

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration**

[Application No. D-10539, et al.]

**Proposed Exemptions; Pension Plan for Employees of Southco, Inc. (the Pension Plan); and Southco, Inc. Employee Stock Ownership Plan (the ESOP; Collectively, the Plans)****AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Notice of proposed exemptions.

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

**Written Comments and Hearing Requests**

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

**ADDRESSES:** All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**Notice to Interested Persons**

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department

within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

**Pension Plan for Employees of Southco, Inc. (the Pension Plan); and Southco, Inc. Employee Stock Ownership Plan (the ESOP; collectively, the Plans) Located in Concordville, Pennsylvania**

Exemption Application Nos. D-10539 and D-10540

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570 Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(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 (E) of the Code, shall not apply to (1) the proposed purchase and holding by the Pension Plan of common stock (the Company Stock) issued by South Chester Tube Company (the Company), an affiliate of Southco Inc. (the Employer), from the ESOP or the Employer; and (2) the acquisition, holding, and exercise of an irrevocable put option (the Put Option) permitting the Pension Plan to sell the Company Stock back to the Employer for cash in an amount that is the greater of either

(i) the fair market value of the Company Stock at the time of the transaction (as established by a qualified, independent appraiser), or (ii) the Pension Plan's original acquisition cost for the Company Stock.

This proposed exemption is subject to the following conditions:

(a) Immediately after acquisition by the Pension Plan, the aggregate fair market value of the Company Stock does not exceed 7.5% of the total assets of the Pension Plan;

(b) A qualified, independent fiduciary representing the Pension Plan expressly approves each acquisition of the Company Stock, based upon a determination that such acquisition is in the best interests of, and appropriate for, the Pension Plan;

(c) The independent fiduciary monitors the Pension Plan's holding of the Company Stock and takes whatever action necessary to protect the Pension Plan's rights, including, but not limited to, the exercising of the Put Option, if appropriate;

(d) The Pension Plan pays a price that is no greater than the fair market value of the Company Stock at the time of the transaction (as established by a qualified, independent appraiser);

(e) In any sale of the Company Stock by the ESOP to the Pension Plan, the ESOP receives a price that is no less than the fair market value of the Company Stock at the time of the transaction (as established by a qualified, independent appraiser);

(f) The Pension Plan pays no commissions nor other fees in connection with the purchase or sale of the Company Stock;

(g) Each purchase or sale of the Company Stock by the Pension Plan is a one-time transaction for cash;

(h) The Employer's obligations under the Put Option are secured by an escrow account at an independent financial institution and containing cash or U.S. government securities worth at least 25 percent of the fair market value of the Company Stock held by the Pension Plan;

(i) The purchase of the Company Stock by the Pension Plan is not part of an arrangement to benefit the Employer pursuant to the Employer's obligation to redeem shares of the Company Stock from the participants of the ESOP; and

(j) All sales of the Company Stock by the ESOP to the Employer meet the requirements of section 408(e) of the Act and the regulation thereunder (see 29 CFR § 2550.408(e)).

**Summary of Facts and Representations**

1. The Employer, a wholly owned subsidiary of the Company, has its

principal office and place of business in Concordville, Pennsylvania. The Employer is engaged in the business of designing and manufacturing industrial latches and access hardware. These products are sold and distributed nationally and internationally through the Employer's own sales organization, as well as through a network of authorized distributors.

2. The Pension Plan is a defined benefit pension plan. As of December 31, 1998, the Pension Plan had 1324 participants. As of March 31, 1999, the Pension Plan had total assets of \$110,877,665. No contributions to the Pension Plan are currently due, nor have any been made since 1985 because of the full funding limitations of section 412 of the Code.

The ESOP, an employee stock ownership plan, had, as of December 31, 1998, 1052 participants. As of that date, the ESOP had total assets of \$55,192,942. No contributions to the ESOP are currently due.

The trustee for both the Pension Plan and the ESOP is PNC Bank, N.A., located in Philadelphia, Pennsylvania.

3. As of December 31, 1998, the Company had a consolidated net worth of \$105,000,000. Equity interests in the Company and its subsidiaries, including the Employer, are not publicly traded. As of October 11, 1999, approximately 29% of the Company Stock was held by the ESOP; 56.9% was held by three trusts (the Family Trusts) established by the deceased founders of the Employer for the benefit of their family members, including children and grandchildren; 14.1% was held by various other individuals.

Because the ESOP owns 29% and the Family Trusts own 56.9% of the outstanding Company Stock, more than 50% of the Company Stock is owned by persons who are not "independent of the issuer" (within the meaning of section 407(f)(1)(B) of the Act). Thus, the Company Stock is not a "qualifying employer security" (as defined in section 407(d)(5)(A) of the Act) with respect to the Pension Plan. Accordingly, absent an individual exemption, the acquisition of the Company Stock by the Pension Plan would constitute a prohibited transaction.

The Company Stock has been appraised by Coopers & Lybrand L.L.P. (Coopers), an independent public accounting firm that performs annual valuations of the Company Stock. In its appraisal report, dated December 31, 1999, Coopers notes the recognition that the Company has received as a quality producer of industrial fasteners. In arriving at a fair market value for the

Company Stock, Cooper states that it gave consideration to the eight factors in the valuation of the stock of closely-held businesses that are set forth in the Internal Revenue Service's Revenue Ruling 59-60.<sup>1</sup> Coopers also utilized the market approach and the income approach to valuation and concluded that a minority interest in the Company Stock had a fair market value of \$16,096 per share, as of December 31, 1999.

4. It is proposed that the Pension Plan purchase shares of the Company Stock from the ESOP, as the participants of the ESOP elect to diversify their investment under section 401(a)(2) of the Code, or from the Employer, as shares of the Company Stock are redeemed from participants of the ESOP upon distribution to them or otherwise become available.<sup>2</sup> Each purchase of the Company Stock by the Pension Plan will be a one-time transaction for cash.

The applicant represents that the Company Stock represents an excellent long-term investment opportunity for the Pension Plan because the Pension Plan will acquire an equity interest in a strong, stable company. Purchase of the Company Stock would also allow further diversification of the Pension Plan's assets.

As a condition of this proposed exemption, immediately after acquisition by the Pension Plan, the aggregate fair market value of the Company Stock may not exceed 7.5% of the total assets of the Pension Plan. The applicant notes that the 7.5% limitation is more stringent than the 10% limitation of section 407(a)(2) of the Act on the amount of "qualifying employer securities" that may be acquired by a defined benefit pension plan.

The Pension Plan would pay a price that is no greater than the fair market value of the Company Stock at the time of the transaction, as established by a qualified, independent appraiser. Further, the Pension Plan would pay no commissions nor other fees in connection with the purchase of the Company Stock. Finally, the Pension Plan would have the protection of a Put Option, which will enable it to sell the Company Stock back to the Employer for cash in an amount that is the greater of either (i) the fair market value of the Company Stock at the time of the

<sup>1</sup> See Rev. Rul. 59-60, 1959-1 C.B. 237, as modified by Rev. Rul. 65-193, 1965-2 C.B. 370, and as modified and extended by Rev. Rul. 68-609, 1968-2 C.B. 327, and Rev. Rul. 77-287, 1977-2 C.B. 319.

<sup>2</sup> The applicant represents that all sales of the Company Stock by the ESOP to the Employer will meet the requirements of section 408(e) of the Act and the regulation thereunder (see 29 CFR § 2550.408(e)).

transaction (as established by a qualified, independent appraiser), or (ii) the Pension Plan's original acquisition cost for the Company Stock. The Employer will bear the cost of all appraisals necessary for purchases of the Company Stock by the Pension Plan pursuant to this proposed exemption, if granted. The Employer will also secure its obligations under the Put Option by an escrow account at an independent financial institution and containing cash or U.S. government securities worth at least 25 percent of the fair market value of the Company Stock held by the Pension Plan.

5. The Employer has retained TrustCorp America (TrustCorp.) to serve as the independent fiduciary for the Pension Plan with respect to the Pension Plan's purchases of the Company Stock. TrustCorp, an affiliate of the regional brokerage firm Ferris Baker Watts (Ferris), is located in Washington, DC. In its letter dated September 29, 1998, TrustCorp states it directly administers 56 ERISA accounts, representing a wide variety of plans, with approximately \$13.8 million in assets. TrustCorp represents that it is independent of the Employer and derives less than one (1) percent of its annual gross income from the Employer and its affiliates. TrustCorp also acknowledges its duties, responsibilities, and liabilities in acting as a fiduciary under the Act with respect to the investment of any assets of the Pension Plan in the Company Stock or the sale of the Company Stock.

6. TrustCorp will expressly approve in writing each acquisition of the Company Stock, based upon a determination that such acquisition is in the best interests of, and appropriate for, the Pension Plan. Each purchase of the Company Stock made by the Pension Plan will be consistent with the investment guidelines, objectives, and liquidity needs of the Pension Plan at the time of the transaction. TrustCorp will review all pertinent information, including the most recent independent appraisal of the Company Stock, the current financial condition of the Pension Plan, the terms of the purchase, and the current financial condition of the Company. TrustCorp will analyze the valuation approach utilized by the appraiser of the Company Stock and determine, among other things, whether the appraiser's minority interest discount for establishing the fair market value of the Company Stock was appropriate.

As the fiduciary responsible for any assets of the Pension Plan invested in the Company Stock, TrustCorp will direct the exercise of all voting and

other ownership rights associated with the Company Stock. TrustCorp will also monitor the Pension Plan's holding of the Company Stock and take whatever action necessary to protect the Pension Plan's rights, including, but not limited to, the exercising of the Put Option, if appropriate. If TrustCorp exercises the Put Option, no more purchases of the Company Stock will be made by the Pension Plan pursuant to this proposed exemption, if granted.

7. In summary, the applicant represents that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because (a) Immediately after acquisition by the Pension Plan, the aggregate fair market value of the Company Stock will not exceed 7.5% of the total assets of the Pension Plan; (b) TrustCorp, as the independent fiduciary for the Pension Plan, will expressly approve each acquisition of the Company Stock, based upon a determination that such acquisition is in the best interests of, and appropriate for, the Pension Plan; (c) TrustCorp will monitor the Pension Plan's holding of the Company Stock and take whatever action necessary to protect the Pension Plan's rights, including, but not limited to, the exercising of the Put Option, if appropriate; (d) the Pension Plan will pay a price that is no greater than the fair market value of the Company Stock at the time of the transaction (as established by a qualified, independent appraiser); (e) the Pension Plan will pay no commissions nor other fees in connection with the purchase or sale of the Company Stock; (f) each purchase or sale of the Company Stock by the Pension Plan will be a one-time transaction for cash; and (g) the Employer's obligations under the Put Option will be secured by an escrow account at an independent financial institution and containing cash or U.S. government securities worth at least 25 percent of the fair market value of the Company Stock held by the Pension Plan.

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

**Robert P. Yoo MD, PC Profit Sharing Plan (the Plan) Located in Hyannis, Massachusetts**

[Applicant No. D-10842]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act

and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, will not apply to the proposed sale (the Sale) by the Plan of a parcel of unimproved real property (the Property) to Robert P. Yoo, M.D. (Dr. Yoo), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) All terms and conditions of the Sale are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(b) The Sales price is the greater of \$113,263 or the fair market value of the Property as of the date of the Sale;

(c) The fair market value of the Property has been determined by an independent, qualified appraiser;

(d) The Sale is a one-time transaction for cash; and

(e) The Plan does not pay any commissions, costs or other expenses in connection with the Sale.

**Summary of Facts and Representations**

1. Robert P. Yoo MD, PC (the Employer) is the sponsor of the Plan. Dr. Yoo is the sole owner and shareholder of the Employer. The Employer is in the business of plastic surgery. The Employer was incorporated on October 1, 1979, in the State of Massachusetts and is located in Hyannis, Massachusetts.

The Plan is a defined contribution profit sharing plan which was established on October 1, 1979. As of May 18, 2000, the Plan had four participants, who are as follows: Dr. Yoo, Marcia C. Fischer, Hilda S. Cohen, and Catherine M. Damon. Dr. Yoo and his wife, Jane E. Yoo, are the Trustees of the Plan. As of November 8, 1999, the Plan had total assets of \$690,923.45.

2. In 1984, the Plan purchased the Property from Robert W. Powers and Rita S. Powers, unrelated third parties, for a purchase price of \$55,000.<sup>3</sup> It is represented that Dr. Yoo and Jane E. Yoo, as Plan trustees, made the original decision to purchase the Property as a long term growth investment for the Plan. The Property is a 5.5 acre parcel of unimproved real property, located at

131 Ashley Drive, Centerville, Massachusetts. The Property is adjacent to property owned and resided on by Dr. Yoo and his wife. The applicant represents that the Property has not been leased to, or used by, any party in interest with respect to the Plan since the date of acquisition by the Plan. The value of the Property represents approximately 14.9% of the Plan's total assets as of May 18, 2000. The applicant represents that the only expenditure the Plan has paid since owning the Property was \$16,500 in real estate taxes from 1984 (*i.e.*, the year of original acquisition) until May 18, 2000. Therefore, the total cost to the Plan for the Property was \$71,500 as of May 18, 2000 (\$16,500 + \$55,000 = \$71,500). From the time of the purchase through May 18, 2000, the Property has remained vacant and no income has been generated.

3. The Property was appraised (the Appraisal) on September 27, 1999, by Meredith A. McClane (Ms. McClane), a Certified Residential Real Estate Appraiser. Ms. McClane is independent of the Employer and is an appraiser with Davis Appraisals located in West Hyannisport, Massachusetts.

Because of the lack of data on recent sales of unimproved property in the area in which the Property is located, Ms. McClane determined the best use and highest value of the Property was associated with valuing the Property consistent with the so-called Development Procedure, where undeveloped land is assumed to be subdivided, developed and sold. Development costs, incentive costs, and carrying charges are subtracted from the estimated proceeds of the sale, and the net income projection is discounted over the estimated period required for market absorption of the developed sites to derive an indication of value for the land being appraised. Ms. McClane determined that the fair market value of the Property was \$102,966 as of September 27, 1999.

Additionally, the applicant will pay to the Plan a premium of \$10,297 as recommended by Ms. McClane as a result of the applicant's ownership of improved real property which is adjacent to the Property. Ms. McClane states that this upward adjustment, commonly referred to as "assemblage" value, reflects the willingness of a purchaser to pay above market value for a parcel of property in order to preserve such purchaser's interest in their present holdings of other parcels which are adjacent to such property. Therefore, based on the valuation procedure plus the premium, the total proposed purchase price for the Property was

<sup>3</sup> The Department expresses no opinion herein as to whether the acquisition and holding of the Property by the Plan violated any of the provisions of Part 4 of Title I of the Act.

\$113,263 as of May 18, 2000 (\$102,966 + \$10,297 = \$113,263).

4. The applicant represents that the Property's rate of appreciation appears to have plateaued and believes that the continued ownership of this relatively illiquid asset is not in the best interest of the Plan and its participants and beneficiaries. The transaction will be a one-time cash sale, and will enable the Plan to diversify its investment portfolio.

Furthermore, the applicant represents that the proposed transaction is in the best interest and protective of the Plan because the Sale will be for an amount equal to the greater of: (i) \$113,263, which represents the sum of the fair market value of the Property as of September 27, 1999 (*i.e.*, \$102,966) and the premium based on the "assemblage" value (*i.e.*, \$10,297), as determined by the Appraisal and Ms. McClane; or (ii) the current fair market value of the Property, as established by an independent, qualified appraiser at the time of the Sale. This amount exceeds the original acquisition cost of the Property, plus expenses and real estate taxes incurred by the Plan from the date of the acquisition until the date of the proposed Sale (*i.e.*, a total cost of \$71,5000 as of May 18, 2000). The Plan will not pay any commissions, costs or other expenses in connection with the Sale. The applicant states that the Appraisal will be updated at the time of the transaction.<sup>4</sup>

5. In summary, the applicant represents that the subject transaction satisfies the statutory criteria contained in section 408(a) of the Act and section 4975(c)(2) of the Code for the following reasons:

(a) All terms and conditions of the Sale will be at least as favorable to the Plan as those which the Plan could obtain in an arms-length transaction with an unrelated party;

(b) The fair market value for Property has been determined by an independent, qualified appraiser;

(c) The Sale will be a one-time transaction for cash;

(d) The Plan will not pay any commissions, costs or other expenses in connection with the Sale;

(e) The Plan will receive an amount equal to the greater of:

(i) \$113,263; or

(ii) the current fair market value of the Property, as established by an independent, qualified appraiser at the time of the Sale.

<sup>4</sup> For this purpose, the Department assumes that the updated appraisal of the Property will take into account any new data on recent sales of similar property in the local real estate market which may affect the valuation conclusion at that time.

**Notice to Interested Persons:** Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

Khalif Ford of the Department, telephone (202) 219-8883 (this is not a toll-free number).

**Actuarial Sciences Associates, Inc. (ASA) and ASA Fiduciary Counselors Inc. (ASA Counselors) Located in Alexandria, VA**

[Exemption Application No: D-10879]

**Proposed Exemption**

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>5</sup>

*I. General Transactions*

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply to a transaction between a party in interest with respect to the Plumbers and Pipe Fitters National Pension Fund (the Fund) and an account (the Account) that holds certain assets of the Fund managed by ASA or ASA Counselors, while serving as independent named fiduciary (the Named Fiduciary) in connection with Prohibited Transaction Exemption 99-46 (PTE 99-46)(64 FR 61944, November 15, 1999); provided that the following conditions are satisfied:

(a) ASA or ASA Counselors, as Named Fiduciary of the Account, is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets under its management and control in excess of \$50,000,000, and shareholders' equity or partners' equity, as defined in Section III(h), below, in excess of \$750,000;

(b) At the time of the transaction, as defined in Section III(i), below, the party in interest or its affiliate, as defined in Section III(a), below, does not have, and during the immediately

preceding one (1) year has not exercised, the authority to—

(1) appoint or terminate the Named Fiduciary as a manager of the Account, or

(2) negotiate the terms of the management agreement with the Named Fiduciary (including renewals or modifications thereof) on behalf of the Fund;

(c) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81-6 (PTCE 81-6)<sup>6</sup> (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)<sup>7</sup> (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)<sup>8</sup> (relating to certain mortgage financing arrangements);

(d) The terms of the transaction are negotiated on behalf of the Account under the authority and general direction of the Named Fiduciary, and either the Named Fiduciary, or (so long as the Named Fiduciary retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the Named Fiduciary, makes the decision on behalf of the Account to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(e) The party in interest dealing with the Account is neither the Named Fiduciary nor a person related to the Named Fiduciary, as defined in Section III(f), below;

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

(g) Neither the Named Fiduciary nor any affiliate thereof, as defined in Section III(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in the Named Fiduciary is a person who, within the ten (10) years immediately preceding the transaction, has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) Any felony involving abuse or misuse of such person's employee

<sup>5</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

<sup>6</sup> 46 FR 7527, January 23, 1981.

<sup>7</sup> 48 FR 895, January 7, 1983.

<sup>8</sup> 47 FR 21331, May 18, 1982.

benefit plan position or employment, or position or employment with a labor organization;

(2) Any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) Income tax evasion;

(4) Any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) Any other crimes described in section 411 of the Act.

For purposes of this Section I(g), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal.

## II. Specific Exemption Involving Places of Public Accommodation

If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 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, effective November 8, 1999, to the furnishing of services, facilities, and any goods incidental thereto by a place of public accommodation owned by the Account managed by the Named Fiduciary to a party in interest with respect to the Fund, if the services, facilities, and incidental goods are furnished on a comparable basis to the general public.

## III. Definitions

(a) For purposes of Section I(b), above, of this proposed exemption, an "affiliate" of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as described in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets. A named fiduciary (within

the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of Section I(b) if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(g), above, of this proposed exemption, an "affiliate" of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as described in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person) or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of Fund assets.

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

(d) The term "goods" includes all things which are movable or which are fixtures used by the Account but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights, and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

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

(f) The Named Fiduciary is "related" to a party in interest for purposes of Section I(e), above, of this proposed exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in the Named Fiduciary, or if the Named Fiduciary (or a person controlling, or controlled by, the Named Fiduciary) owns a 5 percent

(5%) or more interest in the party in interest. For purposes of this definition:

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

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

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

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

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

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

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

(g) The term "relative" means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(h) For purposes of Section I(a) of this proposed exemption, the term "shareholders' equity" or "partners' equity" means the equity shown in the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this proposed exemption, in accordance with generally accepted accounting principles.

(i) The "time" as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the effective date of this exemption, if granted, or a renewal that requires the consent of the Named Fiduciary occurs on or after such effective date, and the requirements of this proposed exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this proposed exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this proposed exemption.

### *Temporary Nature of Exemption*

The Department has determined that the relief provided to ASA and ASA Counselors by this proposed exemption will be temporary in nature. The exemption, if granted, will be effective, November 8, 1999, through December 20, 1999, for ASA and from December 20, 1999, and thereafter for ASA Counselors. The exemption, if granted, will expire on the day which is five (5) years from November 8, 1999. Accordingly, the relief provided by this proposed exemption will not be available upon expiration of such five-year period for any new or additional transactions described herein after such date. Should ASA or ASA Counselors wish to extend, beyond the five-year period, the relief provided by this proposed exemption, they may submit another application for exemption.

### *Preamble*

In October 1997, the Department received an exemption application (D-10514) from the Fund requesting relief from the prohibited transaction provisions of section 406(a) and (b) of the Act. The Department published a notice of proposed exemption (the Notice) in the **Federal Register** on May 29, 1998, at 63 FR 29453. The final exemption, Prohibited Transaction Exemption 99-46 (PTE 99-46), was published in the **Federal Register** on November 15, 1999, at 64 FR 61944. PTE 99-46 provides an exemption, effective October 9, 1997, from the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 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, for the transfer to the Fund from the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Union), a party in interest with respect to the Fund, of the Union's limited partnership interests in the Diplomat Properties, Limited Partnership (the Partnership), the sole asset of which is the Diplomat Resort and Country Club (the Property), and the transfer to the Fund of the Union's stock in Diplomat Properties, Inc., the corporate general partner of the Partnership; provided certain conditions are satisfied. In response to issues raised by the commentators after the publication of the Notice, the applicants agreed to a number of additional requirements, including the retention by the Fund of an independent Named Fiduciary to oversee the Fund's investment in the Partnership. In

connection with PTE 99-46, ASA was appointed, effective November 8, 1999, by the trustees of the Fund (the Trustees) to serve as the Named Fiduciary of the Account which holds the Fund's interest in the Partnership.

### **Summary of Facts and Representations**

1. The Fund is a Taft-Hartley multi-employer defined benefit pension fund. The Fund has approximately 123,349 participants and beneficiaries, as of March 2, 2000. As of November 30, 1999, the Fund had approximately \$4.3 billion in assets. The assets of the Fund include the interests in the Partnership and in the corporate general partner of the Partnership which the Fund acquired pursuant to PTE 99-46. The sole asset of the Partnership consists of the Property located in Hollywood and Hallandale, Florida. The Property consists of several parcels, including an oceanfront hotel complex, a motel, a vacant parcel of oceanfront real estate approved for development as condominiums, a golf course, a country club, and a marina (collectively, the Project).

The Fund currently owns 100 percent (100%) of the equity interests in the Partnership. Such interests in the Partnership are not publicly offered securities. Pursuant to regulations issued by the Department, 29 CFR § 2510.3-101 (the Plan Assets Regulation), when a plan acquires an equity interest in an entity, which interest is not a publicly offered security or a security issued by an investment company registered under the Investment Company Act of 1940, the underlying assets of the entity will be deemed to include plan assets, unless certain exceptions apply. However, when 100 percent (100%) of the outstanding equity interests in such entity are owned by a plan or a related group of plans, such exceptions do not apply (see 29 CFR § 2510.3-101(h)(3) of the Plan Asset Regulation). Accordingly, in the situation described herein the applicants represent that the Property, which is the sole asset of the Partnership, would be deemed to be an asset of the Fund; and any transaction involving the Property is treated as a transaction involving Fund assets for purposes of the Act.

2. The request for relief from the prohibited transaction provisions of the Act was filed on behalf of ASA and ASA Counselors. ASA is a Delaware corporation which provides a broad range of benefit consulting services. ASA became a registered investment adviser under the Investment Advisers Act of 1940, as amended, (the Advisers Act) on November 19, 1998, and ceased

to be a registered investment adviser on January 29, 2000.<sup>9</sup> ASA Counselors, a wholly owned subsidiary of ASA, was established to provide investment advisory services. ASA Counselors became a registered investment adviser under the Advisers Act, effective November 29, 1999. It is represented that ASA Counselors has a net worth in excess of \$750,000. Ellen A. Hennessy, Esq. serves as President and CEO of ASA Counselors and is a Senior Vice President of ASA.

In connection with PTE 99-46, ASA was appointed, effective November 8, 1999, by the Trustees to serve as the Named Fiduciary of the Account, which holds the Fund's interest in the Partnership and the Property which is the sole asset of the Partnership. In this regard, it is represented that the Trustees chose ASA from a list of potential independent fiduciaries that were acceptable to the Department. The terms of the appointment of ASA are set forth in the Independent Named Fiduciary Agreement (the Agreement) between the Fund and ASA. It is represented that in the course of granting PTE 99-46, the terms and conditions under which ASA was to be engaged as the Named Fiduciary of the Account were reviewed by the Department of Labor. It is represented that those terms and conditions permitted the assignment of the Agreement to an affiliate of ASA, provided that such affiliate met certain conditions.

Subsequently, it is represented that when ASA Counselors became a registered investment adviser, and began performing the investment advisory services previously performed by ASA, ASA assigned its responsibilities under the Agreement to ASA Counselors with the consent of the Trustees of the Fund and the Department, in accordance with the terms of the Agreement. For this reason, ASA and ASA Counselors have requested that the proposed exemption be applicable to both ASA and ASA Counselors.

Furthermore, the applicants have requested retroactive relief for transactions described herein, effective as of November 8, 1999, the date of ASA's appointment, to cover the entire period that either ASA or ASA Counselors has acted as the Named Fiduciary. Specifically, it is represented that ASA served as Named Fiduciary with respect to the Account from

<sup>9</sup>The applicants represent that ASA was a registered investment adviser throughout the period it acted as Named Fiduciary, pursuant to PTE 99-46, from November 8, 1999, through December 20, 1999.

November 8, 1999, until December 20, 1999, and that ASA Counselors has served and will serve as Named Fiduciary thereafter. While it is represented that neither ASA nor ASA Counselors is aware of any transaction that would have been a prohibited transaction in the absence of the requested exemption, the size of the Fund and the scope of the Project would cause extreme administrative difficulties in attempting to identify whether any inadvertent party in interest transactions have occurred since November 8, 1999.

3. ASA and ASA Counselors have requested a general exemption, rather than an exemption involving a specific transaction with a particular party in interest. Due to the size and complexity of the Fund, the identities of the parties in interest which may be involved in the subject transactions were not known at the time the application was filed. Because the Property is a complex real estate development, involving a variety of commercial spaces and public accommodation, relief from the prohibited transaction provisions of the Act has been requested for transactions with parties in interest that are expected to occur in the ordinary course of the operation of the Property.

4. The requested exemption would permit ASA, effective from November 8, 1999, until December 20, 1999, and thereafter ASA Counselors, while serving as the Named Fiduciary of the Account, to engage on behalf of the Account in certain transactions with parties in interest with respect to the Fund, without violating section 406(a)(1)(A) through (D) of the Act. Further, in the case of transactions involving places of public accommodation, the requested exemption would permit, effective November 8, 1999, the furnishing of services, facilities, and any goods incidental thereto by a place of public accommodation owned by the Account that is managed by the Named Fiduciary, to a party in interest with respect to the Fund, if the services, facilities, and incidental goods are furnished on a comparable basis to the general public.

With respect to the furnishing of services, facilities, and any goods incidental thereto by places of public accommodation owned by the Account, the applicants maintain that, absent this exemption, it would not be feasible to monitor routine transactions in the operation of the hotel complex, the golf course, and the other components of the Property. In this regard, given the large number of participants and beneficiaries of the Fund, as well as the large number

of contributing employers and service providers to the Fund, and their affiliates, it is not possible to prevent party in interest transactions from occurring. Accordingly, if granted, this exemption will permit the furnishing of services, facilities, and any goods incidental thereto by places of public accommodation owned by the Account, and managed by ASA or ASA Counselors, to parties in interest with respect to the Fund, if such services, facilities and incidental goods are furnished on a comparable basis to the general public.

With respect to transactions with parties in interest, other than those involving places of public accommodation, the requested exemption, if granted, would provide relief to ASA or ASA Counselors, while serving as Named Fiduciary of the Account, which is similar to the relief provided to qualified professional asset managers (QPAMs or a QPAM) under Prohibited Transaction Class Exemption 84-14 (PTCE 84-14).<sup>10</sup> In general, PTCE 84-14 permits various parties in interest with respect to an employee benefit plan to engage, under certain conditions, in transactions involving plan assets, if the assets are managed by persons defined under the exemption as QPAMs. The applicants have represented that the Fund currently has engaged CS Capital Management Inc. (CSC), to manage the Project.<sup>11</sup> In this regard, ASA Counselors has the authority to retain or remove CSC. Under the terms of the Agreement, ASA and, pursuant to the assignment, ASA Counselors have agreed to indemnify the Fund for any losses or damages incurred by the Fund as a result of a breach of fiduciary duty by any QPAM retained to manage the Project.

Specifically, ASA and ASA Counselors have requested relief under conditions which are similar to those required in Part I of PTCE 84-14.<sup>12</sup> In this regard, Part I of PTCE 84-14

<sup>10</sup> 49 FR 9494 (March 13, 1984), as corrected, 50 FR 41430 (October 10, 1985).

<sup>11</sup> The applicants represent that CSC meets the definition of a QPAM, as set forth in Part V(a) of PTCE 84-14, and that PTCE 84-14 is available to provide relief from the prohibited transaction provisions of the Act for transactions between parties in interest with respect to Fund and the Project while under the management of CSC. The Department is offering no view, herein, as to whether CSC has satisfied all of the conditions, as set forth in PTCE 84-14, nor is the Department, herein, providing CSC any relief with respect to such transactions.

<sup>12</sup> It is represented that ASA and ASA Counselors are not requesting an exemption for the type of transactions which are described in Part II and Part III of PTCE 84-14, and would be covered by that exemption if the conditions stated therein were met.

provides relief from the restrictions of section 406(a)(1)(A)-(D) of the Act and 4975(c)(1)(A)-(D) of the Code for transactions between a party in interest with respect to an employee benefit plan and an investment fund in which such plan has an interest which is managed by a QPAM; provided certain conditions are met. One such condition (the Diverse Clientele Test), as set forth in Part I(e) of PTCE 84-14, requires that:

The transaction is not entered into with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof \* \* \*) or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction.

In this regard, it is represented that due to the nature and scope of the responsibilities of the Named Fiduciary, the assets of the Fund held by the Account managed by ASA or ASA Counselors exceed 20 percent (20%) of the total assets that those entities have under management. The applicants represent that they are unable to satisfy the Diverse Clientele Test found in Part I(e) of PTCE 84-14 and accordingly, request the relief which would be provided by this proposed exemption.

5. Notwithstanding their inability to satisfy the Diverse Clientele Test, the applicants maintain that the requested administrative exemption should be granted where it can be demonstrated that the applicants, like a QPAM, act in the best interest of plan participants, unencumbered by a relationship with parties in interest. With regard to independence, it is represented that neither ASA nor ASA Counselors had any relationship with the Fund or with the Trustees, prior to the execution of the Agreement and the appointment of ASA as Named Fiduciary. In the opinion of the applicants, the Department's involvement in the appointment process ensured that when selected to serve as the Named Fiduciary of the Account, ASA was independent and qualified to act in that capacity. Furthermore, restrictions on the removal (or assignment) of the Named Fiduciary by the Trustees without either the consent of the Department or a court order obtained for cause, in the opinion of the applicants, provide sufficient protection to ensure the continued independence of ASA and ASA Counselors. Furthermore, it is represented that the annual fee paid by the Fund represents less than one-fourth (1/4) of one percent (1%) of the more than \$100 million in total annual

revenues received by ASA and its subsidiaries in 1998 and 1999.

6. In the opinion of the applicants, the proposed exemption is in the best interest of the Fund. In this regard, if granted, the proposed exemption would facilitate the management of the Property in the manner most efficient and beneficial to the participants and beneficiaries that have interests in the Fund. As discussed above, the proposed exemption would facilitate routine operations of the Property. In the absence of the exemption, it would be burdensome to examine each transaction to determine whether such transaction might involve a party in interest. Furthermore, without the exemption, the Account could be prevented from entering into beneficial financial transactions with parties in interest that would enhance the return to the Fund.

7. The applicants maintain that in granting PTCE 84-14, the Department has already determined that the type of exemption requested by ASA and ASA Counselors is administratively feasible. Accordingly, in the opinion of the applicants, the requested exemption would not impose any administrative burdens on the Department which are not already imposed by PTCE 84-14.

8. It is represented that the conditions of the proposed exemption provide adequate safeguards for the protection of the rights of participants and beneficiaries of the Fund, in that ASA and ASA Counselors satisfy the requirements set forth in the definition of a QPAM, pursuant Part V(a) of PTCE 84-14. In this regard, with respect to the capitalization requirement, ASA and ASA Counselors represent that they each have shareholder's equity of more than \$750,000. Further, in connection with the transfer of its responsibilities to ASA Counselors, ASA has agreed that it will cause ASA Counselors to maintain shareholders' equity of at least \$750,000 while the Agreement is in effect. Furthermore, as of the last day of the most recent fiscal year, the total client assets under the management and control of ASA or ASA Counselors exceeds \$50,000,000, as required for a QPAM under Part V(a)(4) of PTCE 84-14. In this regard, the total assets under the management and control of ASA, during the period from November 8, 1999, through December 20, 1999, and under the management and control of ASA Counselors thereafter, have exceeded \$50,000,000 largely due to the assets in the Account which either ASA or ASA Counselors have managed while serving as the Named Fiduciary in connection with PTE 99-46.

9. The applicants maintain that the proposed exemption would be protective of the rights of participants and beneficiaries of the Fund because of the on-going oversight of both the Trustees and the Department. In this regard, it is represented that under the terms of the Agreement, ASA Counselors periodically reports to both the Trustees and the Department. In the absence of the proposed exemption, ASA and ASA Counselors may be unable to exercise the degree of control over the financing and operations of the Project, as contemplated by the Department. The Fund has more than \$4 billion in assets and has party in interest relationships with a variety of financial institutions and other service providers. In the opinion of the applicants, without the requested exemption, the pool of possible lenders and equity investors would be unduly restricted, because any financial institution that has pre-existing relations with the Fund would be excluded from dealing with the Account.

10. The proposed exemption contains conditions which are designed to ensure the presence of adequate safeguards to protect the interests of the Fund regarding the subject transactions. Except for the Diverse Clientele Test, as set forth in Part I(e) of PTCE 84-14, the proposed exemption contains conditions substantially similar to those which are set forth in Part I of PTCE 84-14. In this regard, the transactions which are the subject of this proposed exemption cannot be part of an agreement, arrangement, or understanding designed to benefit a party in interest. Furthermore, neither the Named Fiduciary nor a person related to the Named Fiduciary may engage in transactions with the Account.

11. In summary, the applicants (*i.e.*, ASA and ASA Counselors) represent that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things:

(a) The Named Fiduciary for the Account is an investment adviser registered under the Advisers Act with assets in excess of \$50,000,000 under its management and control, and shareholders' equity in excess of \$750,000;

(b) At the time of the transaction, the party in interest or its affiliate does not have, and during the preceding one (1) year has not exercised, the authority to appoint or terminate the Named Fiduciary, as a manager of the Fund's assets in the Account, or to negotiate the terms on behalf of the Fund (including

renewals or modifications) of the management agreement;

(c) The subject transactions are not those which are described in PTCE 81-6; PTCE 83-1; or PTCE 82-87;

(d) The terms of the transactions were negotiated on behalf of the Account by, or under the authority and general direction of ASA until December 20, 1999, and thereafter have been and will continue to be negotiated by ASA Counselors; and either ASA or ASA Counselors (or a property manager acting in accordance with written guidelines established and administered by ASA until December 20, 1999, and thereafter by ASA Counselors) has made or will make the decision on behalf of the Account to enter into each transaction;

(e) The transactions are not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(f) At the time each transaction is entered into, renewed, or modified, the terms of the transaction are at least as favorable to the Account as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither ASA nor ASA Counselors, nor any affiliate thereof, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in ASA or ASA Counselors, is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of any felony, as set forth in Section I(g) of this proposed exemption;

(h) Neither ASA nor ASA Counselors, nor a person related thereto, engages in the transactions with the Account which are the subject of this proposed exemption; and

(i) Services, facilities, and any goods incidental thereto, provided by a place of public accommodation which is owned by the Account managed by the Named Fiduciary will be furnished to any party in interest on a basis which is comparable to the furnishing of such services, facilities and incidental goods to the general public.

#### Notice to Interested Persons

ASA will furnish a copy of the Notice of Proposed Exemption (the Notice) along with the supplemental statement (the Supplemental Statement), as described at 29 CFR § 2570.43(b)(2), to the Trustees of the Fund and to interested persons who commented in writing to the Department in connection with PTE 99-46, to inform such persons of the pendency of this exemption. In this regard, the Trustees of the Fund include the President, Secretary, and

Treasurer of the Fund, who are the three most senior officials of the Union whose members are participants in the Fund. Given the technical nature of the proposed exemption and the fact that participants of the Fund were individually notified in connection with the Department's consideration of PTE 99-46, the applicants believe that it should be sufficient to meet the Department's notification requirements if Union officials receive a copy of the Notice and the Supplemental Statement on behalf of the Union membership and that individual notification be provided only to those participants in the Fund who have shown an interest in the investment made in the Property to which the proposed exemption relates. A copy of the Notice, as it appears in the **Federal Register**, and a copy of the Supplemental Statement, will be provided, by first class mailing, within fifteen (15) days of the publication of the Notice in the **Federal Register**. Comments and requests for a hearing are due on or before 45 days from the date of publication of the Notice in the **Federal Register**.

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

**United Food and Commercial Workers Union Local 789 and St. Paul Food Employers Health Care Plan (the Plan) Located in Bloomington, Minnesota**

[Application No. L-10872]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act shall not apply to the proposed purchase of prescription drugs, at discount prices, by Plan participants and beneficiaries, from Rainbow Pharmacies and Rainbow Foods Group, Inc. (RFG)(collectively, referred to as Rainbow), parties in interest with respect to the Plan, provided the following conditions are satisfied: (a) The terms of the transaction are at least as favorable to the Plan as those the Plan could obtain in a similar transaction with an unrelated party; (b) any decision by the Plan to enter into agreements governing the subject purchases will be made by Plan fiduciaries independent of Rainbow; (c) at least 50% of the preferred providers participating in the Preferred Pharmacy

Network (PPN) which will be selling prescription drugs to the Plan's participants and beneficiaries will be unrelated to Rainbow; (d) Rainbow will provide prescription drugs to eligible persons under the identical conditions and for the identical amounts as under the Snyder Drug Stores, Inc. (Snyder) and SuperValue Pharmacies, Inc. (SPI) Agreements; and (e) the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.

**Summary of Facts and Representations**

1. The Plan is a multi-employer employee welfare benefit plan which has been in existence since 1966. The Plan was established to provide health and welfare benefits including life, sickness, accident and other benefits for participants and their beneficiaries. The Plan is directed by a ten person joint board of trustees comprised of five individuals selected to represent the United Food and Commercial Workers Union Local 789 and five individuals selected to represent the retail food employers. The Plan currently has approximately 5,922 participants and beneficiaries, and \$11,500,000 in total assets.

2. RFG is a large retail grocer in Minnesota, incorporated in Nevada. In 1999, RFG began operating pharmacies in some of its grocery stores under the name Rainbow Pharmacies. Rainbow Pharmacies is part of RFG. RFG has filed a "doing business as" for the name Rainbow Pharmacies. The applicant represents that Rainbow is a party in interest to the Plan because they make contributions to the Plan on behalf of their employees that are participants in the Plan.

3. Under the Plan, participants have two alternative ways to receive the prescription drug benefit. One, a participant may have a prescription filled at an out-of-network pharmacy, pay the pharmacy's charge for the prescription at the time of dispensing, and submit a reimbursement claim to the Plan Administrator. The Plan would then reimburse the participant in full for the pharmacy's charge for the prescription, less the \$5.00 participant co-payment. Two, a participant may have a prescription filled at a pharmacy within a preferred network, and pay only the \$5.00 co-payment. The pharmacy then submits the claim for the remaining agreed-upon cost for the prescription directly to the Plan Administrator.

4. Effective January 1, 1994, the trustees of the Plan implemented the Plan's first prescription drug PPN in order to manage prescription drug price

and utilization, manage related costs, provide ready participant access to courteous and reliable pharmacy services and professional advice, and to minimize or eliminate eligibility policing problems. The first Preferred Provider Agreement (the Agreement), the result of arm's-length negotiations, is between the Plan and Snyder. Snyder is not a party in interest with respect to the Plan.

5. Under the Agreement, Snyder agrees to provide prescription drugs to the Plan participants and their beneficiaries consistent with the Plan document and the Agreement at a specified reduced cost in exchange for the potential to realize an expanded customer base due to its status as a preferred pharmacy with respect to the Plan. The material elements of the Agreement are as follows:

- (1) Snyder agrees to dispense covered prescription drugs, using generic drugs when available, within prescribed dosage units for one dispensing fee;
- (2) The agreed upon dispensing fee is:
  - (a) The lesser of:
    - (i) The Usual and Customary charge for such prescription drug, or
    - (ii) The sum of the Drug Acquisition Cost plus the Professional Dispensing Fee.

The Drug Acquisition Cost for each prescription drug provided by the Pharmacy to an Eligible Person shall be defined to be the lesser of the following amounts:

- (a) 90% of the average wholesale price (AWP) for such prescription drug; or
- (b) The lowest stated maximum allowable cost (MAC) for such prescription drug on the most recently published pharmaceutical industry maximum allowable cost list, however, in no event will the MAC price exceed the Federal Upper Limits (as published by the Federal Government under the Federal Medical Entitlement Program).

The Professional Dispensing Fee shall equal \$2.45 for each dispensing of a prescription drug in accordance with the Plan and the Agreement.

(3) Neither the Plan nor the participant is liable for the cost of any prescription drug dispensed contrary to the Agreement;

(4) Snyder will provide eligibility identification cards, maintain a current computerized eligibility list, and verify eligibility prior to dispensation;

(5) The Plan receives 67 1/2 percent of formulary rebates received by Snyder based on the dispensing of each manufacturer's formulary drugs under the Plan and the Agreement. The Plan also receives quarterly formulary reports of formulary drugs dispensed and rebates received;

(6) The Plan has the right to inspect Snyder's records to audit claims and formulary rebates;

(7) Snyder must provide monthly prescription drug utilization reports; and

(8) The Plan has the right to terminate the Agreement upon a maximum of 60 days written notice.

6. The Plan's trustees have also negotiated an identical Agreement with SPI, a large retail grocer in Minnesota. It expanded the PPN by including the pharmacies located in Cub Foods (Cub) stores, a wholly owned subsidiary of SPI. The terms of the SPI Agreement are identical to those of the Snyder Agreement. The fees are determined by a combination of amounts objectively established by reference to industry resources and beyond the control or manipulation of SPI.

SPI and Cub are parties in interest with respect to the Plan because they make contributions to the Plan on behalf of their employees that are participants in the Plan. Accordingly, the applicant received an exemption, Prohibited Transaction Exemption (PTE) 95-61, 80 FR 37,689 (July 21, 1995).

Pursuant to PTE 95-61, the Plan entered into the Agreement with SPI to maximize the benefits that can be provided to participants and their beneficiaries. The reduction in costs paid by the Plan for prescription drugs enabled the Plan to maintain its current level of benefits to the participants and their beneficiaries. Expanding the PPN to include SPI, thereby increasing the utilization of the PPN, enabled the Plan to obtain additional discounts on prescriptions currently dispensed out-of-network. The Plan receives even greater savings due to the negotiated fees rather than the usual and customary billing of out-of-network pharmacies.

Specifically, the applicant represents that since its agreement with Snyder in 1994, the Plan has saved \$53,188 for ingredient costs alone. The savings over the usual and customary billing of out-of-network pharmacies was estimated to be \$90,000. Further, prescriptions dispensed by Snyder resulted in additional savings of \$10,000. In reference to the SPI Agreement, during 1996, the applicant represents savings amounted to approximately \$28,800 for ingredients alone. The savings over the usual and customary billing of out-of-network pharmacies is estimated to be approximately \$36,000.

7. The applicant represents that the Plan wishes to enter into a preferred pharmacy agreement with Rainbow which is similar to the Agreements entered into between the Plan and Snyder and SPI. The applicant

represents that the financial terms of all three Agreements are identical and will not deviate in the future from the terms of the Snyder Agreement, including any amendments which may be made in the future to the Snyder Agreement.

The applicant further represents that pursuant to the Rainbow Agreement, Rainbow will provide prescription drugs to eligible persons under the identical conditions and for the identical amounts as under the Snyder and SPI Agreements.

The applicant notes that the only remuneration that will be paid to Rainbow by the Plan will be the fees as determined under the Agreement. Further, the fees are determined by the combination of amounts objectively established by reference to industry resources and beyond the control and/or manipulation of Rainbow.

8. The Plan seeks to maximize the benefits that can be provided to participants and their beneficiaries. Reducing the cost paid by the Plan for prescription drugs will enable the Plan to maintain its current level of benefits to the participants and their beneficiaries. Expanding the PPN to include Rainbow, thereby increasing the utilization of the PPN, will enable the Plan to obtain additional discounts on prescriptions currently dispensed out-of-network. The Plan will be able to receive even greater savings due to the negotiated fees rather than the usual and customary billing of out-of-network pharmacies. The applicant represents that it is projected that the Plan will realize an additional savings of \$15,000 by the addition of Rainbow to the PPN. The requested exemption is also in the interest of the Plan because preferred pharmacies will be more conveniently located as a result of the expanded PPN.

9. The applicant represents that the PPN will be at least 50% composed of preferred providers that are not affiliated with Rainbow. All Plan decisions with respect to the PPN, including any decision to enter into the Agreement with Rainbow, will be made by Plan fiduciaries unrelated to Rainbow. In this regard, any fiduciary affiliated with Rainbow will remove himself or herself from all consideration by the Plan as to whether or not to engage in the transaction. Lastly, the applicant represents that the proposed transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.

10. In summary, the applicant represents that the proposed transaction satisfies the criteria contained in section 408(a) of the Act for the following reasons: (a) The terms of the transaction are at least as favorable to the Plan as

those the Plan could obtain in a similar transaction with an unrelated party; (b) any decision by the Plan to enter into agreements governing the subject purchases will be made by Plan fiduciaries independent of Rainbow; (c) at least 50% of the preferred providers participating in the Preferred Pharmacy Network (PPN) which will be selling prescription drugs to the Plan's participants and beneficiaries will be unrelated to Rainbow; (d) Rainbow will provide prescription drugs to eligible persons under the identical conditions and for the identical amounts as under the Snyder Drug Stores, Inc. (Snyder) and SuperValue Pharmacies, Inc. (SPI) Agreements; and (e) the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.

*For Further Information Contact:* Mr. J. Martin Jara of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions 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 20th day of June, 2000.

**Ivan Strasfeld,**

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

[FR Doc. 00-16019 Filed 6-23-00; 8:45 am]

**BILLING CODE 4510-29-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (00-072)]

### Performance Review Board, Senior Executive Service (SES)

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of Membership of SES Performance Review Board.

**SUMMARY:** The Civil Service Reform Act of 1978, Pub. L. 95-454 (Section 405) requires that appointments of individual members to a Performance Review Board be published in the **Federal Register**.

The performance review function for the SES in the National Aeronautics and Space Administration is being performed by the NASA Performance Review Board (PRB) and the NASA Senior Executive Committee. The latter performs this function for senior executives who report directly to the Administrator or the Deputy Administrator and members of the PRB. The following individuals are serving on the Board and the Committee:

#### Performance Review Board

Ghassem Asrar, Chairperson, Associate Administrator for Earth Science, NASA Headquarters

John T. Pennington, Executive Secretary, Chief, Agency Executive Personnel Branch, NASA Headquarters  
Joan S. Peterson, Director, Personnel Division, NASA Headquarters

Robert M. Stephens, Deputy General Counsel, NASA Headquarters

Oceola S. Hall, Deputy Associate Administrator for Equal Opportunity Programs, NASA Headquarters

Earle K. Huckins, Deputy Associate Administrator for Space Science NASA Headquarters

Susan H. Garman, Associate Director, NASA Johnson Space Center

William F. Townsend, Deputy Director, NASA Goddard Space Flight Center

Kathie L. Olsen, Chief Scientist, Office of the Administrator, NASA Headquarters

Paula M. Cleggett, Deputy Associate Administrator for Public Affairs, NASA Headquarters

Delma C. Freeman, Deputy Director, Langley Research Center

Carolyn S. Griner, Deputy Director, NASA Marshall Space Flight Center

Wallace C. Sawyer, Deputy Director, NASA Dryden Flight Research Center

Mark Craig, Deputy Director, NASA Stennis Space Center

#### Senior Executive Committee

Daniel R. Mulville, Chairperson, Associate Deputy Administrator, NASA Headquarters

Joan S. Peterson, Executive Secretary, Director, Personnel Division, NASA Headquarters

Lori B. Garver, Associate Administrator for Policy and Plans, NASA Headquarters

Ghassem Asrar, Associate Administrator for Earth Science, NASA Headquarters

Vicki A. Novak, Associate Administrator for Human Resources and Education, NASA Headquarters

**Daniel S. Goldin,**

*Administrator.*

[FR Doc. 00-16042 Filed 6-23-00; 8:45 am]

**BILLING CODE 7510-01-P**

## NATIONAL SCIENCE FOUNDATION

### Committee Management; Renewals

The NSF management officials having responsibility for the 29 advisory committees listed below have determined that renewing these groups for another two years is necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), by 42 USC 1861 *et seq.* This determination follows consultation with the Committee Management Secretariat, General Services Administration.

1. Special Emphasis Panel in Graduate Education (#57)
2. Special Emphasis Panel in Elementary, Secondary and Informal Education (#59)
3. Advisory Committee for Mathematical and Physical Sciences (#66)

4. Special Emphasis Panel in Engineering Education and Centers (#173)

5. Advisory Committee for Computer and Information Science and Engineering (#1115)

6. . Advisory Committee for Social, Behavioral and Economic Sciences (#1171)

7. Committee on Equal Opportunities in Science and Engineering (#1173)

8. Special Emphasis Panel in Advanced Computational Infrastructure and Research (#1185)

9. Special Emphasis Panel in Astronomical Sciences (#1186)

10. Special Emphasis Panel in Bioengineering and Environmental Systems (#1189)

11. Special Emphasis Panel in Chemical and Transport Systems (#1190)

12. Special Emphasis Panel in Chemistry (#1191)

13. Special Emphasis Panel in Computing—Communications Research (#1192)

14. Special Emphasis Panel in Experimental and Integrative Activities (#1193)

15. Special Emphasis Panel in Design, Manufacture and Industrial Innovation (#1194)

16. Special Emphasis Panel in Electrical and Communications Systems (#1196)

17. Special Emphasis Panel in Experimental Program to Stimulate Competitive Research (#1198)

18. Special Emphasis Panel in Human Resource Development (#1199)

19. Special Emphasis Panel in Information and Intelligent Systems (#1200)

30. Special Emphasis Panel in Materials Research (#1203)

21. Special Emphasis Panel in Mathematical Sciences (#1204)

22. Special Emphasis Panel in Civil and Mechanical Systems (#1205))

23. Special Emphasis Panel in Advanced Networking and Infrastructure Research (#1207)

24. Special Emphasis Panel in Physics (#1208)

25. Special Emphasis Panel in Polar Programs (#1209)

26. Special Emphasis Panel in Research, Evaluation and Communications (#1210)

27. Special Emphasis Panel in Undergraduate Education (#1214)

28. Special Emphasis Panel in Educational Systemic Reform (#1765)

29. Advisory Panel for Biomolecular Processes (#5138)

Authority for these Committees will expire on June 30, 2002, unless they are renewed. For more information, please contact Karen York, NSF, at (703) 306-1182.