable, the performance of ERE under each of its contracts with the Accounts at least once each year and shall instruct Equitable and ERE of any

action which should be taken by Equitable on behalf of the Accounts with respect to the continuation, termination or other exercise of rights available to the Account under the terms of the contracts. Equitable will carry out such instruction from the Independent Fiduciary to the extent it is legal and permitted by the terms of the service provision arrangement.

(7)(a) The terms of each such arrangement shall be in writing and must be reviewed by the Independent Fiduciary prior to implementation.

(b) If Equitable or ERE hold Account properties and general account properties in the same real estate market during a period when there is leasing competition between those properties, ERE will hire, during such period, a third party leasing agent for Account properties.

(c) In the case of any emergency circumstances, ERE may provide property services to an Account for a period not exceeding 90 days, but no compensation may be paid by an Account for such services without the prior approval of the Independent Fiduciary.

(8)(a) Equitable and ERE shall furnish the Independent Fiduciary with any reasonably available information which Equitable reasonably believes to be necessary or which the Independent Fiduciary shall reasonably request to determine whether such approval of the transactions described above should be given or to accomplish the Independent Fiduciary's periodic reviews of the performance of ERE under the contracts.

(b) With respect to ERE, such information will include: A description of the Property Services Policy for the Account and the plan clients investing therein; a description of the real estate services which are required; the qualifications of ERE to do the job; a statement, supported by appropriate factual representations, of the reasons for Equitable's belief that ERE is qualified to provide the services; a copy of the proposed arrangement for services and the terms on which ERE would provide the services; the reasons why Equitable believes the retention of ERE would be in the best interests of the Account; information demonstrating why the fees and other terms of the arrangement are reasonable and comparable to fees customarily charged by similar firms for similar services in comparable locales; the identities of non-affiliated service providers and the terms under which these service providers might perform the services; and in any case that it is determined that the property manager will also provide leasing services, Equitable will

disclose whether any affiliated property manager under consideration by the Independent Fiduciary is a property manager to any properties that are in competition for tenants with the property for which ERE is under consideration.

(9) Seventy-five percent or more of the units of beneficial interests in an Account must be held by plans or other investors having total assets of at least \$50 million. In addition, 50 percent or more of the plans investing in an Account must have assets of at least \$50 million. For purposes of the 50 percent test above, a group of plans will be counted as a single plan if either the decision to invest in the Account (or the decision to make investments in the Account available as an option for an individually directed account) is made by a fiduciary other than Equitable who exercises such discretion with respect to plan assets in excess of \$50 million.

(10)(a) Not more than 10 percent of the assets of a plan covering employees of Equitable will be invested in an Account. Notwithstanding the foregoing, this percentage requirement will continue to be satisfied by any plan that exceeds the 10 percent limitation of this subsection provided that no portion of any excess results from an increase in the assets transferred by such plan to the Accounts.

(b) Not more than 10 percent of the assets of an Account will be represented by the plans covering employees of Equitable.

(c) For other plans, not more than 20 percent of the assets of each such plan can be invested in the Accounts. Notwithstanding the foregoing, this percentage requirement will continue to be satisfied by any plan that exceeds the 20 percent limitation of this subsection provided that no portion of any excess results from an increase in the assets transferred by such plan to the Accounts. Moreover, this 20 percent limitation shall not apply to any plan which, as of February 28, 1990, the date of the proposed exemption relating to PTE 91-8, had more than 20 percent of its assets invested in the Accounts provided that the plan makes no additional contribution to such Accounts subsequent to that date.

(d) Equitable in-house plans shall have the same voting rights as those given to non-Equitable plan investors. However, the votes of Equitable in-house plans shall be disregarded if such votes are outcome-dispositive with respect to any issue.

(11) At the time the transactions are entered into, the terms of the transactions must be at least as favorable to the Accounts as the terms generally

available in arm's length transactions between unrelated parties. In addition, the compensation paid to ERE for services under its contracts with any Account must not exceed payments in an arm's length transaction between unrelated parties for comparable properties in similar locales, and shall not be in excess of reasonable compensation within the meaning of section 408(b)(2) of the Act and regulation 29 CFR 2550.408b-2.

(12)(a) Within one-year of the grant of this exemption, and after the beginning of each subsequent five-year period, ERE will prepare a survey of property management and leasing fees for the properties that have similar geographic location and property types to those held by the Accounts. The survey will include data regarding the fees that have been charged to the Accounts by several property management firms that are unaffiliated with Equitable or ERE for services that are contemplated by the exemption during the one year period prior to the beginning of the new five-year period. Also, the survey will include data as to the fees paid by Equitable or ERE for such services performed for the properties not held by the Accounts during the same period and other market data regarding the cost of property management and leasing services by geographic location and property types.

(b) The Independent Fiduciary will review ERE's internal survey referred to in (a) above, and will verify the accuracy of the data by independently reviewing a sampling of the properties to which such fees apply. Based upon its review of the survey and its own professional resources and expertise, the Independent Fiduciary will determine a typical range of annual fees for property management and leasing services for the Accounts. The average of the range, as determined from such survey, will serve as the basis of comparison for determining for the next five-year period whether continuation of the property management and leasing services policy (the Property Services Policy) has provided cost savings to the Accounts.

(c) Equitable and ERE will demonstrate to the Independent Fiduciary at the end of the applicable five-year period that the aggregate property management and leasing fees charged to each Account pursuant to the Property Services Policy plus the cost of the services of the Independent Fiduciary under the exemption that are allocated to the Accounts, are less than the fees that would have been charged using the benchmark rate established at the beginning of the five year period.

(d) The Independent Fiduciary will review the data supplied by ERE and, to the extent considered necessary by the Independent Fiduciary, data collected from the Independent Fiduciary's own surveys, and will document its findings and analysis of such cost savings in a report to be delivered to each of the plans participating in the Accounts within 75 days after the end of the five year period and each subsequent five-year period and prior to the implementation of the annual confirmation procedure described in paragraph (5) of Section II with respect to such period. In the event the Independent Fiduciary finds that cost savings have not been achieved for the Accounts, it will not approve any additional services arrangements pursuant to the Property Services Policy until Equitable and ERE have demonstrated to the satisfaction of the Independent Fiduciary that policies intended to assure cost savings to the Accounts have been implemented by Equitable and ERE. The survey, the Independent Fiduciary's report reviewing the survey, and the final report of the Independent Fiduciary analyzing whether cost savings had been achieved during the five year period to which the survey relates, will be maintained by Equitable or ERE in accordance with the recordkeeping requirements of Section III.

(13)(a) The fees paid to ERE and/or its affiliates for property management services provided in connection with a property held for an Account shall not exceed for any one year period: (1) In the case of property management services which include leasing services, 7 percent of the overall gross receipts of the property; and (2) in the case of property management services which do not include leasing services, 4 percent of the overall gross receipts of the property.

(b) Where a property manager is separately compensated for leasing services; (1) The fee for new leases will not exceed 7 percent of the lease amount; (2) the fee for renewal leases will not exceed 2 percent of the lease amount; and (3) the fee for leases in which outside brokers are involved will not exceed 2.75 percent of the lease amount (the Independent Fiduciary must certify that an economic advantage to the Accounts exists before consummation of any leasing or management service contract).

Section III—Recordkeeping

(1) Equitable or ERE will maintain for a period of six years from the date of the transaction, the records necessary to enable the persons described in

paragraph (2) of this section to determine whether the conditions of this exemption have been met. Included in these records maintained by Equitable or ERE will be written records of the Independent Fiduciary which had been periodically furnished by the Independent Fiduciary to ERE or Equitable and the records described in paragraph (12) of Section II. Such records are described in Parts III and VI of the summary of facts and representations of the notice of proposed exemption relating to PTE 91-8 and in paragraph (12) of Section II. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond Equitable's or ERE's control, the records are lost or destroyed or the records of the Independent Fiduciary are not maintained or produced prior to the end of the six-year period.

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

(1) Any duly authorized employee or representative of the Department and the Internal Revenue Service;

(2) Any fiduciary of a plan who has authority to acquire or dispose of the interests of the plan in the Accounts or any duly authorized employee or representative of such fiduciary;

(3) Any contributing employer to any plan that has an interest in the Accounts or any duly authorized employee or representative of such employer;

(4) Any participant or beneficiary of any plan participating in the Accounts, or any duly authorized employee or representative of such participant or beneficiary; and

(5) The Independent Fiduciary.

(b) None of the persons described in subparagraphs (2)–(5) of this paragraph shall be authorized to examine trade secrets of Equitable, ERE or commercial or financial information which is privileged or confidential.

Section IV—Definitions

(1) The Accounts—The Accounts are Equitable's Separate Account No. 8, Separate Account No. 16-I, Separate Account No. 16-II, Separate Account No. 16-III, Investment Management Account No. 230 for the Westinghouse Electric Corporation Pension Plan; and such other pooled or single-customer accounts, joint ventures, general or limited partnerships or other real estate investment vehicles that may be

established by Equitable for the investment of employee benefit plan assets in real estate related investments to the extent disposition of its assets is subject to the discretionary authority of Equitable.

(2) Equitable—For purposes of this exemption, the term Equitable includes Equitable and/or affiliates of Equitable as defined in paragraph (4) of this section which act as investment managers with respect to an Account.

(3) ERE—For purposes of this exemption, the term ERE includes ERE and/or affiliates of ERE as defined in paragraph (4) of this section, which provides services to an Account pursuant to this exemption.

(4) An affiliate of a person means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person.

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

(6) Independent Fiduciary—A person who:

(a) Is not an affiliate [as defined in Section IV(4)] of Equitable or ERE;

(b) Is not an officer, director, employee of, or partner in, Equitable or ERE [or affiliates thereof as defined in Section IV(4)];

(c) Is not a corporation or partnership in which Equitable or ERE has an ownership interest or is a partner;

(d) Does not have an ownership interest in Equitable or ERE, or its affiliates;

(e) Is not a fiduciary with respect to any plan participating in an Account; and

(f) Has acknowledged in writing acceptance of fiduciary obligations and has agreed not to participate in any decision with respect to any transaction in which the Independent Fiduciary has an interest that might affect its best judgment as a fiduciary.

For purposes of this definition of Independent Fiduciary, no organization or individual may serve as an Independent Fiduciary for any fiscal year if the gross income received by such organization or individual (or partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder) from Equitable or ERE, or their affiliates, (including amounts received for services as Independent Fiduciary under any prohibited transaction exemption granted by the Department) for that fiscal year exceeds 5 percent of its or his

annual gross income from all sources for such fiscal year.

In addition, no organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director or 10 percent or more partner or shareholder, may acquire any property from, sell any property to or borrow any funds from Equitable or ERE, their affiliates, or any Account maintained by Equitable or ERE, their affiliates, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of 6 months after such organization or individual ceases to be an Independent Fiduciary or negotiates any such transaction during the period that such organization or individual serves as Independent Fiduciary.

This exemption is subject to the express condition that the summary of facts and representations set forth in the notice of proposed exemption relating to PTE 91-8 (40 FR 7057/7069), as amended by the notice of proposed exemption to make permanent as modified PTE 91-8 (61 FR 47205/47214) and the written comments submitted in response thereto, accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

Signed at Washington, DC, this 18th day of June, 1997.

Ivan Strasfeld,

Director of the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 97-16362 Filed 6-20-97; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Docket No. 50-368

In the Matter of Entergy Operations, Inc. (Arkansas Nuclear One, Unit 2)

Exemption I

Entergy Operations, Inc. (the licensee) is the holder of Facility Operating License No. NPF-6, which authorizes operation of Arkansas Nuclear One, Unit 2 (ANO-2). The license provides, among other things, that the licensee is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

The facility consists of two pressurized water reactors, Arkansas Nuclear One, Units 1 and 2, located at the licensee's site in Pope County, Arkansas.

II

In its letter dated December 23, 1996, the licensee requested an exemption from certain requirements in Title 10 of the Code of Federal Regulations, Part 50, Appendix R, Section III.O, for ANO-2.

III

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security and (2) when special circumstances are present. Special circumstances are present whenever, according to 10 CFR 50.12(a)(2)(ii), "Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule. * * *"

10 CFR Part 50, Appendix R, Section III.O requires that the reactor coolant pump (RCP) shall be equipped with an oil collection system if the containment is not inerted during normal operation. The oil collection system shall be so designed, engineered, and installed that failure will not lead to fire during normal or design basis accident conditions and that there is reasonable assurance that the system will withstand the Safe Shutdown Earthquake. The underlying purpose of 10 CFR Part 50, Appendix R, Section III.O is to ensure that leaking oil will not lead to a fire which could damage safe shutdown systems during normal or design basis accident conditions.

On the basis of the enclosed safety evaluation, the U. S. Nuclear Regulatory Commission (NRC) staff concluded that the design of the oil filling system and the level of protection provided by the licensee through the use of certain compensatory measures during oil fill operations provides reasonable assurance that a lube oil fire will not occur. The staff also concluded that a worst-case postulated fire, due to not having a lube oil collection system for the RCP lube oil fill lines, would be of limited magnitude and extent. In addition, such a fire would not cause significant damage in the containment building and would not prevent the operators from achieving and maintaining safe shutdown conditions. The staff concluded, therefore, that the lack of an oil collection system for the RCP lube oil fill lines is an acceptable exemption from the technical