5. The applicant requests an exemption for the proposed sale of the Property by the Account to Dr. Overland. The applicant desires to sell the Property due to the illiquid nature of the asset, and because the investment has failed to appreciably increase in value. In this regard, Dr. Overland is concerned about continual Plan expenses concomitant with holding the Property such as property taxes, utility costs and fire maintenance. Finally, the applicant states that he is apprehensive regarding potential property liability issues, and possible changes in zoning regulations that could affect the future development and value of the Property.

6. The Property was appraised by two independent, qualified appraisers. Both appraisers utilized the market value approach, which involves an analysis of similar recently sold properties in the area surrounding the Property in question, so as to derive the most valid sales price of the Property. On April 1, 1997, Mr. Roy Wright, a Senior Residential Appraiser and member of the Appraisal Institute, determined a fee simple interest in the Property to be worth $120,000. On April 20, 1997, David W. Isom, also a Senior Residential Appraiser and member of the Appraisal Institute, determined a fee simple interest to be worth $90,000. Because of the significant disparity in the two appraisals, it has been decided that the average of the two, $105,000, should be used as a benchmark with respect to the value of the Property.

7. The applicant represents that the proposed transaction would be feasible in that it would be a one-time transaction for cash. Furthermore, the applicant states that the transaction would be in the best interests of the Account because if the Property were sold, the Account would be able to invest the proceeds from the Sale in other assets and achieve a higher rate of return. Finally, the applicant asserts that the transaction will be protective of the rights of the participant and beneficiary as indicated by the fact that the Account will receive not less than the fair market value of the Property as of the date of sale or $105,000, and will incur no commissions, costs, or other expenses as a result of the Sale.

8. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) the terms and conditions of the Sale would be at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party; (b) the Sale would be a one-time cash transaction permitting the Account to invest in assets with a higher rate of return; (c) the Account would receive not less than the fair market value of the Property as of the date of sale or $105,000; and (d) the Account would not be required to pay any commissions, costs or other expenses in connection with the Sale.

NOTICE TO INTERESTED PERSONS: Because Dr. Overland is the only participant to be affected by the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. James Scott Frazier, telephone (202) 219–8881. (This is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

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

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 2nd day of February 1998.

Ivan Strasfeld,

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

[FR Doc. 98–3051 Filed 2–5–98; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10396]

Notice of Proposed Exemption for Certain Transactions Involving the Massachusetts Mutual Life Insurance Company (MM), Located in Springfield, MA

AGENCY: Pension and Welfare Benefits Administration, Labor

ACTION: Notice of proposed exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1986 (the Code). The proposed exemption would exempt certain transactions that may occur as a result of the sharing of real estate investments among various Accounts maintained by MM, including the MM general account and the general accounts of MM's affiliates which are licensed to do business in at least one state (collectively, the General Account), and the ERISA-Covered Accounts with respect to which MM is a fiduciary. As an acknowledged investment manager and fiduciary, MM is primarily responsible for the acquisition, management and disposition of the assets allocated to the ERISA-Covered Accounts.

DATES: Written comments and requests for a public hearing must be received by the Department on or before April 7, 1998.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent of the Office of Exemption Determinations, Pension and

Welfare Benefits Administration, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Attention: Application No. D–10396. The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of an application for exemption from the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and from 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. The proposed exemption was requested in an application filed by MM 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, 32847, August 10, 1990).

Summary of Facts and Representations

1. MM is a mutual life insurance company organized under the laws of the Commonwealth of Massachusetts and subject to supervision and examination by the Insurance Commissioner of the Commonwealth of Massachusetts. MM operates in all 50 states, as well as the District of Columbia and Puerto Rico, and presently has approximately 3 million individual and group policyholders and $242 billion of life insurance in force. MM, either directly or through its affiliates, offers a complete portfolio of life insurance, health insurance, asset accumulation products, health and pension employee benefits, plan administration and investment management services.[1] It also provides health and pension benefits to its employees, including former employees of Connecticut Mutual Life Insurance Company (Connecticut Mutual).[2] The assets of MM as of December 31, 1996 are estimated to be $55.7 billion and its assets under management as of that date are approximately $130.8 billion.

MM maintains several pooled separate accounts in which pension, profit-sharing and thrift plans participate, and also manages all or a portion of the assets of a number of large plans pursuant to various single customer separate accounts and advisory accounts (the ERISA-Covered Accounts). A number of ERISA-Covered Accounts invest in equity interests in real estate or in mortgage loans. The ERISA-Covered Accounts, MM's general account (which includes all of MM's assets invested on behalf of its policyholders not participating in separate accounts), the general accounts of one or more of MM's affiliates which are insurance companies licensed to do business in at least one of the fifty states, accounts maintained by MM for foreign pension plans and other ''non-ERISA'' investors, and accounts which MM may establish in the future (collectively, the Accounts) may participate in the transactions which are the subject of this proposed exemption.

2. The applicant represents that in recent years real estate has gained increasing popularity among plan sponsors. Various high quality commercial real estate investments from time to time become available which offer the potential for a higher rate of return than do other real estate investments. Because there are relatively few potential investors for large scale investments such as office buildings, shopping centers, and industrial parks, the owner or developer of such real estate investments must offer a higher return in order to attract investors. In many cases, MM's real estate accounts would be precluded from acquiring these investments on an individual basis because such investments would require the commitment of a disproportionately large percentage of account assets to one or a few investments. The sharing of large or uniquely desirable real estate investments would permit the ERISA-Covered Accounts to participate in more attractive and profitable real estate investments while maintaining portfolio diversification.

3. The real estate investments which MM proposes to share may either take the form of a direct investment in real property or an interest in a joint venture partnership which holds title to, manages, and/or develops real property. MM's investments in joint venture partnerships may include an equity interest in the joint venture and a debt interest in mortgages to which the joint venture property is subject. Development joint venture arrangements could be ''leveraged''; that is, acquisition and development costs are met by the equity contribution of the joint venture partners and by loans to the partnership which are secured by the joint venture's interest in its real property. MM, on behalf of its Accounts, could own 50 percent of the joint venture partnership and provide 100 percent of the debt financing.

4. MM anticipates that real estate investments will be allocated to each Account maintained by MM in the same proportions of debt and equity. No ERISA-Covered Account will participate in an investment for the purpose of enabling another Account to make an investment.

5. General investment criteria for each ERISA-Covered Account are set forth in the separate account contract between MM and the plan contractholder. MM's allocation procedures provide for the allocation of each real estate investment opportunity to one or more Accounts for which the opportunity is suitable, taking into consideration each Account's investment criteria and strategy, as well as each Account's acquisition budget for the year. These procedures are periodically reviewed by MM to ensure that each Account receives equitable treatment.

6. During the course of MM's holding of a real estate investment, certain situations may arise which require a decision to be made with regard to the management or disposition of the investment. For example, there may be a need for additional contributions of operating capital, or there may be an offer to purchase the investment by a third party or a joint venture partner. When MM shares these investments among more than one Account, a potential for conflict may arise since the same decision may not be in the best interest of each Account. Therefore, the applicant has submitted a request for exemption, with certain proposed safeguards designed to protect the interests of any participating ERISA-Covered Account in the resolution of potential or actual conflicts.

7. Each plan contractholder currently participating in an ERISA-Covered Account that proposes to share real estate investments which are structured as shared investments under this proposed exemption must be furnished with a written description of the transactions that may occur involving such investments which might raise questions under the conflict of interest prohibitions of the Act with respect to MM's involvement in such transactions and which are the subject of this proposed exemption. This description

[1] On March 31, 1996, MM sold its group life and health subsidiary, and will no longer offer group life and health insurance after the completion of a transition period under the purchase and sale agreement.

[2] On February 29, 1996, Connecticut Mutual, a mutual life insurance company organized under the laws of the State of Connecticut, was merged with and into MM. As a result of the merger, MM succeeded to all rights, benefits, obligations and liabilities of Connecticut Mutual. In addition, certain of the retirement plans of Connecticut Mutual and its affiliates were merged with and into the retirement plans of MM and its affiliates (collectively, the Affiliate Plans) as of January 1, 1997.

must discuss the reasons why such conflicts of interest may be present (*i.e.*, because the General Account participates in the investment and may benefit from the transaction or because the interests of the various Accounts participating in the investment may be adverse with respect to the transaction). The description must also disclose the principles and procedures to be used to resolve any anticipated impasses, as will be outlined below. In addition, each current contractholder in an ERISA-Covered Account that proposes to share investments must receive a copy of this notice of pendency within thirty days of its publication, and a copy of the exemption when granted before the Account begins to participate in the sharing of investments.

8. With respect to new contractholders in an ERISA-Covered Account that participates in the sharing of investments, each prospective contractholder must be provided with the above mentioned written description, a copy of the notice of pendency and a copy of the exemption as granted before the contractholder begins to participate in the Account. A plan contractholder may withdraw from a single customer or open-end pooled ERISA-Covered Account by providing written notice to MM. Where a plan contractholder is in a closed-end pooled ERISA-Covered Account, it may not have a right to have its interest redeemed prior to the predetermined termination date, but it may sell its interest to a third party.

9. An independent fiduciary or independent fiduciary committee must be appointed on behalf of each ERISA-Covered Account participating in the sharing of investments. The independent fiduciary, acting on behalf of the ERISA-Covered Account, shall have the responsibility and authority to approve or reject recommendations made by MM or its affiliates regarding the allocation of shared real estate investments to the ERISA-Covered Account and recommendations concerning those transactions occurring subsequent to the allocations which are the subject of this proposed exemption. The independent fiduciary is informed of the procedures set forth in the proposed exemption for the resolution of anticipated impasses prior to his or its acceptance of the appointments. MM and its affiliates shall provide the independent fiduciary with the information and materials necessary for the independent fiduciary to make an informed decision on behalf of the ERISA-Covered Account. No allocation or transaction which is the subject of the proposed exemption will be undertaken prior to the rendering of such informed decision by the independent fiduciary. However, the independent fiduciary need only have the authority to make decisions regarding allocations among, or any other subject transaction involving an ERISA-Covered Account and any other Account that occur after the plan(s) invest(s) in the ERISA-Covered Account. In the case of transactions involving the possible transfer of an interest in a real estate investment between the General Account and an ERISA-Covered Account, the independent fiduciary will not be limited to approving or rejecting the recommendations of MM, but will have full authority to negotiate the terms of the transfer (in accordance with the independent appraisal procedure described below) on behalf of the ERISA-Covered Account. The independent fiduciary shall also review on an as-needed basis, but not less than twice annually, the shared real estate investments in the ERISA-Covered Account's portfolio to determine whether the shared real estate investments are held in the best interest of the ERISA-Covered Account.

10. The independent fiduciary must be unrelated to MM or its affiliates. The independent fiduciary may not be, or consist of, any officer, director or employee of MM, or be affiliated in any way with MM or any of its affiliates. (See definition of ''affiliate'' in Section V(a), below.) The independent fiduciary must be either (1) A business organization which has (or whose principals have) at least five years of experience with respect to commercial real estate investments, (2) a committee comprised of three to five individuals who each have at least five years of experience with respect to commercial real estate investments, or (3) the plan sponsor (or its designee) of a plan or plans that is the sole participant in an ERISA-Covered Account. An organization or individual may not serve as an independent fiduciary for an ERISA-Covered Account for any fiscal year if the gross income (excluding retirement income) received by such organization or individual (or any partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder) from MM and its affiliates for that fiscal year exceeds five percent of its or his annual gross income from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the five percent limitation shall be applied with reference to the fiscal year in which such organization or individual serves as an independent fiduciary. The income limitation will exclude compensation for services of an independent fiduciary who is initially selected by a plan sponsor for a single customer ERISA-Covered Account, because this situation would not give rise to the possibility of divided loyalty on the part of the independent fiduciary. The income limitation will include services rendered to the Accounts under any prohibited transaction exemptions granted by the Department. 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 ten percent or more partner or shareholder, may (i) Acquire any property from, sell any property to, or borrow any funds from, MM or its affiliates, during the period that such organization or individual serves as an independent fiduciary and a period of six months after such organization or individual ceases to be an independent fiduciary, or (ii) negotiate any such transaction during the period that such organization or individual serves as independent fiduciary. The independent fiduciary of a pooled ERISA-Covered Account may be a committee of three to five investors or investor representatives approved by the plans participating in the pooled ERISA-Covered Account.[3] A business organization or committee member may not serve as an independent fiduciary of more than one ERISA-Covered Account.

11. In the case of a single customer ERISA-Covered Account, if the plan sponsor or its designee decides not to act as the independent fiduciary, the independent fiduciary or independent fiduciary committee will be selected initially by MM. In that event, the independent fiduciary must be approved by the plan sponsor or another plan fiduciary prior to the commencement of its fiduciary responsibilities on behalf of the ERISA-Covered Account. The applicant represents that because pooled ERISA-Covered Accounts often include several hundred plan contractholders, the independent fiduciary will be selected initially by MM. Prior to the commencement of the independent fiduciary's responsibilities on behalf of an Account, the selection of the independent fiduciary, however, must be approved by a majority of the

[3] The Department notes that where the independent fiduciary consists of such a committee, the committee members would each need to have the requisite minimum of five years' experience with respect to commercial real estate investments.

contractholders in such an Account by vote proportionate to their interests in the Account.

12. For both single customer and pooled ERISA-Covered Accounts, prior to the making of any decision to approve the selection of an independent fiduciary, plan contractholders must be furnished appropriate biographical information pertaining to the independent fiduciary or members of the independent fiduciary committee. This biography must set forth the background and qualifications of the fiduciary (or fiduciaries) to serve in that capacity. The information must also disclose the total amount of compensation received by the fiduciary (or each member of a fiduciary committee) from MM or an MM affiliate during the preceding year, including compensation for any business services performed by the fiduciary or any affiliate for MM or its affiliates. The disclosure relating to compensation must be updated annually thereafter. Subsequent disclosures must also include the amount of fees and expenses paid for independent fiduciary services. The plans will be able to use this information to determine whether to approve MM's initial selection of the fiduciary or fiduciary committee and whether to continue such approval each year thereafter.[4]

13. Once an independent fiduciary committee or organization is appointed, the members of the committee or the organization will continue to serve subject to an annual vote by each of the plans participating in the ERISA-Covered Account. An independent fiduciary or committee member may be removed by a majority vote of the Account's contractholders or, in the case of a committee member, ''for cause'' by a majority vote of the other members of the committee. The term ''for cause'' means that there must be sufficient and reasonable grounds for removal and the reasons for removal must be related to the ability and fitness of an individual to perform his or her required duties. MM will not have the authority to remove an independent fiduciary or a member of an independent fiduciary committee. If a vacancy occurs by virtue of the death, resignation or removal of a member of an independent fiduciary committee, replacement members of the committee will be appointed by a majority vote of remaining members of the committee. Possible replacements may be suggested by members of the committee, MM or plan contractholders. If an organization acting as independent fiduciary is removed by majority vote of the Account's contractholders, the procedure described above for the initial selection of an independent fiduciary will apply to the replacement.

14. The independent fiduciary will be compensated by the ERISA-Covered Account. MM may indemnify any independent fiduciary or members of an independent fiduciary committee with respect to any action or threatened action to which such person is made a party by reason of his or her service as an independent fiduciary. Indemnification will be provided as permitted under the laws of the Commonwealth of Massachusetts and subject to the requirement that such person acted in good faith and in a manner he or she reasonably believed to be solely in the interests of the participants and beneficiaries of the plans participating in the Account.

15. Written minutes must be taken and maintained in connection with all meetings involving independent fiduciary committees of ERISA-Covered Accounts. Such minutes must include a rationale as to why decisions were made. Where the independent fiduciary is a committee, decisions will be made on the basis of a majority vote. Any dissenting committee member will provide a written rationale for his dissent. Where the independent fiduciary is a single entity (e.g., a business organization) for which no minutes of meetings would be maintained, all decisions of such independent fiduciary and rationale thereof must be set forth in writing and maintained by MM pursuant to the recordkeeping requirements outlined in the General Conditions below.

16. In connection with the management of real estate shared investments, it is possible that MM, on behalf of the General or Non-ERISA Accounts, or the independent fiduciaries for ERISA-Covered Accounts participating in a shared investment, may develop different approaches as to whether or how long an investment should be held by an Account. Certain situations may also arise during the course of MM's holding of a shared real estate investment in which decisions will need to be made where it is not possible to obtain the agreement of MM and all of the independent fiduciaries involved. These situations may arise as a result of an action taken by a third party, or they may arise in connection with an action proposed by MM or the independent fiduciary for an ERISA-Covered Account. In such cases, MM will make recommendations to the independent fiduciaries regarding a proposed transaction. If a course of action cannot be found that is acceptable to each independent fiduciary, a stalemate procedure will be followed to ensure that a decision can be made. The applicant represents that the stalemate procedure is similar to procedures typically used to resolve disputes between co-venturers under real estate joint venture agreements and is therefore familiar to most real estate investors.

17. With respect to stalemates between two or more ERISA-Covered Accounts which share an investment, the stalemate procedure is designed to provide a result that is similar to what would occur in comparable situations where unrelated parties to a transaction were dealing at arm's length. This means that the action which will be taken in such cases is the one that does not require an Account: 1) to invest new money; 2) to change the terms of an existing agreement; or 3) to change the existing relationship between the Accounts.

18. However, one additional option will be provided in the event of such stalemates. Where investments are shared by two or more Accounts (other than the General Account), MM will make recommendations to the independent fiduciaries of each participating ERISA-Covered Account regarding investment management decisions that must be made for a real estate shared investment. For example, if the independent fiduciaries cannot agree on a MM recommendation, MM may offer alternate recommendations (possibly including partition and sale of undivided interests) in an attempt to facilitate agreement. If the independent fiduciaries still cannot agree, each ERISA-Covered Account will be offered the opportunity to buy out the other ERISA-Covered Account's interest on the basis of a specified price. The specified price may be based on the price offered by a third party, or, if no third party offer is received (or if the third party offer is unacceptable to either ERISA-Covered Account), the specified price will be the price established under the independent appraisal procedure described below. As in a buy-sell provision in a typical joint venture, the ERISA-Covered Account to which the offer is made will have the option to sell to the offering ERISA-Covered Account at the specified price, or to buy out the offering ERISA-Covered Account's interest at that price.

19. If the independent fiduciary for the ERISA-Covered Account which disagrees with MM's recommendation

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[4] MM represents that the contractholders in its single customer and pooled closed-end real estate Accounts are knowledgeable and sophisticated investors who fully understand the operation of the ERISA-Covered Accounts.

does not wish to make a buy-sell offer to the other ERISA-Covered Account, the other Account(s) (except for the General Account) may do so. If no ERISA-Covered Account chooses to exercise the buy-sell option, MM will take the action designed to preserve the status quo, i.e., the action designed to avoid expenditure of additional funds by the Accounts and avoid any change in existing arrangements or contractual relationships.

20. Where a real estate investment is shared by the General Account and one or more ERISA-Covered Accounts and a stalemate occurs between the General Account and an ERISA-Covered Account, MM may offer alternate recommendations to facilitate an agreement. If the Accounts still cannot reach agreement, each Account will be offered the opportunity to buy out the other Account's interest on the basis of a specified price, which will be established in accordance with the independent appraisal procedure described below, or will be the price offered by a third party. If none of the Accounts elects to make a buy-sell offer to the other Account, MM would be required to take the action selected by the independent fiduciary of the ERISA-Covered Account. Where the General Account wishes, e.g., to hold its interest and the independent fiduciary for the ERISA-Covered Account determines to sell its interest, the General Account will buy out the interest of the ERISA-Covered Account at the price offered by the third party, or, at the ERISA-Covered Account's option, at an independently determined price. Conversely, where the independent fiduciary for the ERISA-Covered Account determines to retain its interest while the General Account wants to sell its interest, the ERISA-Covered Account has the option of buying out the General Account, or, if the independent fiduciary chooses not to, the status quo will be maintained.

Specific Transactions

I. Direct Real Estate Investments

(a) Transfers Between Accounts

21. Following the initial sharing of investments, it may be in the best interests of the Accounts participating in the investment for one Account to sell its interest to the other(s). Such a situation may arise, for example, when one Account experiences a need for liquidity in order to satisfy the cash needs of the plans participating in the Account, while for the other Account(s) the investment remains appropriate. One possible means of reconciling this situation is for the ''selling'' Account to sell its interest in the shared investment to the remaining participating Account(s) or to another Account(s) at current fair market value. Such sales may not, however, be appropriate in all circumstances. An inter-Account transfer will only be permitted when it is determined to be in the best interests of each Account that would be involved in the transaction. The transfer may also be subject to the approval of the Insurance Departments of a number of states, including Massachusetts and/or New York. Because MM would be acting on behalf of both the ''buying'' and ''selling'' Accounts (but not the General Account) in such an inter-Account transfer, the transfer might be deemed to constitute a prohibited transaction under section 406(b)(2) of the Act. Accordingly, exemptive relief is requested herein for the sale or transfer of an interest in a shared real estate investment by one ERISA-Covered Account to another Account of which MM is a fiduciary. Such transfers would have to be at fair market value and approved by the independent fiduciary for each ERISA-Covered Account involved in the transfer.

Ordinarily, no transfer of an interest in a shared investment will be permitted between the General Account and an ERISA-Covered Account. The transfer of an interest in a shared investment between the General Account and an ERISA-Covered Account may be deemed to constitute a violation of sections 406(a)(1) (A) and (D) as well as sections 406(b) (1) and (2) of ERISA. As noted above, however, where a stalemate arises between the General Account and an ERISA-Covered Account, the transfer of such an interest would be permitted to resolve the conflict. Specific stalemate procedures have been developed for these situations. If, for example, a third party makes an offer to purchase the entire investment held by MM on behalf of the General Account and an ERISA-Covered Account, it is possible that the General Account would like to accept the offer and the independent fiduciary on behalf of the ERISA-Covered Account would like to reject the offer. In that event, MM may offer alternative recommendations to the independent fiduciary. If there is still no agreement, the independent fiduciary (as the party wishing to reject the offer) would be given the opportunity to buy-out the General Account's interest at a specified price. This price may be a proportionate share of the third party offer; or, if such price is unacceptable to the ERISA-Covered Account, a proportionate share of the price determined through the independent appraisal procedure described below. This procedure would give the ERISA-Covered Account an opportunity to retain its interest in the shared investment. If the ERISA-Covered Account does not choose to buy-out the General Account's interest, the General Account would be required to accede to the direction of the ERISA-Covered Account and would, therefore, reject the third party offer.

If, in the event of a third party purchase offer, the General Account wants to reject the offer but the independent fiduciary on behalf of the ERISA-Covered Account wants to accept the offer, the procedures described above would apply, except that the General Account (as the party wishing to reject the offer) would have the opportunity to buy-out the ERISA-Covered Account's interest at a proportionate share of the third party purchase offer, or, at the option of the independent fiduciary for the ERISA-Covered Account, at an independently determined price. This will permit the ERISA-Covered Account to sell its interest in a real estate investment, if it chooses to do so, at no less than the same price it would have received from a third party.

Even in the absence of a third party offer, MM may recommend the sale of a shared investment. If the independent fiduciary approves the recommendation, MM will arrange for the sale. If the independent fiduciary does not approve MM's recommendation, MM may offer alternative recommendations, possibly including partition and sale of divided interests. If, however, no agreement is reached, the independent fiduciary (as the party wishing to reject the recommendation) would be given the opportunity to buy-out the General Account's interest in accordance with the independent appraisal procedure described below. If there is no buy-out, MM would take the course of action consistent with the ERISA-Covered Account's determination and would, therefore, not sell the investment.

The independent fiduciary may also determine independently that a shared investment in an ERISA-Covered Account should be sold. If MM agrees with this recommendation, MM will arrange the sale. If MM, on behalf of the General Account, disagrees with the recommendation, MM will first attempt to sell the ERISA-Covered Account's interest to another Account other than the General Account. In this case, the sale price and other terms would have to be approved by the independent fiduciary for each ERISA-Covered Account. If the ERISA-Covered Account's interest cannot be sold to another Account, MM may offer alternative recommendations, possibly including partition and sale of the ERISA-Covered Account's interest to a third party. If no agreement is reached with respect to these options, the General Account (as the party opposed to the sale) would have the opportunity of buying out the ERISA-Covered Account's interest at a price established under independent appraisal procedures described below. If there is no buy-out and no agreement, MM will be required to take the course of action consistent with the ERISA-Covered Account's determination and will sell the entire investment.

Where an independent price for the transfer of an interest in a shared investment between the General Account and an ERISA-Covered Account is not established by an offer from an unrelated third party (or where the third party price is unacceptable to the ERISA-Covered Account), the stalemate procedure provides for the appointment of an independent appraiser. Under this procedure, MM and the independent fiduciary will each appoint an independent appraiser. These two appraisers will then choose a third appraiser. The panel of appraisers will each evaluate the entire investment, and the average of the three appraisals will be used to determine the proportional value of each shared investment interest. However, the General Account and the ERISA-Covered Account may agree that, if one valuation is more than a specified percentage outside the range of the other two valuations, that valuation may be disregarded and the transfer price will be the average of the remaining two valuations. The applicant represents that this procedure, which is of the variety typically used in real estate joint venture agreements, provides adequate protection for the ERISA-Covered Account because the independent fiduciary is an equal participant in the appraisal process. See Section I(a).

(b) Joint Sales of Property

22. In situations involving shared real estate investments, an opportunity may arise to sell the entire investment to a third party, and it may be determined for all of the participating Accounts that the sale is desirable. When the General Account is participating in the investment, and the sale is therefore determined to be in the best interests of the General Account (in addition to being in the interests of the other Account(s)), the sale might be deemed to constitute a prohibited transaction under section 406 of the Act and section 4975 of the Code.[5] Similarly, MM may be acting on behalf of two ERISA-Covered Accounts or an ERISA-Covered Account and a non-ERISA-Covered Account other than the General Account. Accordingly, exemptive relief is requested for these joint sales. The sales would have to be approved by the independent fiduciary for each ERISA-Covered Account involved in the sale. In accordance with MM's stalemate procedures, if the independent fiduciary for one ERISA-Covered Account wishes to sell its interest in a shared investment and the independent fiduciary for another ERISA-Covered Account does not want to sell, MM will attempt to negotiate a compromise, including the transfer of interests from one Account to the other. If no agreement can be reached, the status quo will be maintained and no sale will be made. See Section I(b).

(c) Additional Capital Contributions

23. On occasion, commercial real estate investments require infusions of additional capital in order to fulfill the investment expectations of the property. For example, developmental real estate investments sometimes require additional capital in order to complete the construction of the property. In addition, the cash flow needed to improve or operate completed buildings may also result in the need for additional capital. Such additional capital is frequently provided by the owners of the property. In the case of a property that is owned entirely by MM on behalf of the Accounts, it is contemplated that needed additional capital will ordinarily be contributed in connection with the investment in the form of an equity capital contribution made by each participating Account in an amount equal to such Account's existing percentage equity interest in the shared investment;[6] that is, in the first instance, each Account would be afforded the opportunity to contribute additional capital on a fully proportionate basis. In the case of ERISA-Covered Accounts, all decisions regarding the making of additional capital contributions must be approved by the independent fiduciary for the Account. The making of an additional capital contribution could be deemed to involve a prohibited transaction under section 406 of the Act. If one or more participating Accounts in a shared investment is unable to provide its share of the needed additional capital, various alternatives may be appropriate, including having the other Account(s) make a disproportionate contribution. For example, where the General Account and an ERISA-Covered Account participate in a shared investment and the need for additional capital arises, it might be determined for liquidity reasons or other factors involving the ERISA-Covered Account that the additional contribution should not be made by that Account. As a result, the additional equity capital may be provided entirely by the General Account with the further consequence that the General Account would thereafter have a larger interest in the investment and, therefore, a larger share in the appreciation and income to be derived from the property.[7] Such an adjustment in ownership interests might be deemed to constitute a prohibited (indirect sales) transaction under section 406 of the Act. In addition, these situations could also occur where two ERISA-Covered Accounts are involved or an ERISA-Covered Account and a non-ERISA-Covered Account are involved. Accordingly, the applicant is requesting exemptive relief that would permit the contribution of additional equity capital for a shared investment by Accounts participating in the investment (including the General Account). Any decision made or action taken by an ERISA-Covered Account (i.e., the contribution of either no additional capital, the Account's pro rata share of additional capital, less than or more than the Account's pro rata share, etc.) must be approved by such independent fiduciary. See Section I(c).

(d) Lending of Funds To Meet Additional Capital Requirements

24. If the General Account and an ERISA-Covered Account participate in a shared investment that experiences the need for additional capital, and it is determined that the ERISA-Covered Account does not have sufficient funds available to meet the call for additional capital, the General Account might be willing and able to loan the required funds to the ERISA-Covered Account. Prior to any loan being made, it must be

[5] The Department notes that all future references to the provisions of the Act shall be deemed to include the parallel provisions of the Code.

[6] In any case where the General Account participates in a shared investment with one or more ERISA-Covered Accounts and a call for additional capital is made, the General Account will always make a capital contribution that is at least equivalent proportionately to the highest capital contribution made by an ERISA-Covered Account.

[7] In the case of shared real estate investments owned entirely by MM accounts, if an Account contributes capital equaling less than its pro rata interest in the investment (or makes no contribution at all), that Account's equity interest will be re-adjusted and reduced based on the change in the fair market value of the property caused by the infusion of new capital.

approved by the independent fiduciary for the ERISA-Covered Account. Such loan will be unsecured and non-recourse, will bear interest at a rate that will not exceed the higher of the prime rate plus two percentage points or the prevailing interest rate on 90-day Treasury Bills, will not be callable at any time by the General Account, and will be prepayable at any time without penalty at the discretion of the independent fiduciary of the ERISA-Covered Account. See Section I(d).

(e) Shared Debt Investments

25. MM occasionally makes real estate investments consisting of interim construction loans or medium or long-term loans on a property. In some instances, MM may have the opportunity to obtain an equity ownership interest in the underlying real property upon maturity of the debt or at the election of MM. It is possible that shared real estate debt investments might raise questions under section 406 of the Act in essentially two situations: (1) a material modification in the terms of a loan agreement, or (2) a default on a loan. From time to time, the terms of outstanding real estate loans need to be modified to take into account new developments. Such modifications may commonly include extensions of the term of the loan, revised interest rates, revised repayment schedules, changes in covenants or warranties to permit, for example, additional financing to be provided. These situations require a decision on behalf of the lender whether it would be in its own interest to make the modifications in question. Similarly, when a borrower commits an act of default under a loan agreement, the lender must determine, in its own interest, what action, if any, it wishes to take. Such action might involve foreclosure on the loan, a restructuring of the loan arrangement, or, in some cases as appropriate, no action at all. When a debt investment is shared among Accounts, a decision must be made on behalf of each Account with respect to the action to be taken when a loan modification or loan default situation occurs. These situations may also occur where two or more Accounts hold interests in debt investments in respect of the same property, and one interest is subordinate to the other in the event of insolvency. In some cases, moreover, it is conceivable that different actions might be desired by different Accounts. Normally, however, only one unified course of action is possible in the situation. Since MM maintains each of these Accounts, the action it decides to take for the participating Accounts may raise questions under section 406 of the Act. Accordingly, exemptive relief is being requested that will permit MM on behalf of the Accounts to take appropriate action with respect to the modification of the material terms of a loan or with respect to a default situation when the loan is a shared investment involving one or more ERISA-Covered Accounts. Each such action would require approval of the independent fiduciary for each ERISA-Covered Account. If there is an agreement among the independent fiduciaries as to the course of action to follow with regard to a proposed loan modification, or an adjustment in the rights upon default, such modification or adjustment will be implemented. If, upon full discussion of the matter, no course of action can be agreed upon by the independent fiduciaries, no modification of the terms of the loan or adjustment in the rights upon default would be made. The terms of the loan agreement as originally stated would be carried out. See Section I(e).

II. Joint Venture Investments

26. Many real estate investments are structured as joint venture arrangements (rather than 100 percent ownership interest in property) in which MM and another party, such as a real estate developer or manager, participate as joint venturer partners (or co-venturers). Either MM or MM's co-venturer may act as managing partner of the joint venture. Joint venture investments typically involve several particular features by virtue of the terms and conditions of the joint venture agreements that may, when MM's joint venture interest is shared, result in possible violations of section 406 of the Act.

(a) Additional Capital Contributions to Joint Ventures

27. As in the case of investments made entirely by MM, joint venture real estate investments sometimes require additional operating capital. Typically, a joint venture agreement will provide for a capital call by the general partner of the joint venture to be made to each joint venturer and that each venturer provide the needed capital on a pro rata basis either in the form of an equity contribution or a loan to the joint venture. If one joint venturer refuses to contribute its pro rata equity share of the capital call, the other joint venturer(s) may contribute additional capital to cover the short-fall and thereby ''squeeze down'' the interest in the venture of the non-contributing joint venturer.[8] Alternatively, if sufficient additional capital is not provided by the joint venturers, other financing may be sought, or the joint venture may be liquidated. In the case of a capital call where MM's joint venture interest is shared by two or more Accounts, a determination must be made on behalf of each Account participating in the shared investment with respect to whether it is appropriate for the Account to provide its proportionate share of additional capital requested by the joint venture. The general rule that MM will follow is that each Account will be given the opportunity to provide its pro rata share of the capital call, but for some Accounts it may be determined to be appropriate to provide less than a full share or no additional capital at all. In such cases, the interest of the Account would be reduced proportionately on a fair market basis. In the case of ERISA-Covered Accounts, all decisions regarding the making of additional capital contributions must be approved by the independent fiduciary for the Account. In addition to situations where some Accounts participating in the ownership of MM's joint venture interest may not be in a position to provide their share of a capital call, other situations may arise where the co-venturer is unable to make its additional capital contributions. Both of these situations may result in prohibited transactions under section 406 of the Act.

28. *MM Shortfall.* The General Account and an ERISA-Covered Account may experience a capital call from the general partner of the joint venture for either an additional equity or debt contribution. If it is determined that the ERISA-Covered Account does not have sufficient funds available to meet its contribution requirement,[9] the

[8] In the case of a call for additional capital involving a typical joint venture arrangement entered into between parties dealing at arm's length, the joint venture agreement may commonly provide that the equity interest of any non-contributing venturer be re-adjusted, or ''squeezed down'', on a capital interest basis. This involves re-adjusting the equity interests of the venturers solely on the basis of the percentage of total capital contributed without taking into account any appreciation on the underlying property. This ''capital interest'' adjustment can substantially diminish the equity interest of the non-contributing venturer in the actual current market value of the underlying property. Thus, this type of re-adjustment is intended to provide an incentive to all venturers to make their proportionate capital contributions so that improvements can be made and the operation of a property continued without burdening the other venturers.

[9] In any case where the General Account and one or more ERISA-Covered Accounts share MM's interest in a joint venture, the General Account will always make a capital contribution that is at least equivalent proportionately to the highest capital contribution made by an ERISA-Covered Account, up to its pro rata share of the additional capital call. Thus, the General Account will never be the cause

Continued

General Account may make a loan to the ERISA-Covered Account to enable the ERISA-Covered Account to make its required pro rata capital contribution. Accordingly, subject to the conditions of the proposed exemption, Section II(a)(2) would provide relief for loans of this type. Prior to any loan being made, it would have to be approved by the independent fiduciary for the ERISA-Covered Account. Such loan will be unsecured and non-recourse, will bear interest at a rate that will not exceed the greater of the prime rate plus two percentage points or the prevailing interest rate on 90-day Treasury Bills, will not be callable at any time by the General Account, and will be prepayable at any time without penalty at the discretion of the independent fiduciary of the ERISA-Covered Account. In addition, the General Account may make an additional equity contribution to the joint venture to cover the ERISA-Covered Account's shortfall. In that event, the equity interest of the ERISA-Covered Account will be ''squeezed down'' (relative to the equity interest of the General Account) on a fair market value basis. This option would avoid the capital basis squeeze-down of the ERISA-Covered Account's interest by the co-venturer. Such contribution would be made by the General Account only after the independent fiduciary for the ERISA-Covered Account is given an opportunity to make an additional contribution. See Section II(a)(3).

A similar situation may arise where two ERISA-Covered Accounts, or an ERISA-Covered and a non-ERISA-Covered Account, participate in a joint venture investment. If one Account is unable or unwilling to provide its proportionate share of a capital call, the other Account may be interested in making up the shortfall. This might be accomplished by means of an equity contribution with a resulting re-adjustment on a current fair market value basis in the equity ownership interests of the participating Accounts. Thus, any of these disproportionate contribution situations between Accounts might result in a violation of section 406 of the Act. Subject to the generally applicable conditions of this proposed exemption, Section II(a)(3) provides relief for these disproportionate contributions.

29. *Co-Venturer Shortfall.* In some cases, MM's co-venturer in a joint venture investment may be unable to meet its additional capital obligation, and MM may deem it advisable for some or all of the participating Accounts to contribute capital in excess of the pro rata share of MM's Accounts in the joint venture in order to finance the operation of the property (and thereby squeeze down the equity interest of the co-venturer).[10] The applicant is requesting exemptive relief that would permit additional capital contributions to be made by participating Accounts (including the General Account) on a disproportionate basis if the need arises. Any instance involving the infusion of additional capital to a joint venture will be considered by the independent fiduciary for each ERISA-Covered Account participating in the investment and any action to be taken by the Account must be approved by the independent fiduciary. These actions might include contributing a pro rata share of additional equity capital (including a capital contribution that squeezes down the interest of a co-venturer on the basis provided in the joint venture agreement), contributing more or less than a pro rata share, or contributing no additional capital. See Section II(a)(4).

(b) Third Party Purchases of Joint Venture Properties

30. Under the terms of typical joint venture agreements, if an offer is received from a third party to purchase the assets of the joint venture, and one joint venture partner (irrespective of the percentage ownership interest of the joint venture partner) wishes to accept the offer, the other joint venture partner must either (1) also accept the offer, or (2) buy out the first partner's interest at the portion of the offer price that is proportionate to the first partner's share of the venture. For example, if MM on behalf of the Accounts and a real estate developer are joint venture partners in a property and an offer is received from another person to acquire the entire property that the developer wants to accept, MM on behalf of the Accounts would be obligated either to sell its interest also to the third party or to buy out the interest of the developer at the portion of the price offered by the third party proportionate to the developer's share of the venture. When MM's interest in a real estate joint venture is shared by two or more Accounts, it is likely that the same decision will be appropriate for each Account in any third-party purchase situation. See Sections I(b) and II(b)(1). It is also possible, however, that it might be in the interests of some Accounts to reject the offer and buy-out the developer, while other Accounts might not have the funds to do so or, for some other reason, would elect to sell to the third party. The joint venture agreements typically require, however, that MM on behalf of the Accounts provide the co-venturer with a unified buy or sell reply. Thus, in making a buy or sell decision in any of these cases involving an ERISA-Covered Account, MM might be deemed to be acting in violation of section 406 of the Act. Further, in order to resolve situations where the same reply is not appropriate for all participating Accounts, various alternatives may be adopted. For example, the Account(s) that wishes to continue owning the property may be willing and able to buy out not only the co-venturer, but also the other participating Account(s) that wishes to accept the third party offer to sell. Or, one Account may itself be willing and able to buy-out the co-venturer while the other Account chooses to continue holding its original interest in the property. Alternatively, all of the Accounts may choose to participate in the buy-out, but on a basis that is not in proportion to their existing ownership interests. Such alternatives, when an ERISA-Covered Account is involved, while all possibly desirable from case to case, may also raise questions under section 406 of the Act, whether or not the General Account is a participant in the investment. Accordingly, the applicant is requesting exemptive relief that would permit MM to respond to third-party purchase offers as appropriate under the circumstances. Such a response might involve acceptance of the offer on behalf of all participating Accounts, a buy-out of a co-venturer by some or all of the participating Accounts on a pro rata or non-pro rata basis, or a buy-out of the interest of one participating Account (and of the co-venturer) by other participating Accounts. Any action by any ERISA-Covered Account in these situations will be required to be approved by the independent fiduciary for the Account in accordance with the stalemate procedure, as described below (see rep. 31, below).

31. In a case involving the sharing of a joint venture interest between two ERISA-Covered Accounts, if one ERISA-Covered Account wishes to buy out the co-venturer and the other ERISA-Covered Account is unable or unwilling to do so, the ERISA-Covered Account wishing to buy out the co-venturer

as between the Accounts of a capital contribution shortfall by MM that would result in a capital basis squeeze down by a co-venturer.

[10] In any case involving a shared joint venture interest held by the General Account and an ERISA-Covered Account, if it is determined that the ERISA-Covered Account will contribute its pro rata share of extra capital, the General Account would also contribute at least its pro rata share of such capital.

would have the opportunity to do so if the other ERISA-Covered Account's interests can also be accommodated. This could be accomplished if, for example (1) the second ERISA-Covered Account wishes to sell its interest to the first ERISA-Covered Account (at a proportionate share of the price offered by the third party offeror) and the first ERISA-Covered Account agrees; or (2) the second ERISA-Covered Account wishes to continue holding its original interest. If, however, the second ERISA-Covered Account wishes to sell its interest and the first ERISA-Covered Account is unwilling or unable to buy it, both Accounts would be required to sell to the third party offeror in order to avoid the expenditure of additional funds by an unwilling Account.

If the General Account participates in a joint venture interest subject to a third party purchase offer, the stalemate procedure would provide the same alternatives, except that if the General Account wishes to accept the third party purchase offer and the ERISA–Covered Account wishes to buy out the co-venturer (and is unwilling or unable to buy out the General Account's interest), the General Account would be required to buy out the co-venturer with the ERISA–Covered Account. See Section II(b).

(c) Rights of First Refusal in Joint Venture Agreements

32. Under the terms of typical joint venture agreements, if a joint venture partner wishes to sell its interest in the venture to a third party, the other joint venture partner must be given the opportunity to exercise a right of first refusal to purchase the first partner's interest at the price offered by the third party. For example, if MM and a real estate developer are joint venture partners and the developer decided to sell its interest to a third party, MM would have the right to purchase the developer's interest at the price offered by the third party. In the case of shared real estate joint ventures, the decision by MM on behalf of the Accounts with respect to whether or not to exercise a right of first refusal might raise questions under section 406 of the Act since each Account participating in the investment might be affected differently by such decision. Because, under the terms of the joint venture agreement, only one option (exercise or not exercise) may be chosen by MM on behalf of the Accounts, exemptive relief is being requested that would permit MM to exercise or not exercise a right of first refusal as may be appropriate under the circumstances. Any action taken on behalf of an ERISA–Covered Account regarding the exercise of such a right would have to be approved by the independent fiduciary. Further, under the requested exemption, if the General Account and an ERISA–Covered Account share a joint venture investment, even though MM may initially decide on behalf of the General Account not to make a purchase under a right of first refusal option, the General Account will be required to participate in the purchase of the other joint venturer's interest if the independent fiduciary determines that it is appropriate for the ERISA–Covered Account to participate in the exercise of the right of first refusal on at least a pro rata basis. If, however, two Accounts other than the General Account participate in a joint venture and agreement cannot be reached on behalf of the Accounts on whether to exercise a right of first refusal, the right will not be exercised and the co-venturer will be permitted to sell its interest to the third party, unless one Account decides to buy-out the co-venturer alone. In this regard, it is conceivable that some participating Accounts may elect to take advantage of a right of first refusal opportunity and buy-out a co-venturer without other participating Accounts taking part in the transaction. For example, in the case of a shared joint venture investment involving the General Account (or any other Account) and an ERISA–Covered Account, if the co-venturer wishes to accept an offer to sell its interest and the independent fiduciary of the ERISA–Covered Account decides not to have the account participate in purchasing the co-venturer's interest, the General Account (or other participating Account) would be free to make the purchase on its own. The exercise of a right of first refusal on such a disproportionate basis might also raise questions under section 406 of the Act for which exemptive relief may be needed. See Section II(c).

(d) Buy-Sell Provisions in Joint Venture Agreements

33. Joint venture agreements entered into by MM typically provide that one joint venture partner may demand that the other partner either sell its interest to the first partner at a price as determined by the terms of the joint venture agreement or buy out the interest of the first partner at such price. If the other joint venture partner refuses to exercise either option within a specified period, it must sell its interest to the first partner at the stated price. These ''buy-sell'' provisions are generally used to resolve serious difficulties or impasses in the operation of a joint venture, but generally a joint venture agreement permits the buy-sell provision to be exercised at any time. As in the situations discussed above, the decision by MM on behalf of the Accounts to make a buy-sell offer, or its reaction to such an offer made by a co-venturer, may affect various participating Accounts differently. Accordingly, any decision made by MM in these cases involving ERISA–Covered Accounts might raise questions under section 406 of the Act. The applicant is requesting exemptive relief that would permit MM to make an appropriate decision under the circumstances on behalf of all participating Accounts to make a buy-sell offer to a co-venturer or to react to a buy-sell offer from a co-venturer. Any such decision must be approved by the independent fiduciary for each ERISA–Covered Account participating in the investment.

34. In the event that MM recommends the initiation of the buy-sell option against the co-venturer, MM will exercise the option if the independent fiduciary on behalf of each participating ERISA–Covered Account approves the recommendation. If, in the case of a General Account/ERISA–Covered Account shared joint venture investment, the independent fiduciary does not agree with MM's recommendation, the independent fiduciary would be given the opportunity to buy out the General Account's interest at a price to be determined in accordance with the independent appraisal procedure described above. If the independent fiduciary declines to buy out the General Account's interest, the General Account would then have the opportunity to buy out the ERISA–Covered Account's interest, (provided the independent fiduciary for the ERISA–Covered Account approves of such sale), also in accordance with the independent appraisal procedure. If neither the General Account nor the ERISA–Covered Accounts buys out the other's interest in the joint venture investment, MM would take the course of action most consistent with the determination of the ERISA–Covered Account, and would, therefore, not exercise the buy-sell option.

In the event that the co-venturer initiates the buy-sell option with respect to a shared joint venture investment, MM must either sell its entire interest to the co-venturer or reject the offer and buy-out the co-venturer's interest at that price. If the participating Accounts agree upon the course of action to be taken, MM will then take the agreed action. If no agreement is reached, various alternatives may be considered. For example, in the case of a General

Account/ERISA-Covered Account shared joint venture investment, if MM recommends rejection of the offer (and consequent purchase of the co-venturer's interest), but the independent fiduciary wants to accept the offer, the General Account would have the option to purchase the co-venturer's interest solely on behalf of the General Account. If the General Account chooses this option, the ERISA-Covered Account (which wished to accept the co-venturer's offer) would have the opportunity to sell its interest to the General Account, at a proportionate share of the price offered by the co-venturer, but would not be required to do so. However, if the General Account declines to purchase the ERISA-Covered Account's interest where the ERISA-Covered Account wishes to accept the buy-sell offer, the entire joint venture interest would be sold to the co-venturer. If the ERISA-Covered Account wishes to reject the buy-sell offer (and purchase the co-venturer's interest) and the General Account wishes to accept the offer, the General Account would be required to purchase its proportionate share of the co-venturer's interest, unless the independent fiduciary for the ERISA-Covered Account elects to purchase more than its proportionate share (including the entire co-venturer interest).

Where two or more ERISA-Covered Accounts share a joint venture investment, the stalemate procedure is similar, except that no ERISA-Covered Account would be required to purchase the interest of a co-venturer (and thus expend additional funds) against its wishes. See Section II(d).

(e) Transactions With Joint Venture Party in Interest

35. The applicant represents that when the General Account holds a 50 percent or more interest in a joint venture, the joint venture itself may be deemed to be a party in interest under section 3(14)(G) of the Act. Thus, any subsequent transaction involving the joint venture and an ERISA-Covered Account that is also participating in the venture (*e.g.*, an additional contribution of capital) may be deemed to be a transaction between the plans participating in an ERISA-Covered Account and a party in interest (the joint venture itself) in violation of section 406. Accordingly, the applicant is requesting exemptive relief from the restrictions of section 406(a) of the Act, only, which would permit: (1) any additional equity or debt capital contributions to a joint venture by an ERISA-Covered Account which is participating in an interest in the joint venture, where the joint venture is a party in interest solely by reason of the ownership on behalf of the General Account of a 50 percent or more interest in such joint venture; or (2) any material modification in the terms of, or action taken upon default with respect to, a loan to the joint venture in which the ERISA-Covered Account has an interest as a lender. Either action would be conditioned upon the approval of the independent fiduciary for the ERISA-Covered Account. See Section III.

Initial Proportionate Allocations

The applicant, MM, has not requested exemptive relief for the initial allocation of shared real estate investments by MM among two or more Accounts, at least one of which is an ERISA-Covered Account, where each of the Accounts participating in a real estate investment participates in the debt and equity interests in the same relative proportions as described in paragraph 3 above. It is the applicant's position that the initial sharing of a real estate investment pursuant to the described allocation by two or more Accounts maintained by MM (which may include both its General Account and one or more ERISA-Covered Accounts) does not involve a *per se* violation of sections 406(a)(1)(D) and 406(b)(1) and (b)(2) of the Act.

Regulations under section 408(b)(2) of the Act (29 CFR 2550.408b–2(e)) provide that the prohibitions of section 406(b) are imposed on fiduciaries to deter them from exercising the authority, control or responsibility which makes them fiduciaries when they have interests which may conflict with the interests of the plans for which they act. In such cases, the regulation states that the fiduciaries have interests in the transactions which may affect the exercise of their best judgment as fiduciaries. It is the Department's view, however, that a fiduciary does not violate section 406(b)(1) with respect to a transaction involving the assets of a plan if he does not have an interest in the transaction that may affect his best judgment as a fiduciary.

Similarly, a fiduciary does not engage in a violation of section 406(b)(2) in a transaction involving the plan if he represents or acts on behalf of a party whose interests are not adverse to those of the plan. Nonetheless, if a fiduciary causes a plan to enter into a transaction where, by the terms or nature of that transaction, a conflict of interest between the plan and the fiduciary exists or will arise in the future, that transaction would violate either section 406(b)(1) or (b)(2) of the Act. Moreover, if, during the course of a transaction which, at its inception, did not involve a violation of section 406(b)(1) or 406(b)(2), a divergence of interests develops between the plan and the fiduciary, the fiduciary must take steps to eliminate the conflict of interest in order to avoid engaging in a prohibited transaction.

In the view of the Department, the mere investment of assets of a plan on identical terms with a fiduciary's investment for its own account and in the same relative proportions as the fiduciary's investment would not, in itself, cause the fiduciary to have an interest in the transaction that may affect its best judgment as a fiduciary. Therefore, such an investment would not, in itself, violate section 406(b)(1). In addition, such shared investment, or an investment by a plan with another account maintained by a common fiduciary, pursuant to reasonable procedures established by the fiduciary would not cause the fiduciary to act on behalf of (or represent) a party whose interests are adverse to those of the plan, and therefore, would not, in itself, violate section 406(b)(2).[11]

With respect to section 406(a)(1)(D) of the Act which prohibits the transfer to, or use by or for the benefit of a party in interest (including a fiduciary) of the assets of a plan, it is the opinion of the Department that a party in interest does not violate that section merely because he derives some incidental benefit from a transaction involving plan assets. We are assuming, for purposes of this analysis, that the fiduciary does not rely upon and is not otherwise dependent upon the participation of plans in order to undertake its share of the investment.

Thus, with respect to the investment of plan assets in shared investments which are made simultaneously with investments by a fiduciary for its own account on identical terms and in the same relative proportions, it is the view of the Department that any benefit that the fiduciary might derive from such investment under these circumstances is incidental and would not violate section 406(a)(1)(D) of the Act.

Accordingly, since it appears that the method by which the interests in the real estate investments are allocated to the Accounts maintained by MM does not result in *per se* prohibited transactions under the Act, the Department has not proposed exemptive

[11] This analysis does not address any issues which may arise under section 406(b)(2) where investments are shared solely by two or more separate accounts maintained by a common fiduciary and the participation of one account is relied upon to support the initial investment of the other account.

relief with respect to the initial sharing of these investments.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include fiduciaries and participants of plans investing in ERISA-Covered Accounts which will be engaging in transactions described in the proposed exemption. Because of the number of affected persons, the Department has determined that the only practical form of providing notice to interested persons is the distribution, by MM, of the notice of proposed exemption as published in the **Federal Register** to the appropriate fiduciaries of each plan described above. The distribution will occur within 30 days of the publication of the notice of proposed exemption in the **Federal Register**.

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 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 among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

(4) The proposed exemption, if granted, will be 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.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

Proposed Exemption

Section I—Exemption for Certain Transactions Involving the Management of Investments Shared by Two or More Accounts Maintained by MM

If the exemption is granted, as indicated below, the restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions if the conditions set forth in Section IV are met:

(a) *Transfers Between Accounts*

(1) The restrictions of section 406(b)(2) of the Act shall not apply to the sale or transfer of an interest in a shared investment (including a shared joint venture interest) between two or more Accounts (except the General Account), provided that each ERISA-Covered Account pays no more, or receives no less, than fair market value for its interest in a shared investment.

(2) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the sale or transfer of an interest in a shared investment (including a shared joint venture interest) between ERISA-Covered Accounts and the General Account, provided that such transfer is made pursuant to stalemate procedures, described in this notice of proposed exemption, adopted by the independent fiduciary for the ERISA-Covered Account, and provided further that the ERISA-Covered Account pays no more or receives no less than fair market value for its interest in a shared investment.

(b) *Joint Sales of Property*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the sale to a third party of the entire interest in a shared investment (including a shared joint venture interest) by two or more Accounts, provided that each ERISA-Covered Account receives no less than fair market value for its interest in the shared investment.

(c) *Additional Capital Contributions*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply either to the making of a pro rata equity capital contribution by one or more of the Accounts to a shared investment; or to the making of a Disproportionate [as defined in Section V(e)] equity capital contribution by one or more of such Accounts which results in an adjustment in the equity ownership interests of the Accounts in the shared investment on the basis of the fair market value of such interests subsequent to such contribution, provided that each ERISA-Covered Account is given an opportunity to make a pro rata contribution.

(d) *Lending of Funds*—The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the lending of funds from the General Account to an ERISA-Covered Account to enable the ERISA-Covered Account to make an additional pro rata contribution, provided that such loan—

(A) is unsecured and non-recourse with respect to participating plans,

(B) bears interest at a rate not to exceed the greater of the prime rate plus two percentage points or the prevailing rate on 90-day Treasury Bills,

(C) is not callable at any time by the General Account, and

(D) is prepayable at any time without penalty.

(e) *Shared Debt Investments*—In the case of a debt investment that is shared between two or more Accounts, including one or more of the ERISA-Covered Accounts, (1) the restrictions of sections 406(a) and 406(b)(1) and (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 any material modification in the terms of the loan agreement resulting from a request by the borrower, any decision regarding the action to be taken, if any, on behalf of the Accounts in the event of a loan default by the borrower, or any exercise of a right under the loan agreement in the event of such default, and (2) the restrictions of section 406(b)(2) of the Act shall not apply to any decision by MM thereof on behalf of two or more ERISA-Covered Accounts: (A) not to modify a loan agreement as requested by the borrower; or (B) to exercise any rights provided in the loan agreement in the event of a loan default by the borrower, even though the independent fiduciary for one (but not all) of such Accounts has approved such modification or has not approved the exercise of such rights.

Section II—Exemption for Certain Transactions Involving the Management of Joint Venture Interests Shared by Two or More Accounts Maintained by MM

If the exemption is granted, the restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions resulting from the sharing of an investment in a real estate joint venture between two or more Accounts, if the conditions set forth in Section IV are met:

(a) *Additional Capital Contributions*—(1) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the making of additional pro rata equity capital contributions by one or more Accounts participating in the joint venture.

(2) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the lending of funds from the General Account to an ERISA-Covered Account to enable the ERISA-Covered Account to make an additional pro rata capital contribution, provided that such loan—

(A) Is unsecured and non-recourse with respect to the participating plans,

(B) Bears interest at a rate not to exceed the greater of the prime rate plus two percentage points or the prevailing rate on 90-day Treasury Bills,

(C) Is not callable at any time by the General Account, and

(D) is prepayable at any time without penalty.

(3) The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975 (c)(1)(A) through (E) of the Code shall not apply to the making of Disproportionate [as defined in section V(e)] additional equity capital contributions (or the failure to make such additional contributions) in the joint venture by one or more Accounts which result in an adjustment in the equity ownership interests of the Accounts in the joint venture on the basis of the fair market value of such joint venture interests subsequent to such contributions, provided that each ERISA-Covered Account is given an opportunity to provide its proportionate share of the additional equity capital contributions; and

(4) In the event a co-venturer fails to provide all or any part of its pro rata share of an additional equity capital contribution, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the making of Disproportionate additional equity capital contributions to the joint venture by the General Account and an ERISA-Covered Account up to the amount of such contribution not provided by the co-venturer which result in an adjustment in the equity ownership interests of the Accounts in the joint venture on the basis provided in the joint venture agreement, provided that such ERISA-Covered Account is given an opportunity to participate in all additional equity capital contributions on a proportionate basis.

(b) *Third Party Purchase Offers*—(1) In the case of an offer by a third party to purchase any property owned by the joint venture, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the acquisition by the Accounts, including one or more ERISA-Covered Account[s], on either a proportionate or Disproportionate basis of a co-venturer's interest in the joint venture in connection with a decision on behalf of such Accounts to reject such purchase offer, provided that each ERISA-Covered Account is first given an opportunity to participate in the acquisition on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any acceptance by MM on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], of an offer by a third party to purchase a property owned by the joint venture even though the independent fiduciary for one (but not all) of such ERISA-Covered Account[s] has not approved the acceptance of the offer, provided that such declining ERISA-Covered Account[s] are first afforded the opportunity to buy out both the co-venturer and ''selling'' Account's interests in the joint venture.

(c) *Rights of First Refusal*—(1) In the case of the right to exercise a right of first refusal described in a joint venture agreement to purchase a co-venturer's interest in the joint venture at the price offered for such interest by a third party, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the acquisition by such Accounts, including one or more ERISA-Covered Account[s], on either a proportionate or Disproportionate basis of a co-venturer's interest in the joint venture in connection with the exercise of such a right of first refusal, provided that each ERISA-Covered Account is first given an opportunity to participate on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by MM on behalf of the Accounts not to exercise such a right of first refusal even though the independent fiduciary for one (but not all) of such ERISA-Covered Accounts has approved the exercise of the right of first refusal, provided that none of the ERISA-Covered Accounts that approved the exercise of the right of first refusal decides to buy-out the co-venturer on its own.

(d) *Buy-Sell Options*—(1) In the case of the exercise of a buy-sell option set forth in the joint venture agreement, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the acquisition by one or more of the Accounts on either a proportionate or Disproportionate basis of a co-venturer's interest in the joint venture in connection with the exercise of such a buy-sell option, provided that each ERISA-Covered Account is first given the opportunity to participate on a proportionate basis; and

(2) The restrictions of section 406(b)(2) of the Act shall not apply to any decision by MM on behalf of two or more Accounts, including one or more ERISA-Covered Account[s], to sell the interest of such Accounts in the joint venture to a co-venturer even though the

independent fiduciary for one (but not all) of such ERISA-Covered Account[s] has not approved such sale, provided that such disapproving ERISA-Covered Account is first afforded the opportunity to purchase the entire interest of the co-venturer.

Section III—Exemption for Transactions Involving a Joint Venture or Persons Related to a Joint Venture

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply, if the conditions in Section IV are met, to any additional equity or debt capital contributions to a joint venture by an ERISA-Covered Account that is participating in an interest in the joint venture, or to any material modification in the terms of, or action taken upon default with respect to, a loan to the joint venture in which the ERISA-Covered Account has an interest as a lender, where the joint venture is a party in interest solely by reason of the ownership on behalf of the General Account of a 50 percent or more interest in such joint venture.

Section IV—General Conditions

(a) The decision to participate in any ERISA-Covered Account that shares real estate investments must be made by plan fiduciaries who are totally unrelated to MM and its affiliates. This condition shall not apply to plans covering employees of MM.

(b) Each contractholder or prospective contractholder in an ERISA-Covered Account which shares or proposes to share real estate investments that are structured as shared investments under this exemption is provided with a written description of potential conflicts of interest that may result from the sharing, a copy of the notice of pendency, and a copy of the exemption if granted.

(c) An independent fiduciary must be appointed on behalf of each ERISA-Covered Account participating in the sharing of investments. The independent fiduciary shall be either

(1) A business organization which has at least five years of experience with respect to commercial real estate investments,

(2) A committee composed of three to five individuals (who may be investors or investor representatives approved by the plans participating in the ERISA-Covered Account, and) who each have at least five years of experience with respect to commercial real estate investments, or

(3) The plan sponsor (or its designee) of a plan (or plans) that is the sole participant in an ERISA-Covered Account.

(d) The independent fiduciary or independent fiduciary committee member shall not be or consist of MM or any of its affiliates.

(e) No organization or individual may serve as an independent fiduciary for an ERISA-Covered Account for any fiscal year if the gross income (other than fixed, non-discretionary retirement income) received by such organization or individual (or any partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder) from MM, its affiliates and the ERISA-Covered Accounts for that fiscal year exceeds five percent of its or his or her annual gross income from all sources for the prior fiscal year. If such organization or individual had no income for the prior fiscal year, the five percent limitation shall be applied with reference to the fiscal year in which such organization or individual serves as an independent fiduciary. The income limitation shall not include compensation for services rendered to a single-customer ERISA-Covered Account by an independent fiduciary who is initially selected by the Plan sponsor for that ERISA-Covered Account.

The income limitation will include income for services rendered to the Accounts as independent fiduciary under any prohibited transaction exemption(s) granted by the Department. Notwithstanding the foregoing, such income limitation shall not include any income for services rendered to a single customer ERISA-Covered Account by an independent fiduciary selected by the Plan sponsor to the extent determined by the Department in any subsequent prohibited transaction exemption proceeding.

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 ten percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from, MM, its affiliates, or any Account maintained by MM or its affiliates, during the period that such organization or individual serves as an independent fiduciary and continuing for a period of six months after such organization or individual ceases to be an independent fiduciary, or negotiate any such transaction during the period that such organization or individual serves as independent fiduciary.

(f) The independent fiduciary acting on behalf of an ERISA-Covered Account shall have the responsibility and authority to approve or reject recommendations made by MM or its affiliates for each of the transactions in this proposed exemption. In the case of a possible transfer or exchange of any interest in a shared investment between the General Account and an ERISA-Covered Account, the independent fiduciary shall also have full authority to negotiate the terms of the transfer. MM and its affiliates shall involve the independent fiduciary in the consideration of contemplated transactions prior to the making of any decisions, and shall provide the independent fiduciary with whatever information may be necessary in making its determinations.

In addition, the independent fiduciary shall review on an as-needed basis, but not less than twice annually, the shared real estate investments in the ERISA-Covered Account to determine whether the shared real estate investments are held in the best interest of the ERISA-Covered Account.

(g) MM maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (h) of this Section to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of MM or its affiliates, the records are lost or destroyed prior to the end of the six-year period.

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

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

(B) Any fiduciary of a plan participating in an ERISA-Covered Account engaging in transactions structured as shared investments under this exemption who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an ERISA-Covered Account engaging in transactions structured as shared investments under this exemption or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an ERISA-Covered Account engaging in transactions structured as shared investments under this exemption, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this subsection (h) shall be authorized to examine trade secrets of MM, any of its affiliates, or commercial or financial information which is privileged or confidential.

Section V—Definitions

For the purposes of this exemption:

(a) An ''affiliate'' of MM includes —

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with MM,

(2) Any officer, director or employee of MM or person described in section V(a)(1), and

(3) Any partnership in which MM is a partner.

(b) An ''Account'' means the General Account (including the general accounts of MM affiliates which are managed by MM), any separate account managed by MM, or any investment advisory account, trust, limited partnership or other investment account or fund managed by MM.

(c) The ''General Account'' means the general asset account of MM and any of its affiliates which are insurance companies licensed to do business in at least one State as defined in section 3(10) of the Act.

(d) An ''ERISA-Covered Account'' means any Account (other than the General Account) in which employee benefit plans subject to Title I or Title II of the Act participate.

(e) ''Disproportionate'' means not in proportion to an Account's existing equity ownership interest in an investment, joint venture or joint venture interest.

The proposed exemption, if granted, will be subject to the express conditions that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions to be consummated pursuant to the exemption.

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

Signed at Washington, D.C., this 2nd day of February, 1998.

Ivan L. Strasfeld,

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

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BILLING CODE 4510–29–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Institute of Museum and Library Services; Grant Application Availability Notice for FY 98

AGENCY: Institute of Museum and Library Services.

ACTION: Grant application availability notice for fiscal year 1998.

SUMMARY: This grant application announcement applies to the following Office of Museum Service programs: General Operating Support (GOS), Conservation Project Support (CP), Conservation Assessment Program (CAP), Museum Assessment Program (MAP I), Museum Assessment Program (MAP II), Museum Assessment Program III (MAP III), Museum Leadership Initiative (MLI) and Professional Services Program (PSP). This announcement also applies to the following Office of Library Services program: National Leadership Grants. All IMLS awards are under 45 CFR part 1180 for Fiscal Year 1998.

ADDRESSES: Institute of Museum and Library Services, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 http://www.imls.fed.us/.

FOR FURTHER INFORMATION CONTACT: For information on museum programs call (202) 606–8540. For information on library programs call (202) 606–5227. For the Director's office call (202) 606–8537. Or contact the agency's website at http://www.imls.fed.us/.

SUPPLEMENTARY INFORMATION: The purpose of for museum awards is to ease the financial burden borne by museums as a result of their increased use by the public and to help them carry out their educational role, as well as other functions. The purpose for National Leadership Grants is to improve library services and collaboration between libraries and museums.

Eligibility

Museums meeting the definitions in 45 CFR 1180.3 may apply for these programs. The definition of ''museum'' includes (but is not limited to) the following institutions if they satisfy the other provisions of this section: Aquariums and zoological parks; botanical gardens and arboretums; nature centers; museums relating to art; history (including historic buildings); natural history; science and technology; and planetariums. To be eligible for support from IMLS a museum must:

Be organized as a public or private nonprofit institution and exit on a permanent basis for essentially educational or aesthetic purposes; and

Exhibit tangible objects through facilities it owns or operates; and

Have at least one professional staff member or the full-time equivalent whose primary responsibility is the care, or exhibition to the public of objects owned or used by the museum; and

Be open and have provided museum services to the general public on a regular basis for at least two full years* prior to the date of application to IMLS; and

Be located in one of the fifty States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

For National Leadership Grants

All types of libraries may apply including public, school, academic, research (which makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public and is not on integral part of an institution of higher learning), special, private (not-for-profit), archives, library agencies, and library consortia. Libraries may apply individually or in partnership.

All disciplines of museums may apply, including art, children and youth, history, natural history, anthropology, nature center, science/technology centers, zoos, aquariums, arboretums, botanical gardens, historic houses and sites, planetariums, general, specialized, museum agencies, and museum consortia. Museums may only apply in a partnership that includes at least one library partner.

Institutions of higher education including public and not-for profit universities and colleges. Graduate library and information science schools may apply as part of an institution of higher education. Institutions of higher education may apply individually or in a partnership.

IMLS recognizes the potential for valuable contributions to the overall goals of the National Leadership Grants program by other public, not-for-profit

* Applicants to the Museum Assessment Program and the Conservation Assessment Program need not be open for two years.