DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10901 and D–10902, et al.]

Proposed Exemptions; IRAs for Eldon Nysether and Mark Nysether (the IRAs)

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, NW, Washington, DC 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, NW, Washington, DC 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.

IRAs for Eldon Nysether and Mark Nysether (the IRAs)

Located in Seattle, Washington

[Application Nos. D–10901 and D–10902]

Proposed Exemption

The Department is considering granting an exemption under the authority of 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 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 proposed sale by the IRAs of their interests in certain improved real property (the Property) to Sea-Land Development Corporation (Sea-Land), a disqualified person with respect to the IRAs,[1] provided that the following conditions are satisfied: (1) The sale is a one-time transaction for cash; (2) the IRAs pay no commissions nor other expenses relating to the sale; and (3) the sale price received by the IRAs equals the Property's fair market value, as of the date of the sale, as established by a qualified, independent appraiser.

Summary of Facts and Representations

1. The two IRAs are individual retirement accounts, as described under section 408(a) of the Code. One IRA was established by Eldon Nysether, the sole participant. The other IRA was established by Mark Nysether, the sole participant. As of November 8, 2000, the IRAs had total assets of $684,124.26 and $684,124.26, respectively. The custodian of both IRAs is The Commerce Bank of Washington, located in Seattle, Washington.

2. The Property consists of a currently unoccupied one-story commercial office building with approximately 20,300 sq. ft. on a 2.17 acre lot. It is located in Skagit Industrial Park, 500 Metcalf Street, Sedro Woolley, Washington. The adjacent parcel to the west of the Property is already owned by Sea-Land. The adjacent parcel is improved with a number of buildings that, together, form an industrial complex.

3. The Property is held as equal interests by each IRA. Except for a small amount of cash, the Property consists of the IRAs' sole asset. According to the applicants, the Property was originally acquired as an investment by the Sea-Dog Corporation 401(k) Profit Sharing Plan (the Sea-Dog Plan) from unrelated parties in 1993 for a total cash purchase price of $275,000.[2] The IRAs obtained the Property in 1997 in a rollover of assets as distributions to which the Nysethers were each entitled as participants in the Sea-Dog Plan, when they were informed by the Sea-First Bank that it would no longer permit real estate to be held in 401(k) plan accounts at the bank. At that time, the Property had an appraised value of $550,000. The Sea-Dog Corporation, in which Mark Nysether has a 34.28% ownership interest and his father Eldon has a 28.15% ownership interest, is a sister company of Sea-Land, the proposed purchaser of the Property. Mark Nysether is also a 50% owner of Sea-Land.[3]

[1] Pursuant to 29 CFR 2510.3–2(d), the IRAs are not within the jurisdiction of Title I of the Act. However, there is jurisdiction under Title II of the Act, pursuant to section 4975 of the Code.

[2] The applicants represent that, at the same time the Sea-Dog Plan purchased the Property, Sea-Land purchased the adjacent industrial complex. In this regard, the Department expresses no opinion herein as to whether the acquisition and holding of the Property by the Sea-Dog Plan violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act. Section 404(a)(1) of the Act requires, among other things, that a fiduciary of a plan act prudently and solely in the interest of the plan and its participants and beneficiaries, when making investment decisions on behalf of the plan.

[3] The applicants state that Sea-Land is a ''disqualified person'' with respect to the IRA for Mark Nysether. Section 4975(e)(2)(G) of the Code defines the term ''disqualified person'' to include, in pertinent part, a corporation of which (or in

The applicants represent that, as of May 5, 2000, the IRAs had received gross rental income, since acquiring the Property, in the following amounts: $26,433.21 to the IRA for Eldon Nysether and $26,433.22 to the IRA for Mark Nysether. In regard to certain expenses relating to the Property, the IRAs, as of May 5, 2000, had each paid $6,921.63 in taxes and $2,506.00 for insurance. The applicants further represent that the Property has not been leased to, nor used by, by a disqualified person with respect to the IRAs, at any time since being acquired by the IRAs.[4]

4. The Property has been appraised by David Parsons & Associates, Inc., qualified, independent appraisers located in Mount Vernon, Washington. Mr. Parsons, M.A.I., a general appraiser certified in the State of Washington, and Roger Lindblom, Associate Appraiser, estimated that the fair market value of the Property was $1,334,000, as of July 11, 2000. In their report, Messrs. Parsons and Lindblom state that they utilized all three valuation approaches: Cost, Sales Comparison, and Income, with greater consideration given to the latter two approaches. They state that the Property is a sound strucure, but the interior needs to be completely refurbished. The Property is zoned CBD, which represents the prime commercial designation for small-to-moderate scale commercial activities in the area where the Property is located.

Further, in a subsequent letter dated November 3, 2000, Mr. Parsons states that, in making an appraisal of the Property, he was aware that the adjacent industrial complex is already owned by Sea-Land, which rents out its buildings to approximately 19 different tenants. Mr. Parsons states that, because most of these tenants operate businesses with small offices, there is not deemed a specific demand for office space from this complex that may affect the value of the subject Property. Thus, according to Mr. Parsons, no premium would be associated with its purchase by Sea-Land.

5. The applicants propose that Sea-Land purchase the Property from the IRAs for an amount in cash equal to the fair market value of the Property ($1,334,000 as of July 11, 2000), as of the date of the sale, based upon an updated, independent appraisal. The IRAs will pay no commissions nor other expenses relating to the sale. Each IRA will receive one-half of the sale proceeds, in accordance with their one-half ownership interests in the Property.

The applicants represent that the proposed exemption is in the best interests of the IRAs because the sale will allow the IRAs an opportunity to divest their respective portfolios of an illiquid asset. In addition, the sale proceeds received by each IRA will be reinvested in other assets that will increase the diversification of the IRAs' assets and facilitate the payment of retirement benefits.

6. In summary, the applicants represent that the proposed transaction satisfies the statutory criteria for an exemption under section 4975(c)(2) of the Code for the following reasons:

(a) the sale will be a one-time transaction for cash; (b) the IRAs will pay no commissions nor other expenses relating to the sale; (c) the sale price received by the IRAs will equal the Property's fair market value, as of the date of the sale, as established by a qualified, independent appraiser; and (d) the sale will allow the IRAs an opportunity to divest their respective portfolios of an illiquid asset, increase the diversification of the IRAs' assets by reinvesting the proceeds of the sale in other assets, and facilitate the payment of retirement benefits.

Notice To Interested Persons

Because the Nysethers are the sole participants in their IRAs, it has been determined that there is no need to distribute the notice of proposed exemption to other interested persons. Comments and requests for a hearing with respect to the proposed exemption are due within 30 days of the date of publication of this notice in the **Federal Register**.

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

which) 50 percent or more of the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation is owned directly or indirectly, or held by, a fiduciary of a plan.

The applicants state that Sea-Land is also a ''disqualified person'' with respect to the IRA for Eldon Nysether, Mark's father, despite Eldon's having no direct ownership interest in Sea-Land. Section 4975(e)(4) of the Code, in part, provides that, for purposes of paragraph (2)(G)(i), there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), the attribution rules under the Code.

[4] The Department notes that any lease or use of the Property by a ''disqualified person,'' as defined in section 4975(e)(2) of the Code, would be a separate prohibited transaction under section 4975(c)(1)(D) of the Code.

ING Barings LLC,

ING Institutional Trust Company and Affiliates

Located in New York, New York

[Exemption Application No.: D–10908]

Proposed Exemption

Section I—Transactions

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 as set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[5] If the exemption is granted, effective as of the date of the publication of the proposed exemption in the **Federal Register**, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) the lending of securities to:

(1) ING Barings LLC (ING);

(2) the London branch (ING Bank London) of ING Bank N.V. or any successor in interest bank which is subject to the laws of the United Kingdom and the Netherlands;

(3) ING Barings Limited (ING London);

(4) ING Baring Securities (Japan) Limited (ING Japan); and

(5) any broker-dealer that, now or in the future, is an affiliate of ING which is subject to regulation under the laws of the United States or the United Kingdom or Japan;[6] by employee benefit plans, including commingled investment funds holding assets of such plans (the Client Plan(s)), for which in connection with securities lending activities, an affiliate of the ING Borrowers, the ING Institutional Trust Company (ING Institutional), its corporate successors, or any foreign or domestic affiliate of ING,[7] acts as a securities lending agent (or sub-agent) or as a directed trustee or custodian for such Client Plans under either of two

[5] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

[6] ING, ING Bank London or any successor in interest bank which is subject to the laws of the United Kingdom and the Netherlands, ING London, ING Japan, and any broker-dealer that, now or in the future, is an affiliate of ING which is subject to regulation under the laws of the United States or the United Kingdom or Japan are referred to herein collectively as ING Borrowers or individually as ING Borrower.

[7] ING Institutional, its corporate successors, or any foreign or domestic affiliate of ING are referred to herein collectively as IITC.

securities lending arrangements referred to herein as Plan A and Plan B; and

(b) the receipt of compensation by IITC in connection with securities lending transactions, provided that for all transactions described above the conditions, as set forth in Section II, below, are satisfied.

Section II—Conditions

(a) For each Client Plan, neither the ING Borrowers nor IITC has or exercises discretionary authority or control with respect to the investment of the assets of such Client Plan involved in the transaction (other than with respect to the investment of cash collateral after the securities have been loaned and collateral received), or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets, including any decisions concerning such Client Plan's acquisition or disposition of securities available for securities lending transactions;

(b) With regard to:

(1) Plan A, under which IITC lends securities of a Client Plan to an ING Borrower in either an agency or sub-agency capacity, such arrangement is approved in advance by a fiduciary of the Client Plan (the Client Plan Fiduciary) that is independent of IITC and the ING Borrower and is negotiated by IITC, which acts as a liaison between the lender and the borrower to facilitate the securities lending transaction.[8]

(2) Plan B, under which an ING Borrower directly negotiates an agreement with the Client Plan Fiduciary, including a Client Plan for which IITC provides services with respect to the portfolio of securities to be loaned, pursuant to an exclusive borrowing arrangement (an Exclusive Borrowing Arrangement), such Client Plan Fiduciary is independent of both the ING Borrower and IITC, and IITC does not participate in any such negotiations.

(c) Before a Client Plan participates in a securities lending program with respect to Plan A and before any loan of securities to an ING Borrower pursuant to Plan A is affected, a Client Plan Fiduciary that is independent of IITC and the ING Borrower must have:

(1) Authorized and approved a securities lending authorization agreement with IITC (the Agency Agreement), where IITC is acting as the direct securities lending agent;

(2) Authorized and approved the primary securities lending authorization agreement (the Primary Lending Agreement) with the primary lending agent, where IITC is lending securities under a sub-agency arrangement with a primary lending agent; and

(3) Approved the general terms of the securities loan agreement (the Basic Loan Agreement) between such Client Plan and the ING Borrower, the specific terms of which are negotiated and entered into by IITC.

(d) The terms of each loan of securities by a Client Plan to an ING Borrower are at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties;

(e) A Client Plan may terminate a securities lending agency (or sub-agency) agreement under Plan A or an Exclusive Borrowing Arrangement under Plan B at any time without penalty on five (5) business days notice, whereupon the ING Borrower shall deliver securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Client Plan within:

(1) the customary delivery period for such securities;

(2) five (5) business days; or

(3) the time negotiated for such delivery by the Client Plan and the ING Borrower, whichever is less.

(f) The Client Plan (or another custodian designated to act on behalf of the Client Plan) receives from the ING Borrower (either by physical delivery or by book entry in a securities depository located in the United States, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to such ING Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable letters of credit issued by a United States Bank, other than IITC or the ING Borrowers, or any combination thereof, or other collateral permitted under PTCE 81–6 (as it may be amended or superseded);

(g) The market value (or in the case of a letter of credit, a stated amount) of the collateral on the close of business on the day preceding the day of the loan is initially at least 102 percent (102%) of the market value of the loaned securities. The applicable Basic Loan Agreement gives the Client Plan a continuing security interest in and an lien on the collateral. The level of collateral is monitored daily either by IITC under Plan A or IITC or other designee of the Client Plan under Plan B. If the market value of the collateral, on the close of trading on a business day, is less than 100 percent (100%) of the market value of the loaned securities at the close of business on that day, the ING Borrower is required to deliver by the close of business on the next day, sufficient additional collateral such that the market value of the collateral will again equal 102 percent (102%).

(h) With regard to:

(1) Plan A, prior to a Client Plan entering into a Basic Loan Agreement, the ING Borrower will furnish its most recent available audited and unaudited statements to IITC, which, in turn, will provide such statements to the Client Plan before such Client Plan approves of the terms of the Basic Loan Agreement. The Basic Loan Agreement contains a requirement that the applicable ING Borrower must give prompt notice at the time of a loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, IITC will not make any further loans to the ING Borrower, unless an independent Client Plan Fiduciary is provided notice of any material change and approves the loan in view of the changed financial condition;

(2) Plan B, prior to a Client Plan entering into an Exclusive Borrowing Arrangement, the ING Borrower will furnish its most recent available audited and unaudited statements to the Client Plan before the Client Plan elects to enter into such agreement. The Exclusive Borrowing Arrangement contains a requirement that the ING Borrower must give prompt notice at the time of the loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements;

(i) In return for lending securities, the Client Plan either:

(1) receives a reasonable fee which is related to the value of the borrowed securities and the duration of the loan; or

(2) has the opportunity to derive compensation through the investment of cash collateral. (Under such circumstances, the Client Plan may pay a loan rebate or similar fee to the ING Borrower, if such fee is not greater than the fee the Client Plan would pay in a comparable arm's length transaction with an unrelated party.)

(j) All the procedures regarding the securities lending activities will at a minimum conform to the applicable

[8] The Department, herein, is not providing exemptive relief for securities lending transactions engaged in by primary lending agents, other than IITC, beyond that provided pursuant to Prohibited Transaction Class Exemption 81–6 (PTCE 81–6) (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987), and Prohibited Transaction Class Exemption 82–63 (PTCE 82–63)(47 FR 14804, April 6, 1982).

provisions of PTCE 81–6 and PTCE 82–63 as well as the applicable banking laws of the United Kingdom and the Netherlands and securities laws of the United States or the United Kingdom or Japan;

(k) ING Institutional agrees to indemnify and hold harmless the Client Plans in the United States (including the sponsor and fiduciaries of such Client Plans) for any transactions covered by this exemption with ING Borrowers so that the Client Plans do not have to litigate in the case of ING Borrowers in foreign jurisdictions or sue ING Borrowers to realize on the indemnification. Such indemnification by ING Institutional is against any and all reasonably foreseeable damages, losses, liabilities, costs, and expenses (including attorney's fees) which the Client Plans may incur or suffer, arising from any impermissible use by ING Borrowers of the loaned securities or from an event of default arising from ING Borrowers' failing to deliver loaned securities in accordance with the applicable Basic Loan Agreement or otherwise failing to comply with the terms of such agreement, except to the extent that such losses or damages are caused by the Client Plans' own negligence.

(1) If any event of default occurs, ING Institutional promptly and at its own expense (subject to rights of subrogation in the collateral and against such borrower), will purchase or cause to be purchased, for the account of the Client Plans, securities identical to the borrowed securities (or their equivalent as discussed above). If the collateral is insufficient to accomplish such purchase, ING Institutional will indemnify the Client Plan for any shortfall in the collateral plus interest on such amount and any transaction costs incurred (including attorney's fees of the Client Plan for legal actions arising out of the default on loans or failure to properly indemnify under this provision). Alternatively, if such replacement securities cannot be obtained on the open market, ING Institutional will pay the Client Plan the difference in U.S. dollars between the market value of the loaned securities and the market value of the related collateral on the date of the borrower's breach of its obligation to return the loaned securities.

(2) If, however, the event of default is caused by the ING Borrower's failure to return securities within a designated time, the Client Plan has the right to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price and any other expenses of the Plan associated with the sale and/or purchase.

(l) The Client Plan receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, and interest payments on the loaned securities, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions.

(m) Prior to any Client Plan's approval of the lending of its securities to any ING Borrower, a copy of the notice of proposed exemption and a copy of the final exemption, if granted, will be provided to such Client Plan.

(n) Each Client Plan receives monthly reports with respect to the securities lending transactions, including but not limited to the information described below in representation number 19 of the Summary of Facts and Representations, so that an independent Client Plan Fiduciary may monitor such transactions with the ING Borrowers.

(o) Only Client Plans with total assets having an aggregate market value of at least $50 million are permitted to lend securities to the ING Borrowers; provided, however, that—

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Client Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are ''plan assets'' under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the ING Borrowers, the foregoing $50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of $50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

(2) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations, or employee organization (the Unrelated Client Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are ''plan assets'' under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the ING Borrowers, the foregoing $50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such plan or an employee organization whose members are covered by such plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(A) Has full investment responsibility with respect to Client Plan assets invested therein; and

(B) Has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million. (In addition, none of the entities described above must be formed for the sole purpose of making loans of securities.)

(p) With respect to any calendar quarter, at least 50 percent (50%) or more of the outstanding dollar value of securities loans negotiated on behalf of Client Plans will be to unrelated borrowers, unless the Client Plan has entered into an Exclusive Borrowing Arrangement with the ING Borrowers.

(q) In addition to the above, all loans involving Foreign Borrowers, as defined in Section III (c), below, must satisfy the following supplemental requirements:

(1) Such Foreign Borrower is a bank which is regulated by both the Dutch Central Bank (De Nederlandsche Bank or DNB) and the Financial Services Authority (FSA) of the United Kingdom or must be a registered broker-dealer subject to regulation by either the Securities and Futures Authority of the United Kingdom (the SFA) or the Ministry of Finance (the MOF) and the Tokyo Stock Exchange .

(2) Such Foreign Borrower must be in compliance with all applicable provisions of Rule 15a–6 (17 CFR 240.15a–6) under the Securities and Exchange Act of 1934 (the 1934 Act) which provides for foreign broker-dealers a limited exemption from United States registration requirements;

(3) All collateral is maintained in United States dollars or United States dollar-denominated securities or letters of credit;

(4) All collateral is held in the United States and the situs of the securities lending agreements (either the Basic Loan Agreement under Plan A or the Exclusive Borrowing Arrangement

under Plan B) is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)–1; and

(5) Prior to entering a transaction involving a Foreign Borrower, the applicable Foreign Borrower must—

(A) Agree to submit to the jurisdiction of the United States;

(B) Agree to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent);

(C) Consent to service of process on the Process Agent; and

(D) Agree that enforcement by a Client Plan of the indemnity provided by ING Institutional will occur in the United States courts;

(r) ING maintains or causes to be maintained within the United States for a period of six (6) years from the date of each securities lending transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in Section II (s)(1) below to determine whether the conditions of this exemption, if granted, have been met; except that—

(1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of ING or the other ING Borrowers, the records are lost or destroyed prior to the end of the six year period; and

(2) no party in interest with respect to an employee benefit plan, other than ING or the other ING Borrowers, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) or (b) of the Code, if such records are not maintained, or are not available for examination as required by Section II(s)(1), below.

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

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission (SEC);

(B) Any fiduciary of a participating Client Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan, or any duly authorized employee or representative of such employer; and

(D) Any participant or beneficiary of any participating Client Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B)-(D) of Section II(s)(1) shall be authorized to examine trade secrets of ING or the other ING Borrowers, or commercial or financial information which is privileged or confidential.

Section III—Definitions

For purposes of this proposed exemption,

(a) The term ''affiliate'' of another person shall include:

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

(2) Any officer, director, employee, or relative (as defined in section 3(15) of the Act) of such other person or any partner in such person; and

(3) Any corporation or partnership of which such other person is an officer, director, employee or in which such person is a partner.

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

(c) The term, ''Foreign Borrower or Foreign Borrowers'' means: (1) ING Bank London or any successor in interest bank subject to the laws of the United Kingdom and the Netherlands; (2) ING London; (3) ING Japan; and (4) any broker-dealer that, now or in the future, is an affiliate of ING which is subject to regulation under the laws of the United States or the United Kingdom or Japan.

Summary of Facts and Representations

1. The ING Groep N.V. (the ING Groep) is a publicly held Dutch corporation with slightly under one billion shares outstanding as of December 31, 1998. American Depository Receipts of the ING Groep are traded on the New York Stock Exchange.[9] In addition, the shares of the ING Groep are traded on the Amsterdam Stock Exchange.

2. ING Barings LLC (ING), a Delaware limited liability corporation, is an indirect wholly-owned subsidiary of the ING Groep. ING is a full service investment firm serving institutional, corporate, and high net worth individual clients. ING is registered with the SEC and is a member of all principal securities exchanges in the United States, including, but not limited to, the New York Stock Exchange, the American Stock Exchange, as well as the National Association of Securities Dealers, Inc. As of March 31, 2000, ING had $17.746 billion in assets.

ING, acting as principal, borrows securities from institutions and either utilizes such securities to satisfy its own needs, or re-lends these securities to brokerage firms and other entities. The average amount of securities on loan to ING during the month of March 2000, was approximately $11.356 billion, and the average amount of securities being lent by ING during March 2000, was approximately $7.986 billion. It is represented that in making securities loans, ING carefully reviews the credit-worthiness of its counter-parties and conforms to the requirements of Regulation T, as promulgated by the U.S. Federal Reserve Board.

3. ING Institutional, an indirect wholly-owned subsidiary of the ING Groep and an affiliate of ING, is organized as a limited purpose trust company licensed by the New York State Banking Department. ING Institutional has its principal executive offices in New York, New York. ING Institutional acts as a securities lending agent and provides securities lending services for Client Plans and other entities. ING Institutional may also be retained from time to time by primary securities lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary securities lending agents. As a securities lending sub-agent, ING Institutional's role (i.e., negotiating the terms of the loans with borrowers pursuant to a client-approved form of a loan agreement, and monitoring receipt of, and marking-to-market, the required collateral) parallels those under the securities lending transactions for which ING Institutional acts as a primary lending agent on behalf of its own clients.

4. ING Bank N.V., a direct subsidiary of the ING Groep, is a Dutch incorporated public limited liability company regulated by the DNB. As of December 31, 1999, ING Bank N.V. had total assets of approximately EUR 349,618 million and shareholder's equity of approximately EUR 13,212 million. ING Bank London, a branch of ING Bank N.V., is authorized to conduct a banking business in the United Kingdom.

5. ING London, an indirect subsidiary of the ING Groep, is an English company registered with the Registrar of Companies for England and Wales. ING

[9] As such, shares of the ING Groep are registered pursuant to section 12(b) of the 1934 Act.

London is also an international investment banking organization. As of December 31, 1999, ING London had total assets of approximately 2,595,477,000 pounds. ING London is authorized to conduct an investment business in and from the United Kingdom as a broker-dealer.

6. ING Japan is an indirect subsidiary of the ING Groep. As of December 31, 1999, ING Japan had total assets of approximately 39 billion yen. ING Japan is a Japanese company authorized to conduct an investment business in Japan as a broker-dealer.

7. Brokers and other entities, including banks, often need to borrow a particular security for certain periods of time in order to satisfy deliveries in cases of short sales, or in cases where a broker, bank, or other entity fails to receive securities which it in turn is required to deliver. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer, a bank, or other entity to earn a fee in addition to any interest, dividends, or other distributions paid on the loaned securities. The lender generally requires that the security loans be fully collateralized. In this regard, the collateral usually is cash or high quality liquid securities issued by the U.S. Government, Federal Agency obligations, or certain bank letters of credit. When the collateral is cash, the lender generally invests the cash and rebates a portion of the earnings on such cash collateral to the borrower. The fee received by the lender is the difference between the earnings on the cash collateral and the amount of the rebate that is paid to the borrower. When a securities loan is collateralized with U.S. Government or Federal Agency securities or with letters of credit issued by a bank, the fee is paid directly by the borrower to the lender.

Institutional investors often utilize the services of an agent in performing securities lending transactions. The lending agent is also paid a fee for its services that may be a percentage of the income earned by the investor from lending its securities. The essential functions which define a securities lending agent are identifying appropriate borrowers of securities and negotiating loan terms with the borrowers. Certain services that are ancillary to securities lending include monitoring the level of collateral, the value of loaned securities, and in some instances, investing the collateral.

8. The applicants request an individual administrative exemption for the lending of securities owned by Client Plans, with respect to which IITC acts as a directed trustee or custodian and/or securities lending agent (or sub-agent),[10] to the ING Borrowers following disclosure to the Client Plans of IITC's affiliation with such ING Borrowers, under either of two arrangements—described as Plan A and Plan B. The applicants also request an individual administrative exemption for the receipt of compensation by IITC in connection with such securities lending transactions. Neither IITC nor the ING Borrowers will have discretionary authority or control over the Client Plans' decisions concerning the acquisition or disposition of securities available for lending. However, because IITC under the Plan A arrangement and the ING Borrowers under the Plan B arrangement (as discussed further below), will have discretion with respect to whether there is a loan of the Client Plans' securities to the ING Borrowers, the lending of securities to the ING Borrowers under such arrangements may be outside the scope of relief provided by PTCE 81–6 and PTCE 82–63.[11]

Plan A

9. As noted above, the agreement by IITC to provide securities lending services, as agent, to a Client Plan will be embodied in the Agency Agreement. In the case of the Plan A arrangement, where IITC acts as the securities lending agent, the Client Plan Fiduciary who is independent of IITC and the ING Borrower will sign the Agency Agreement with IITC before the Client Plan participates in IITC's securities lending program. Further, the Client Plan and IITC will agree to an arrangement under which IITC will be compensated for its services as the lending agent prior to the commencement of any lending activity. The Client Plan may terminate the Agency Agreement at any time, without penalty, on no more than five (5) business days' notice.

The Agency Agreement will, among other things, describe the operation of the securities lending program, prescribe the form of the securities loan agreement to be entered into on behalf of the Client Plan with the borrowers, and identify the securities which are available to be lent, the required collateral, and daily marking-to-market. The Agency Agreement will set forth the basis and rate for IITC's compensation from the Client Plan for the performance of securities lending services. Further, the Agency Agreement will contain provisions regarding designation by the Client Plan of a list of permissible borrowers, including the ING Borrowers. Specifically, the Client Plan will acknowledge that the ING Borrowers are affiliates of IITC. Pursuant to the Agency Agreement, IITC will represent to each Client Plan that each loan made to ING Borrowers on behalf of such Client Plan will be at market rates, and in no event will such rates be less favorable to the Client Plan than a loan of such securities made at the same time and under the same circumstances to an unaffiliated borrower.

10. When IITC is lending securities under a sub-agency arrangement, before the Client Plan participates in the securities lending program, the primary lending agent will enter into the Primary Lending Agreement with a Client Plan Fiduciary, who is independent of such primary lending agent, IITC, and the ING Borrowers. The Client Plan may terminate the Primary Lending Agreement at any time, without penalty, on no more than five (5) business days' notice.

The Primary Lending Agreement will contain substantive provisions akin to those in the Agency Agreement described above, relating to the description of the operation of the securities lending program, the use of an approved form of securities loan agreement, the identification of securities which are available to be lent, the required collateral, daily marking-to-market, and the provision of a list of approved borrowers, including the ING Borrowers. The Primary Lending Agreement will specifically authorize the primary lending agent to appoint sub-agents, including IITC, to facilitate its performance of securities lending agency functions.

Where IITC is to act as a sub-agent, the Primary Lending Agreement will expressly disclose such fact. The Primary Lending Agreement will also set forth the basis and rate for the

[10] Future references to IITC's performance of services as securities lending agent should be deemed to include its parallel performance as a securities lending sub-agent, and references to the Client Plans should be deemed to include those plans for which IITC is acting as a sub-agent with respect to securities lending activities, unless otherwise specifically indicated or by the context of reference.

[11] PTCE 81–6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to certain broker-dealers or banks which are parties in interest.

PTCE 82–63 provides an exemption under specified conditions from section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code for the payment of compensation to a plan fiduciary for services rendered in connection with loans of plan assets that are securities. PTCE 82–63 permits the payment of compensation to a plan fiduciary for the provision of securities lending services only if the loan of securities itself is not prohibited under section 406(a) of the Act.

primary lending agent's compensation from the Client Plan for the performance of securities lending services. Further, such agreement will authorize the primary lending agent to pay a portion of its fee, as the primary lending agent determines in its sole discretion, to any sub-agent(s), including IITC, that the primary lending agent retains pursuant to the authority granted under such agreement.

Pursuant to its authority to appoint sub-agents, the primary lending agent will enter into a securities lending sub-agency agreement (the Sub-Agency Agreement) with IITC under which the primary lending agent will retain and authorize IITC, as sub-agent, to lend securities of the primary lending agent's clients, subject to the same terms and conditions as are specified in the Primary Lending Agreement. Thus, for example, the form of securities loan agreement will be the same as that approved by the Client Plan Fiduciary in the Primary Lending Agreement, and the list of permissible borrowers under the Sub-Agency Agreement (which will include the ING Borrowers) will be limited to those approved borrowers listed as such under the Primary Lending Agreement.

The Sub-Agency Agreement will contain provisions that are in substance comparable to those which would appear in the Agency Agreement in situations where IITC is the primary lending agent. In this regard, IITC will make the same representation in the Sub-Agency Agreement with respect to arm's-length dealings with the ING Borrowers. The Sub-Agency Agreement will also set forth the basis and rate for IITC's compensation to be paid by the primary lending agent.

11. IITC, acting as securities lending agent for the Client Plans, will negotiate the Basic Loan Agreement and any modifications thereto with the ING Borrowers on behalf of the Client Plans. The Basic Loan Agreement will set forth the basis for compensation to the Client Plan for lending securities to the ING Borrowers under each category of collateral. The Basic Loan Agreement will also contain a requirement that the ING Borrowers must pay all transfer fees and transfer taxes related to the security loans. An independent Client Plan Fiduciary will approve the form of the Basic Loan Agreement before such fiduciary executes the Agency Agreement. Further, the Basic Loan Agreement will specify, among other things, the right of the Client Plan to terminate a loan at any time and the Client Plan's rights in the event of any default by the ING Borrowers.

12. Prior to making any loans under the Basic Loan Agreement, the ING Borrower will furnish to IITC (assuming IITC does not already possess such statements), its most recent available audited financial statements (and unaudited financial statements if more recent than such audited statements). IITC will, in turn, provide such statements to the Client Plan before the independent Client Plan Fiduciary is asked to approve the terms of the Basic Loan Agreement. The terms of the Basic Loan Agreement will contain a requirement that the ING Borrower must give prompt notice at the time of the loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, IITC will request that the independent Client Plan Fiduciary approve the loan in view of the changed financial condition.

13. Each time a Client Plan loans securities to an ING Borrower pursuant to the Basic Loan Agreement, such ING Borrower will execute a designation letter specifying the material terms of the loan, including the securities to be loaned, the required level of collateral, and the fee or rebate payable, and any special delivery instructions. The terms of each loan will be at least as favorable to the Client Plan as those of a comparable arm's-length transaction between unrelated parties.

14. To assure uniformity of treatment among borrowing brokers and to limit the discretion IITC would have in negotiating securities loans to the ING Borrowers, IITC will establish each day a written schedule of lending fees and rebate rates. In this regard, IITC will adopt minimum daily lending fees payable by each borrower, including ING Borrowers, to IITC on behalf of the Client Plans with respect to securities loans secured with collateral other than cash and will adopt maximum daily rebate rates payable to each borrower, including the ING Borrowers, with respect to securities loans secured with cash collateral. Loans to all borrowers, including ING Borrowers, of a given security on any day will be made at rebate rates or lending fees on the relevant daily schedule or at rebate rates or lending fees that may be more advantageous to the Client Plans. In no case will the loans be made to ING Borrowers at rebate rates or lending fees less advantageous to the Client Plan than those on the schedule.

IITC will negotiate on behalf of a Client Plan rebate rates for loans secured by cash collateral payable to each borrower, including ING Borrowers. When a loan of securities by a Client Plan is collateralized with cash, IITC, at the Client Plan's direction, will either transfer such cash collateral to the Client Plan or its designated agent for investment. Alternatively, IITC may invest the cash in short-term securities or interest-bearing accounts. In either case, IITC will on behalf of the Client Plan rebate a portion of the earnings on the cash collateral to the ING Borrowers. The rebate rates, which are established for loans secured by cash collateral made by the Client Plans, will take into account the potential demand for the loaned securities, the applicable benchmark cost of funds indices (typically, the U.S. Federal Funds Rate established by the Federal Reserve System (Federal Funds), the overnight ''REPO'' [12] rate, or the like), and the anticipated investment return on overnight investments which are permitted by the Client Plan Fiduciary. For example, where cash collateral derived from an overnight loan is intended to be invested in a generic repurchase agreement, any rebate fee determined with respect to an overnight repurchase agreement benchmark will be set below the applicable ''ask'' quotation therefor. For example, where cash collateral is derived from a loan with an expected maturity date (term loan) and is intended to be invested in instruments with similar maturities, the maximum rebate fee will be less than the investment return (assuming no investment default). With respect to any loan to ING Borrowers, IITC will not knowingly negotiate a rebate rate with respect to such loan which over the anticipated term of the loan would produce a zero or negative return to the Client Plan (assuming no default on the investments related to the cash collateral from such loan where IITC has investment discretion over the cash collateral). IITC represents that the written rebate rate established daily for cash collateral under loans negotiated with the ING Borrowers will not exceed the rebate rate which would be paid to a similarly situated unrelated borrower with respect to a comparable securities lending transaction.

Where the collateral consists of obligations other than cash, the ING Borrowers will pay a fee to the Client Plan based on the value of the loaned

[12] An overnight ''REPO'' is an overnight repurchase agreement that is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes, and bonds. The dealer or bank sells securities to an investor with a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a rate below the Federal Funds rate (the rate charged by the banks lending funds to each other).

securities. The lending fees, which are established with respect to loans made by the Client Plans collateralized by other than cash, will be set daily to reflect conditions as influenced by potential market demand. For loans secured by collateral other than cash, the applicable lending fee in respect of any outstanding loan will be reviewed daily by IITC for competitiveness and adjusted, where necessary, to reflect market terms and conditions. With respect to any calendar quarter, at least 50 percent (50%) of the securities loans negotiated on behalf of the Client Plans will be to borrowers not affiliated with IITC, and so the competitiveness of the loan fee will be tested in the marketplace. Accordingly, the applicants state that loans to the ING Borrowers should result in a competitive rate of income to the lending Client Plan. At all times, IITC will effect loans in a prudent and diversified manner.

Prior to lending any securities to the ING Borrowers on behalf of the Client Plan, IITC will disclose the method for determining minimum daily lending fees and maximum daily rebate rates, as described above, to an independent Client Plan Fiduciary for approval. The method of determining the actual daily securities lending rates (fees and rebates), the minimum lending fees payable by the ING Borrowers and the maximum rebate payable to the ING Borrowers, will be specified in an exhibit attached to the Agency Agreement to be executed between the independent Client Plan Fiduciary and IITC in cases where IITC is the direct securities lending agent.

15. If IITC reduces the lending fee or increases the rebate rate on any outstanding loan to an ING Borrower (except for any change resulting from a change in the value of any index with respect to which the fee or rebate is calculated), IITC, by the close of business on the date of such adjustment, shall provide the independent Client Plan Fiduciary with notice that IITC has adjusted such fee or rebate to such affiliated borrower, and that the Client Plan may terminate such loan at any time. IITC shall provide the independent Client Plan Fiduciary with such information as may reasonably be requested regarding such adjustment.

16. While IITC will normally lend securities to requesting borrowers on a ''first come, first served'' basis, as a means of assuring uniformity of treatment among borrowing brokers, in some cases it may not be possible to adhere to a ''first come, first served'' allocation. This can occur in instances when: (a) the credit limit established for such ''first in line'' borrower by IITC and/or the Client Plan has already been satisfied; (b) the ''first in line'' borrower is not approved as a borrower by a particular Client Plan whose securities are sought to be borrowed; or (c) the ''first in line'' borrower cannot be ascertained, as an operational matter, because several borrowers spoke to different representatives of IITC at or about the same time with respect to the same security. In situations (a) and (b), above, loans would usually be effected with the ''second in line'' borrower. In situation (c), above, securities would be allocated as equitably as practicable among all eligible requesting borrowers.

17. IITC on behalf of a Client Plan will receive collateral from ING Borrowers by physical delivery, book entry in a U.S. securities depository, wire transfer, or similar means by the close of business on or before the day the loaned securities are delivered to such ING Borrowers. The collateral will consist of U.S. dollars, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable United States bank letters of credit issued by an entity other than the ING Borrowers or any affiliate thereof, or any combination thereof, or other collateral permitted under PTCE 81–6 (as amended from time to time or, alternatively, any additional or superceding class exemption that may be issued to cover securities lending by employee benefit plans).

The market value of the collateral on the close of business on the business day preceding the day the loaned securities are delivered to the ING Borrowers will be at least 102 percent (102%) of the then market value of the loaned securities. The Basic Loan Agreement will give the Client Plan a continuing security interest in and a lien on the collateral. IITC will monitor the level of the collateral daily. If the market value of the collateral falls below 100 percent (100%), IITC will require the ING Borrower to deliver by the close of business the next day sufficient additional collateral to bring the level back to at least 102 percent (102%).

18. Subject to the terms and conditions of the Agency Agreement (or the Primary Lending Agreement), IITC will invest and reinvest all or substantially all cash collateral in approved investments designated by the applicable Client Plan and identified on a schedule attached to the relevant agreement. All approved investments made by IITC will be for the sole account and risk of the applicable Client Plan. From time to time, the Client Plan may instruct IITC in writing not to make an approved investment with a certain counter-party, or through a particular financial institution or intermediary. Alternatively, the Client Plan may also retain the right to directly control the reinvestment of the cash collateral.

19. Each Client Plan participating in the lending program will be sent a monthly transaction report. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or loan premium (as the case may be) at which the security is loaned, and the number of days the security has been on loan. At the request of the Client Plan, such a report will be provided on a weekly or daily basis, rather than a monthly basis. Also, upon request of the Client Plan, IITC will provide the Client Plan with daily confirmations of securities lending transactions.

In order to provide the means for monitoring lending activity, rates on loans to the ING Borrowers compared with loans to other brokers, and the level of collateral on such loans, it is represented that the monthly report will show, on a daily basis, the market value of all outstanding loans of securities to the ING Borrowers and to other borrowers. Further, the monthly report will state the daily fees where collateral other than cash is utilized and will specify the details used to establish the daily rebate payable to all brokers where cash is used as collateral. The monthly report also will state, on a daily basis, the rates at which securities are loaned to the ING Borrowers compared with the rates at which securities are loaned to other brokers. This statement will give each independent Client Plan Fiduciary information that can be compared to that contained in the daily rate schedule.

20. Under the Plan A arrangement and, in some instances, under the Plan B arrangement (see paragraph 21, below, for the types of lending services which may be provided to the Client Plans by IITC under Plan B arrangement), the Client Plan will pay a fee to IITC for providing lending services to the Client Plan, which will reduce the income earned by the Client Plan from lending its securities to the ING Borrowers. The Client Plan and IITC will agree in advance to this fee, which will represent a percentage of the income the Client Plan earns from its lending activities.

Plan B

21. With respect to Plan B, the ING Borrowers will directly negotiate an Exclusive Borrowing Arrangement with a fiduciary of a plan, including Client Plans for which IITC serves as directed trustee or custodian, where such fiduciary is independent of the ING Borrower and IITC. Under the Exclusive Borrowing Arrangement, the ING Borrower will have exclusive access for a specified period of time to borrow securities of the Client Plan pursuant to certain conditions. IITC will not participate in the negotiation of the Exclusive Borrowing Arrangement. The involvement of IITC, if any, will be limited to such activities as holding securities available for lending, handling the movement of borrowed securities and collateral, and investing or depositing any cash collateral and supplying the Client Plans with certain reports. The applicants represent that, under an Exclusive Borrowing Arrangement, neither the ING Borrower nor IITC will perform for the relevant Client Plan the functions which constitute the essential functions of a securities lending agent.

22. Upon delivery of loaned securities to the ING Borrower, IITC, or another custodian on behalf of the Client Plan, will receive from the ING Borrower on the same day by physical delivery, book entry in a U.S. securities depository, wire transfer, or similar means collateral consisting of U.S. dollars, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable United States bank letters of credit issued by an entity other than the ING Borrowers, or any combination thereof, or other collateral permitted under PTCE 81–6 (as amended from time to time or, alternatively, any additional or superceding class exemption that may be issued to cover securities lending by employee benefit plans).

The market value of the collateral at the close of business on the business day preceding the day the loaned securities are delivered to the ING Borrower will be at least 102 percent (102%) of the then market value of the loaned securities. IITC or such other custodian will monitor the level of the collateral daily. If the market value of the collateral falls below 100 percent (100%) of that of the loaned securities, the ING Borrower will deliver sufficient additional collateral on the following day such that the market value of all collateral will equal at least 102 percent (102%) of the market value of the loaned securities. The ING Borrower or, in the case of some Client Plans, IITC, will provide a weekly report to the Client Plan showing, on a daily basis, the aggregate market value of all outstanding security loans to the ING Borrower, and the aggregate market value of the collateral.

23. Before entering into an Exclusive Borrowing Arrangement, the ING Borrower will furnish to the Client Plan, if such plan does not already possess such statements, the most recent publicly available audited and unaudited statements of its financial condition, as well as any other publicly available information which the ING Borrower believes is necessary for the Client Plan to determine whether to enter into or renew the arrangement, and a copy of the final exemption, if granted, together with this proposed exemption. The Exclusive Borrowing Arrangement will contain a requirement that the ING Borrower must give prompt notice at the time of a loan of any material adverse changes in financial condition of the ING Borrower since the date of the most recently furnished financial statements. All the procedures under the Exclusive Borrowing Agreement will conform to the applicable provisions of PTCE 81–6 and PTCE 82–63 and will be in compliance with the applicable banking laws of the United Kingdom and the Netherlands, and the securities laws of the United States, the United Kingdom or Japan.

24. In exchange for the exclusive right to borrow certain securities from a Client Plan, an ING Borrower will pay such Client Plan either a flat fee, or a minimum flat fee plus a percentage (negotiated at the time the Exclusive Borrowing Arrangement is entered into) of the total balance outstanding of borrowed securities, or a percentage of the total balance outstanding without any flat fee. A percentage may be established by reference to an objective formula. The ING Borrower and the independent Client Plan Fiduciary may agree that different fee arrangements will apply to different securities or different groups of securities. Any change in the rate paid to the Client Plan will require the written consent of the independent Client Plan Fiduciary. However, such Client Plan's consent will be presumed where the rate changes pursuant to an objective formula. In such instances, an independent Client Plan Fiduciary must be notified at least 24 hours in advance of the rate change, and the independent Client Plan Fiduciary must not object in writing to such change, prior to the effective date of the change. Under this fee arrangement, all earnings generated by the cash collateral will be returned to the ING Borrower. The Client Plan will receive credit for all interest, dividends, or other distributions on any borrowed securities. In addition, under some arrangements, the earnings on the collateral due to the ING Borrower, and the dividends, interest, and other distributions on the borrowed securities payable to the Client Plan may be offset against each other, so that only a net amount will be returned to the ING Borrower.

25. Either party may terminate the Exclusive Borrowing Arrangement and/or any outstanding securities loan at any time. Upon termination of any securities loan, the ING Borrower will deliver any borrowed securities back to the Client Plan within five (5) business days of written notice of termination.

26. With regard to those Client Plans for which IITC provides custodial, clearing, and/or reporting functions relative to securities lending transactions, IITC and an independent Client Plan Fiduciary and the ING Borrowers will agree in advance and in writing to any fee that IITC is to receive for such services. Such fees, if any, would be fixed fees (*e.g.,* IITC might negotiate to receive a fixed percentage of the value of the assets with respect to which it performs these services, or to receive a stated dollar amount) and any such fee would be in addition to any fee IITC has negotiated to receive from any such Client Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement for IITC to provide such functions relative to loans of securities to the ING Borrower will be terminable by the Client Plan within five (5) business days of receipt of written notice without penalty to the Client Plan, except for the return to the ING Borrower of a part of any flat fee paid by such ING Borrower to the Client Plan, if the Client Plan has also terminated its Exclusive Borrowing Arrangement with the ING Borrower. Before entering into an agreement with the Client Plan to provide such functions relative to loans of securities to the ING Borrower, IITC will furnish to the Client Plan any publicly available information which it believes is necessary for the Client Plan to determine whether to enter into or renew the Exclusive Borrowing Arrangement.

27. The conditions of this exemption, if granted, will provide adequate safeguards for the Client Plans which engage in securities lending transactions. Under the terms of this proposed exemption, only Client Plans with total assets having an aggregate market value of at least $50 million are permitted to lend securities to the ING

Borrowers, as measured in accordance with Section I(o) of this proposed exemption. This restriction is intended to assure that any lending to the ING Borrowers will be monitored by an independent Client Plan Fiduciary of above average experience and sophistication in matters of this kind who is acting on behalf of a Client Plan.

Further, safeguards are provided in that for any transactions with ING Borrowers covered by this proposed exemption, ING Institutional, a U.S. affiliate of ING, has agreed to indemnify and hold harmless the Client Plans in the United States (including the sponsor and fiduciaries of such Client Plans) so that the Client Plans will not have to litigate in the case of ING Borrowers in foreign jurisdictions or sue ING Borrowers to realize on the indemnification. Such indemnification by ING Institutional protects the Client Plans against any and all reasonably foreseeable damages, losses, liabilities, costs, and expenses (including attorney's fees) which such plans may incur or suffer, arising from any impermissible use by ING Borrowers of the loaned securities or from an event of default arising from an ING Borrower's failure to deliver loaned securities in accordance with the applicable Basic Loan Agreement or otherwise failing to comply with the terms of such agreement. If any event of default occurs, ING Institutional promptly and at its own expense (subject to rights of subrogation in the collateral and against such borrower), will purchase or cause to be purchased, for the account of the Client Plans, securities identical to the borrowed securities (or their equivalent). Alternatively, if such replacement securities cannot be obtained on the open market, ING Institutional will pay the Client Plan the difference in U.S. dollars between the market value of the loaned securities and the market value of the related collateral, on the date of the borrower's breach of its obligation to return the loaned securities. If, however, the event of default is caused by the ING Borrower's failure to return securities within a designated time, the Client Plan has the right to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price and any other expenses of the Plan associated with the sale and/or purchase. If the collateral is insufficient to accomplish such purchase, ING Institutional will indemnify the Client Plan for any shortfall in the collateral plus interest on such amount and any transaction costs incurred (including attorney's fees of the Client Plan for legal actions arising out of the default on loans or failure to properly indemnify under this provision).

28. The proposed exemption will be protective of the rights of participants and beneficiaries of the Client Plans because of the on-going oversight of certain regulatory agencies. In this regard, ING Bank London is subject to primary supervision of DNB (i.e., De Nederlandsche Bank), the Dutch central bank. DNB is also a member of the European System of Central Banks. Pursuant to the Dutch banking law and directives issued by the European Union (EU), DNB is responsible for safeguarding the solvency and liquidity of Dutch banks and protecting the rights of creditors thereof, including branches of ING Bank located in EU Member States. ING represents that the DNB ensures that there are procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, administration, and financial resources. ING further represents that it is required to provide the DNB on a recurring basis with information regarding capital adequacy, as well as periodic, consolidated financial reports on the financial condition of ING Bank N.V. and its affiliates.

DNB has adopted rules to insure that Dutch banks, such as ING Bank, remain solvent through limitations imposed on the risk-bearing operations of such institutions. DNB has also issued liquidity directives mandating that Dutch banks maintain a certain level of liquid assets to insure that all liabilities can be met when due. Finally, DNB supervises the administrative organizations of Dutch banks, including their internal accounting systems and internal control systems. This authority includes taking measures designed to prevent conflicts of interest within Dutch banks and advising (and, when necessary, directing) Dutch banks with regard to their internal administrative organization to insure adequate risk management. It is represented that such supervisory authority also applies to the ING Bank London.

To ensure compliance with all applicable rules and to enable DNB to monitor the operations, Dutch banks are required to submit monthly and audited annual returns which reflect the banks true and fair financial position. DNB can withdraw a bank's license for failure to follow instructions to correct an incorrect return. Failure to file an annual report, within six (6) months of the end of the fiscal year, can result in the imposition of a fine or two years imprisonment.

With regard to enforcement, where a Dutch bank fails to comply with DNB's solvency, liquidity, or administrative organization requirements, DNB will inform the bank that a violation has occurred and that such violation must be corrected. In this regard, it is represented that DNB may instruct the bank on how to correct the violation. Failure to comply with DNB instructions within a two week period, or failure to submit a suitable explanation of the violation, may result in: (a) all management decisions being subject to DNB approval; (b) the appointment of DNB officers to assume control; or (c) when warranted, a cease and desist order or significant fines. If officers of a foreign branch of a Dutch bank, such as ING Bank London, fail to follow DNB instructions, and if such failure rises to a criminal violation, a fine or two years imprisonment may be imposed.

Further protection is offered the Client Plans in that ING Bank London is also subject to regulation by the FSA (i.e., the Securities and Futures Authority of the U.K.) for the Bank of England. FSA assumed the regulatory role of the Bank of England in 1998. FSA's powers include licensing banks in the United Kingdom, issuing directives to address violations or irregularities involving such banks, requiring information from a bank or its auditor regarding supervisory matters and revoking bank licenses.

29. As a broker-dealer authorized to conduct business in the United Kingdom, ING London is authorized and governed by the rules, regulations, and registration requirements of the SFA. In this regard, ING London is subject to rules relating to minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules and requirements for books and records with respect to client accounts. Although ING London is not registered with the SEC in the United States, the rules and regulations set forth by the SFA share a common objective with the SEC in that both protect the investor by regulating the securities industry under their jurisdiction. The SFA requires each firm that employs registered representatives or registered traders to have a positive tangible net worth and be able to meet its obligations when due. In addition, the SFA rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. Further, to demonstrate capital adequacy, the SFA rules impose

reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting and record keeping requirements to the effect that required records must be produced at the request of the SFA, at any time. Finally, the rules and regulations of the SFA for broker-dealers impose potential fines and penalties that establish a comprehensive disciplinary system.

30. As a Japanese company authorized as a broker-dealer, ING Japan is governed by the rules, regulations and membership requirements of the MOF (*i.e.,* the Ministry of Finance) and the Tokyo Stock Exchange. In this regard, ING Japan is subject to rules relating to minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules, and requirements for books and records with respect to client accounts. The MOF and the Tokyo Stock Exchange share a common objective with the SEC in that each provides protection for the investor by the regulation of the securities industry. The rules of MOF and the Tokyo Stock Exchange require each firm that employs registered representatives or registered traders to have a positive tangible net worth and to be able to meet its obligations when due. In addition, the rules of the MOF and the Tokyo Stock Exchange set forth comprehensive financial resource and reporting/disclosure requirements regarding capital adequacy. Further, to demonstrate capital adequacy, the rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting and record keeping requirements to the effect that required records must be produced at the request of the MOF and the Tokyo Stock Exchange at any time. Finally, the rules and regulations of the MOF and the Tokyo Stock Exchange for broker-dealers impose potential fines and penalties that establish a comprehensive disciplinary system.

31. In addition to the protections afforded by the DNB and the FSA in the case of the ING Bank London, by the SFA in the case of ING London, and the MOF and the Tokyo Stock Exchange regulations in the case of ING Japan, ING represents that the Foreign Borrowers, including ING Bank London,[13] ING London, and ING Japan, will comply with all applicable provisions of Rule 15a–6 of the 1934 Act. In this regard, Rule 15a–6 provides foreign broker-dealers with a limited exemption from SEC registration requirements, as described below, and offers additional protections. Specifically, Rule 15a–6 provides an exemption from U.S. broker-dealer registration for foreign broker-dealers that induce or attempt to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a ''U.S. institutional investor'' [14] or a ''U.S. major institutional investor,'' [15] provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary.

32. Several safeguards, described more fully below, are incorporated into the proposed exemption to ensure the protection of the Client Plans' assets involved in these securities lending transactions. In this regard, ING represents that under Rule 15a–6, any Foreign Borrower that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major institutional investor must, among other things—

(a) Provide written consent to service of process for any civil action brought by, or proceeding before, the SEC or any self-regulatory organization;

(b) Provide the SEC (upon request or pursuant to agreements reached between any foreign securities authority, including any foreign government, and the SEC or the U.S. Government) with any information or documents within the possession, custody, or control of the foreign broker-dealer, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to transactions effected pursuant to the rule;

(c) Rely on the U.S. registered broker-dealer [16] through which the transactions with the U.S. institutional and major institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating their terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

(4) Maintain required books and records relating to the transactions, including those required by Rule 17a–3 (Records to be Made by Certain Exchange Members) and Rule 17a–4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

(5) Receive, deliver and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or U.S. major institutional investor in compliance with Rule 15c3–3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities); and

(6) Participate in all oral communications (*e.g.,* telephone calls) between the foreign associated person and the U.S. institutional investor (not the U.S. major institutional investor), and accompany the foreign associated person on all visits with both U.S. institutional and major institutional investors. By virtue of this participation, the U.S. registered broker-dealer would become responsible for the content of all these communications.

33. In all cases, ING will maintain records of each transaction and market records sufficient to assure that all loans

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[13] Section 3(a)(4) of the 1934 Act defines ''broker'' to mean ''any person engaged in the business of effecting transactions in securities for the account of others, but it does not include a bank.'' Section 3(a)(5) of the 1934 Act provides a similar exclusion for ''banks'' in the definition of the term ''dealer.'' However, section 3(a)(6) of the 1934 Act defines ''bank'' to mean a banking institution organized under the laws of the United States or a State of the United States. Further, Rule 15(a)(6)(b)(2) provides that the term ''foreign broker or dealer'' means ''any non-U.S. resident person . . . whose securities activities, if conducted in the United States, would be described by the definition of ''broker'' or ''dealer'' in sections 3(a)(4) or 3(a)(5) of the 1934 Act. Therefore, the test of whether an entity is a ''foreign broker'' or ''dealer'' is based on the nature of such foreign entity's activities and, with certain exceptions, only banks that are regulated by either the United States or a State of the United States are excluded from the definition of the term ''broker'' or ''dealer.'' Thus, for purposes of this exemption request, the applicants will comply with the applicable provisions and relevant SEC interpretations and amendments of Rule 15a–6 with respect to all Foreign Borrowers.

[14] The term ''U.S. institutional investor,'' as defined in Rule 15a–6(b)(7), includes an employee benefit plan within the meaning of the Act, if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or (b) the employee benefit plan has total assets in excess of $5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are ''accredited investors,'' as defined in Rule 501(a)(1) of Regulation D of the Securities Exchange Act of 1933, as amended.

[15] The term ''U.S. major institutional investor'' is defined in Rule 15a–6(b)(4) as a person that is a U.S. institutional investor that has total assets in excess of $100 million or an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of $100 million.

The Department notes that a SEC No-Action Letter has expanded the categories of entities that qualify as '''major U.S. institutional investors''. See SEC No-Action letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997.

[16] ING London and ING Japan, in lieu of relying on a U.S. broker-dealer and to the extent permitted by applicable U.S. securities law, may rely on a U.S. bank or trust company, including ING Institutional, to perform this role.

to the ING Borrowers will be effected under arm's-length terms. Such records will be provided to the Client Plan Fiduciary, who is independent of IITC and the ING Borrowers, in the manner and format agreed to by such Client Plan Fiduciary and IITC, without charge to the Client Plan.

34. The applicants represent that the proposed transactions are in the interest of the Client Plans in that the lending of securities is a low-risk method to enable a plan to enhance its returns on otherwise idle assets. In this regard, a Client Plan which participates in securities lending is able to earn a fee for lending the securities to the borrower while continuing to receive the economic benefits of receiving dividends, interest payments, and other distributions made with respect to the loaned securities.

35. The proposed exemption is administratively feasible in that it will not require any ongoing involvement by the Department, and the proposed conditions provide for the review and approval of the securities borrowing agreement by an independent Client Plan Fiduciary. Further, it is represented that the conditions to which the applicants have consented are comparable in all material respects to other recent individual administrative exemptions granted by the Department under similar circumstances. In addition, the applicants represent that both the Plan A and Plan B arrangements described herein incorporate the relevant conditions contained in class exemptions, PTCE 81–6 and PTCE 82–63. Finally, the applicants will bear the cost of filing the application for exemption and the costs associated with providing notice to interested persons, and will be responsible for the payment of all transfer fees and taxes related to securities lending transactions that are the subject of this proposed exemption.

36. In summary, the applicants represent that the subject transactions will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

a. Plan A requires approval of the terms of the Basic Loan Agreement and the execution of the Agency Agreement (or the Primary Lending Agreement) by an independent Client Plan Fiduciary before such Client Plan lends any securities to an ING Borrower;

b. Under Plan B, an ING Borrower will directly negotiate the Exclusive Borrowing Arrangement with the Client Plan and such arrangement may be terminated by either party to the arrangement at any time;

c. The lending arrangements will permit the Client Plans to lend securities to the ING Borrowers, which have a substantial market position as securities lenders, and will enable the Client Plans to diversify the list of eligible borrowers and earn additional income from the loaned securities while continuing to receive any dividends, interest payments, and other distributions on those securities;

d. Neither the ING Borrowers nor IITC will exercise any discretionary authority or control with respect to the investment of the assets of Client Plans involved in the securities lending transactions, or render investment advice with respect to those assets, including any decisions concerning a Client Plan's acquisition or disposition of securities available for lending;

e. Before a Client Plan participates in a securities lending program under Plan A and before entering into any securities lending transaction under Plan A with an ING Borrower, an independent Client Plan Fiduciary must have: (i) Authorized and approved the Agency Agreement with IITC, where IITC is acting as the direct securities lending agent; (ii) Authorized and approved the Primary Lending Agreement with the primary lending agent, where IITC is serving under a Sub-Agency Agreement with the primary lending agent; (iii) Approved the general terms of the Basic Loan Agreement between such Client Plan and the ING Borrower;

f. A Client Plan may terminate any securities lending agency agreement at any time without penalty on five (5) business days' notice;

g. By the close of business on or before the day the loaned securities are delivered to the ING Borrowers, IITC (or another custodian acting on behalf of the Client Plan) will receive from the ING Borrowers, by various means, collateral consisting of U.S. dollars, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, or irrevocable U.S. bank letters of credit (issued by an entity other than the ING Borrowers) or other collateral permitted under PTCE 81–6;

h. The market value of the collateral which secures any loan of securities will at all times equal at least 102 percent (102%) of the market value of the loaned securities;

i. The Basic Loan Agreement will give the Client Plans a continuing security interest in, and a lien on, the collateral which secures any loan of securities;

j. IITC will monitor daily the level of the collateral which secures any loan of securities;

k. All the procedures regarding the securities lending activities will conform to the applicable provisions of PTCE 81–6 and PTCE 82–63 and will be in compliance with the applicable banking laws of the United Kingdom and the Netherlands, and the securities laws of the United States, the United Kingdom or Japan;

l. In the event the ING Borrower fails to return securities within a designated time, the Client Plan will have the right under the Basic Loan Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price;

m. If the collateral is insufficient to satisfy the obligation of the ING Borrower to return the Client Plan's securities, ING Institutional will indemnify the Client Plan with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Client Plan plus applicable interest at a reasonable rate;

n. The Client Plan will receive the equivalent of all distributions made to the holders of the borrowed securities during the term of the loan;

o. Only those Client Plans which have assets with an aggregate market value of at least $50 million (except for certain Related Client Plans or Unrelated Client Plans whose assets are commingled in a group trust under the conditions discussed herein) will be permitted to lend securities to ING Borrowers;

p. With respect to any calendar quarter, at least 50 percent (50%) or more of the outstanding dollar value of securities loans negotiated on behalf of Client Plans will be to unrelated borrowers, unless the Client Plan has entered into an Exclusive Borrowing Arrangement;

q. The terms of each loan of securities by the Client Plans to the ING Borrowers will be at least as favorable to such plans as those of a comparable arm's-length transaction between unrelated parties;

r. Each Client Plan will receive monthly reports on the securities lending transactions, so that an independent Client Plan Fiduciary may monitor the securities lending transactions with the ING Borrower;

s. Before entering into the Basic Loan Agreement and before a Client Plan lends any securities to an ING Borrower, an independent Client Plan Fiduciary will receive sufficient information concerning the financial condition of the ING Borrower, including the audited

and unaudited financial statements of such ING Borrower;

t. The ING Borrower will provide to a Client Plan prompt notice at the time of each loan by such plan of any material adverse changes in such ING Borrower's financial condition, since the date of the most recently furnished financial statements;

u. The Client Plan will receive a reasonable fee that is related to the value of the borrowed securities and the duration of the loan, or will have the opportunity to derive compensation through the investment of cash collateral;

v. The loan rebate or similar fee paid by the Client Plan to the ING Borrower will not be greater than the fee such Client Plan would pay an unrelated party in an arm's length transaction;

w. Prior to the Client Plan's approval of the lending of its securities to any ING Borrowers, a copy of the final exemption, if granted, and a copy of this notice of pendency will be provided to the Client Plan;

x. ING will maintain or cause to be maintained within the United States for a period of six (6) years from the date of each transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable certain parties to determine whether the conditions of this exemption, if granted, have been met; and

y. All loans involving the Foreign Borrowers must satisfy certain supplemental requirements, as set forth in Section I(q), above, of this proposed exemption.

Notice to Interested Persons

Included among those persons who may be interested in the pendency of the proposed exemption are the trustees or fiduciaries of Client Plans which are interested in lending securities to the ING Borrowers. In this regard, the applicant represents that because the Client Plans which will be potentially interested in the transactions cannot be identified at the time the Notice of Proposed Exemption (the Notice) is published in the **Federal Register**, that the only practical means of notifying the trustees or fiduciaries of the Client Plans is by publication of the Notice in the **Federal Register**. Written comments and/or requests for a hearing must be received by the Department not later than thirty (30) days from the date of the publication of this proposed exemption in the **Federal Register**. Further, it is represented that prior to entering into a securities lending agreement with a Client Plan, the applicants will provide the appropriate fiduciaries of such plan, by first class mail, a copy of such Notice and a copy of the final exemption, if granted.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department telephone (202) 219–8883. (This is not a toll-free number.)

Cranston Print Works Company General Employees' Retirement Plan (the Plan)

Located in Cranston, Rhode Island

[Application No. D–10909]

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 by the Plan of shares of common stock (the Stock) of Cranston Print Works Company (Cranston) from Cranston, the Plan's sponsor; (2) the Plan's holding of the Stock; (3) the acquisition and holding by the Plan of an irrevocable put option (the Put Option) which permits the Plan to sell the Stock to Cranston at a price which is the greater of: (i) the fair market value of the Stock determined by an independent appraisal at the time of the exercise of the Put Option, or (ii) the price at which the Stock originally was sold by Cranston to the Plan; and (4) the possible future repurchase of the Stock by Cranston pursuant to the Put Option or a right of refusal, provided the following conditions are satisfied: (a) the purchase of the Stock by the Plan will be a one-time transaction for cash, and no commissions will be paid by the Plan with respect to the purchase; (b) the Stock will represent no more than 7.5% of the value of the assets of the Plan; (c) the Plan pays no more than the fair market value of the Stock on the date of the acquisition, as determined by an independent, qualified appraiser; (d) the transactions will be expressly approved on behalf of the Plan by a qualified, independent fiduciary based upon a determination that such acquisition is in the best interests of, and appropriate for, the Plan; (e) the Plan's independent fiduciary will monitor the holding of the Stock by the Plan and take whatever action is necessary to protect the Plan's rights, including, but not limited to, the exercising of the Put Option if the independent fiduciary, in its sole discretion, determines that such exercise is appropriate; (f) the purchase price per share for any shares of the Stock that are repurchased by Cranston pursuant to the right of first refusal will be the greater of: (i) the then current fair market value of the Stock, as determined by a bona fide third party purchase offer from an unrelated party, or (ii) the fair market value of the Stock, as determined by a contemporaneous independent appraisal; and (g) Cranston's obligation under the Put Option is secured by an escrow arrangement, as described herein, which is maintained by the Plan's independent fiduciary as long as the Plan continues to hold any shares of the Stock.

Summary of Facts and Representations

1. Cranston, the Plan sponsor, is involved in the textile, trucking and chemical industries. Equity interests in Cranston, including the Stock, are not publicly-traded. As of December 31, 1999, approximately 97.4% of the outstanding shares of the Stock were held by Cranston's Employee Stock Ownership Plan (the ESOP). The balance of the outstanding Stock is held by individual shareholders.

2. The Plan is a defined benefit pension plan. As of December 31, 1999, the Plan had assets with a total market value of approximately $112,000,000. The Plan had 1,346 participants as of that date and an accumulated benefit obligation of approximately $56,400,000. The total market value of the Plan's assets has increased since December 31, 1999; as of June 6, 2000, the total was over $115 million. As of the January 1, 2000 actuarial valuation, the Plan had projected benefit obligations of $56.4 million, making the Plan better than 200% funded with respect to the projected benefit obligations.

3. The Plan proposes to acquire approximately 650,000 shares of the Stock from Cranston's treasury.[17] The applicant represents that the Plan's investment in the Stock will be limited to no more than 7.5% of the Plan's assets, determined immediately after the sale. No assets of the Plan are currently invested in any loans to, property leased to, or securities issued by Cranston or any of its affiliates. No commissions will be charged with respect to the sale of the Stock to the Plan.

4. In connection with the Plan's acquisition of the Stock, the Plan will

[17] As of May 21, 2000, the price per share for the Stock was $13.29. Therefore, the proposed transaction will involve approximately $8.6 million in cash.

also obtain a Put Option from Cranston. The Put Option, which will be exercisable by the Plan's independent fiduciary (see reps. 6 and 9, below), will permit the Plan to require Cranston to purchase from the Plan all or any portion of the Stock sold to the Plan upon a determination by the Plan's independent fiduciary that the Stock is no longer a prudent investment for the Plan considering: (a) the diversification and liquidity of the Plan's assets; (b) the relative size of the investment in the Stock as a proportion of the Plan's overall assets; (c) the funding of the Plan (i.e., the ratio of the Plan's assets to its actuarially determined obligations); and (d) Cranston's prospects as a long-term investment. The purchase price to Cranston of such Stock sold pursuant to the Put Option will be the greater of: (i) the fair market value of the Stock at the time the Put Option is exercised, as determined by an independent appraisal, or (ii) the price at which the Stock was sold by Cranston to the Plan.

The Plan will also give Cranston a right of first refusal with respect to the Stock. Thus, if the Plan proposes to sell any or all of its shares of the Stock to a party other than Cranston, Cranston will have a right of first refusal to repurchase those shares from the Plan for cash. The purchase price per share for any shares of Stock that are repurchased pursuant to the right of first refusal will be the greater of the then fair market value for the Stock, as determined by a bona fide third party purchase offer from an unrelated party, or the fair market value of the Stock as determined by a contemporaneous independent appraisal.

5. The applicant represents that the acquisition of the Stock by the Plan will be a one-time transaction for cash, and the Plan will invest no more than 7.5% of its assets in the Stock. The applicant further represents that the Stock purchased by the Plan will not be a ''qualifying employer security'' as defined under section 407(d)(5) of the Act, because it will not be an employer security that satisfies the requirements of section 407(f)(1) of the Act. In this regard, the Stock purchased by the Plan will not satisfy section 407(f)(1)(B) of the Act because that section requires that at least 50% of the aggregate amount of the Stock which is issued and outstanding be held by persons independent of the issuer. Thus, since the ESOP holds approximately 97.4% of the Stock, the requirements of section 407(f)(1)(B) will not be met. Accordingly, the applicant states that the statutory exemption contained in section 408(e) of the Act (relating to the acquisition or sale by a plan of qualifying employer securities) will not apply to the proposed acquisition or sale of the Stock by the Plan, and the applicant has requested the relief proposed herein.

6. In connection with the Plan's proposed acquisition of the Stock, Cranston will deposit 12.5% of the sales proceeds as the initial balance in an escrow account (the Escrow) as an additional safeguard to support Cranston's obligations to the Plan under the Put Option. Thus, the Escrow will ensure that the proposed transaction is in the Plan's best interests and protective of the Plan. Cranston further represents that it will add deposits of $125,000 to the Escrow at the end of each calendar quarter thereafter until a total of 25% of the purchase price of the Stock has been deposited into the Escrow. The applicants represent that the Escrow will be held by the Plan's independent fiduciary (see rep. 7, below).

7. State Street Bank and Trust Company (the Bank) headquartered in Boston, Massachusetts, will act as the Plan's independent fiduciary for the purposes of approving the proposed transaction and monitoring the retention of the Stock by the Plan after the acquisition. Cranston has no corporate lending or banking relationships with the Bank and owns no interest in the Bank either directly or indirectly. The Bank is an industry leader in independent fiduciary transactions. Among other things, the Bank manages over $75 billion in company stock as assets in retirement and deferred compensation plans. The Bank has acted as an independent fiduciary in a wide range of transactions, including leveraged employee stock ownership plan acquisitions, defined benefit plan investments, mergers and acquisitions, and initial public offerings.

8. In addition, the Bank has retained Willamette Management Associates (Willamette), located in Chicago, Illinois, to act as its financial advisor in connection with its decision to purchase the Stock. Willamette, which has been in operation for over 31 years, has a national practice in providing opinions regarding fairness and securities valuation. Willamette has made a preliminary determination that, as of May 21, 2000, the Stock had a fair market value of $13.29 per share. Willamette developed this value for the Stock utilizing the Capitalization of Earnings Method and the Guideline Publicly Traded Method. Willamette will prepare an appraisal as of the date of sale. In determining fair market value on the acquisition date, Willamette will consider the income and cash flow capacities of Cranston. Willamette will review prior analyses of the Stock which have been conducted for the ESOP, and discuss with Cranston's management all relevant changes to Cranston's financial situation since the most recent prior analysis. Willamette will review financial data bearing upon recent and proposed operations, and will consider the most current economic environment in which Cranston operates its business. Neither Willamette nor any of its principals own any interest in Cranston, and Cranston owns no interest in Willamette.

9. The Bank represents that it will independently review Willamette's valuation of the Stock, as well as the annual valuations performed by Management Planning, Inc. for the ESOP for the years 1997, 1998 and 1999. In addition, the Bank will independently review Cranston's audited financial statements for the fiscal years ending June 30, 1997, 1998 and 1999, and unaudited financial statements for the nine month period ending March 31, 2000. The Bank will also review the current audited and unaudited financial statements that are available as of the date of the sale of the Stock to the Plan. The Bank will interview officers at Cranston and will consider the purchase of the Stock in the context of the investment goals of the Plan.

Prior to purchasing the Stock, the Bank, as a result of this review and relying on the opinion of Willamette, will make specific findings that: (a) it is appropriate for the Plan to purchase the Stock from Cranston; (b) such purchase is in the Plan's best interests; and (c) the Plan is paying no more than adequate consideration (i.e., fair market value) for the Stock. The Bank represents that it has made a preliminary determination, based upon the advice of Willamette, that the transaction is prudent for the Plan and in the Plan's best interests, and that the proposed consideration to be paid for the Stock by the Plan would not be greater than its current fair market value.

10. The Bank will have the authority and the responsibility, as the Plan's independent fiduciary, to monitor the Plan's continued holding of the Stock. The Bank will make all decisions for the Plan regarding the continued holding or disposition of the Stock.[18] The Bank

[18] The Department notes that any decision made by the Bank as the Plan's independent fiduciary with respect to the exercise of the Plan's rights under the Put Option shall be fully subject to the fiduciary responsibility provisions of the Act. However, by proposing this exemption, the Department is not expressing an opinion regarding

Continued

will direct the Plan's trustee with respect to the exercise of voting and other privileges applicable to shareholders of Cranston, and the Plan's rights pursuant to the Put Option as it deems appropriate.

11. In summary, the applicants represent that the proposed transactions will satisfy the criteria of section 408(a) of the Act because: (a) the Stock will represent no more than 7.5% of the Plan's assets at the time of the acquisition; (b) the purchase price for the Stock will be determined by an evaluation prepared by Willamette, a qualified independent expert in the valuation of such securities; (c) the Plan has received an additional safeguard in the form of an irrevocable Put Option which will enable the Plan, upon the independent fiduciary's decision, to sell the Stock back to Cranston at a price which is equal to the greater of the Stock's then current fair market value, as determined by independent appraisal, or the price at which the Stock was sold by Cranston to the Plan; (d) the Bank, an independent fiduciary for the Plan, will determine that the transactions are appropriate for the Plan and in the best interests of the Plan's participants and beneficiaries; (e) the Bank will monitor the holding of the Stock and determine, among other things, when to exercise the Put Option; (f) any sale of the Stock by the Plan to Cranston pursuant to Cranston's right of first refusal will be triggered by a proposed sale of the Stock by the Plan to an unrelated party pursuant to a bona fide purchase offer, and any shares of the Stock that are repurchased by Cranston, under its right of first refusal, will be for cash at a price which is equal to the greater of the then current fair market value of the Stock, as determined by the bona fide third party purchase offer, or the fair market value of the Stock as determined by a contemporaneous independent appraisal; and (g) Cranston will make an initial deposit of 12.5% of the purchase price for the Stock into the Escrow (which will be held by the Bank), and will make additional deposits of $125,000 at the close of each calendar quarter thereafter until a total of 25% of the purchase price for the Stock has been deposited into the Escrow to support Cranston's obligations to the Plan under the Put Option.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz 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 1st day of December, 2000.

Ivan Strasfeld,

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

[FR Doc. 00–31017 Filed 12–5–00; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Prohibited Transaction Exemption 2000–63; [Exemption Application No. D–10651, et al.] Grant of Individual Exemptions; Merrill Lynch & Co., Inc. (ML&Co.)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) 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).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, 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 proposed to the Secretary of Labor.

whether any actions taken by the Bank would be consistent with its fiduciary obligations under Part 4 of Title I of the Act. In this regard, section 404(a) requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making decisions on behalf of a plan.