

functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

### III. Current Actions

This Notice requests comments on the extension of the ICR included in PTE 91-55. The Department is not proposing or implementing changes to the existing ICR at this time.

*Type of Review:* Extension of a currently approved collection of information.

*Agency:* Pension and Welfare Benefits Administration, Department of Labor.

*Title:* Prohibited Transaction Exemption 91-55.

*OMB Number:* 1210-0079.

*Affected Public:* Business or other for-profit; Not-for-profit institutions; Individuals.

*Total Respondents:* 3.

*Frequency:* On occasion.

*Total Responses:* 55,000.

*Estimated Total Burden Hours:* 2,400 hours.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 6, 2001.

**Gerald B. Lindrew,**

*Pension and Welfare Benefits Administration, Deputy Director, Office of Policy and Research.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2001-07; Exemption Application No. D-10855, et al.]

### Grant of Individual Exemptions; American Express Financial Corporation (AEFC)

**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, DC. 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.

### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

- (a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

### American Express Financial Corporation (AEFC) Located in Minneapolis, MN; Exemption

[Prohibited Transaction Exemption 2001-07; Exemption Application No. D-10855]

### Section I. Exemption for the Acquisition, Holding and Disposition of American Express Company Stock

The restrictions of sections 406(a)(1)(D), 406(b)(1) and section 406(b)(2) of the Act, section 8477(c)(2)(A) and (B) of the Federal Employees Retirement System Act, and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(D) and (E) of the Code, shall not apply to the acquisition, holding and disposition of the common stock of American Express Company or its current and future affiliates (AE Stock) by Index and Model-Driven Funds (collectively, the Funds) that are managed by AEFC and its affiliates [as defined in Section III(g)(1)], provided that the following conditions and the General Conditions of Section II are met:

(a) The acquisition or disposition of AE Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the AE Stock which is intended to benefit AEFC or any party in which AEFC may have an interest.

(b) Whenever AE Stock is initially added to an index on which an Index or Model-Driven Fund is based, or initially added to the portfolio of an Index or Model-Driven Fund, all acquisitions of AE Stock necessary to bring the Fund's holdings of such Stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the model which has been used to transform the index, occur in the following manner:

(1) Purchases are from, or through, only one broker or dealer on a single trading day;

(2) Based on the best available information, purchases are not the opening transaction for the trading day;

(3) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(4) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(5) Aggregate daily purchases do not exceed 15 percent of the average daily trading volume for the security, as determined by the greater of either (i) the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous five (5) business days, both based on the best information reasonably available at the time of the transaction;

(6) All purchases and sales of AE Stock occur either (i) on a recognized U.S. securities exchange (as defined in Section III(j) below), (ii) through an automated trading system (as defined in Section III(i) below) operated by a broker-dealer independent of AEFC that is registered under the Securities Exchange Act of 1934 (the '34 Act), and thereby subject to regulation by the SEC, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section III(i) below) that is operated by a recognized U.S. securities exchange (as defined in Section III(j) below), pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(7) If the necessary number of shares of AE Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require AE Stock, AEFC appoints a fiduciary which is independent of AEFC to design acquisition procedures and monitor compliance with such procedures.

(c) Subsequent to acquisitions necessary to bring a Fund's holdings of AE Stock to its specified weighting in the index or model pursuant to the restrictions described in paragraph (b) above, all aggregate daily purchases of AE Stock by the Funds do not exceed on any particular day the greater of:

(1) 15 percent of the average daily trading volume for the AE Stock occurring on the applicable exchange and automated trading system (as

defined below) for the previous five (5) business days, or

(2) 15 percent of the trading volume for AE Stock occurring on the applicable exchange and automated trading system (as defined below) on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

(d) All transactions in AE Stock not otherwise described in paragraph (b) above are either: (i) Entered into on a principal basis in a direct, arms-length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of AEFC and is registered under the '34 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system (as defined in Section III(i) below) operated by a broker-dealer independent of AEFC that is subject to regulation by either the SEC or another applicable regulatory authority, or an automated trading system operated by a recognized U.S. securities exchange (as defined in Section III(j) below) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized U.S. securities exchange (as defined in Section III(j) below) so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from, or sales to, AEFC (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption).

(f) No more than five (5) percent of the total amount of AE Stock, that is issued and outstanding at any time, is held in the aggregate by Index and Model-Driven Funds managed by AEFC.

(g) AE Stock constitutes no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(h) A plan fiduciary independent of AEFC authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds AE Stock, other than in the case of an employee benefit plan sponsored or maintained by AEFC for its own employees (an AEFC Plan), pursuant to the procedures described herein.

(i) A fiduciary independent of the AEFC directs the voting of the AE Stock held by an Index or Model-Driven Fund on any matter in which shareholders of AE Stock are required or permitted to vote.

(j) No more than ten (10) percent of the assets of any Fund that acquires and holds AE Stock is comprised of any AEFC Plan(s) for which AEFC exercises investment discretion.

### *Section II. General Conditions*

(a) AEFC maintains or causes to be maintained for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of AEFC, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest other than AEFC 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) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

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

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

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or a representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph II(b) shall be authorized to examine trade secrets of AEFC or commercial or financial information which is considered confidential.

### *Section III. Definitions*

(a) The term "Index Fund" means any investment fund, account or portfolio sponsored, maintained, trustee, or managed by AEFC, in which one or more investors invest, and —

(1) Which is designed to track the rate of return, risk profile and other

characteristics of an independently maintained securities Index, as described in Section III(c) below, by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) For which AEFC does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains "plan assets" subject to the Act, pursuant to the Department's regulations (see 29 CFR 2510.3-101, Definition of "plan assets"—plan investments); and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit AEFC or any party in which AEFC may have an interest.

(b) The term "Model-Driven Fund" means any investment fund, account or portfolio sponsored, maintained, trustee, or managed by AEFC, in which one or more investors invest, and —

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of AEFC, to transform an independently maintained Index, as described in Section III(c) below;

(2) Which contains "plan assets" subject to the Act, pursuant to the Department's regulations (see 29 CFR 2510.3-101, Definition of "plan assets"—plan investments); and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit AEFC or any party in which AEFC may have an interest.

(c) The term "Index" means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States, but only if —

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers; and,

(2) The index is created and maintained by an organization independent of AEFC; and,

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of AEFC.

(d) The term "opening date" means the date on which investments in or withdrawals from an Index or Model-Driven Fund may be made.

(e) The term "Buy-up" means an acquisition of AE Stock by an Index or Model-Driven Fund in connection with the initial addition of such Stock to an independently maintained index upon which the Fund is based or the initial investment of a Fund in such Stock.

(f) The term "AEFC" refers to American Express Financial Corporation and its affiliates, as defined below in paragraph (g).

(g) An "affiliate" of AEFC includes:

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

(2) Any officer, director, employee or relative of such person, or partner of any such person; and

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

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

(i) The term "automated trading system" means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an "alternative trading system" within the meaning of the SEC's Reg. ATS [17 CFR part 242.300], as such definition may be amended from time to time, or an "automated quotation system" as described in section 3(a)(51)(A)(ii) of the '34 Act [15 USC 8c(a)(51)(A)(ii)].

(j) The term "recognized U.S. securities exchange" means a U.S. securities exchange that is registered as a "national securities exchange" under Section 6 of the '34 Act (15 USC 78f), as such definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (e.g., 17 CFR part 240.3b-16).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on September 19, 2000 at 65 FR 56715.

## Written Comments

The Department received one written comment with respect to the Notice and no requests for a public hearing. The comment, which was submitted by the applicant, AEFC, requests certain modifications to the conditional language and the Summary of Facts and Representations (the Summary) of the Notice. AEFC has requested these changes for purposes of clarification or to correct several typographical errors.

Following is a discussion of AEFC's comment and the Department's responses to the areas of concern raised by AEFC.

1. *Investment by the AEFC plans in the funds.* On page 56716 of the Notice, Section I(j) provides that "[n]o more than ten (10) percent of the assets of any Fund that acquires and holds AE Stock is comprised of any AEFC Plan(s) for which AEFC exercises investment discretion." AEFC assumes that this condition relates to the aggregate interest of all Plans that are sponsored by AEFC and its affiliates. AEFC also assumes that this condition does not restrict Fund investments by any AEFC Plan that is a participant-directed, defined contribution plan, even though AEFC or its affiliates may have used their authority to make such Fund available as a permissible investment under such Plan.

In consideration of AEFC's comment, the Department hereby confirms that the 10 percent investment limitation refers to the aggregate interest that all AEFC Plans may have in a Fund. The Department also wishes to confirm that this limitation does not restrict Fund investments by any AEFC Plan, which is a defined contribution, participant-directed plan, even though AEFC or its affiliates may have used their authority to make such Fund available to an AEFC Plan participant as a Plan investment option.

In addition to the above, AEFC has requested the Department to clarify that the 10 percent investment limitation would be met if a collective investment fund (in which an AEFC Plan has more than a 10 percent interest) invests in an Index or Model-Driven Fund that holds AE Stock. On a "look-through" basis, AEFC represents that the AEFC Plan would not hold more than a 10 percent interest in the second Fund.

In response to this comment, the Department wishes to emphasize that this principle would apply as long as the AEFC Plan's interest in the second Fund does not exceed, on a "look-through" basis, 10 percent of the second Fund. For purposes of illustration, the

Department is providing the following example.

Assume that Plan A, an AEFC Plan, has invested \$30 million in Collective Investment Fund #1 and that Collective Investment Fund #1 has total assets of \$100 million. On the basis of the foregoing, Plan A has a 30 percent undivided ownership interest in Collective Investment Fund #1.

Assume that Collective Investment Fund #1 invests all of its assets in Index Fund #2 which has \$500 million in total assets and invests in AE Stock.

Plan A's ownership interest in Index Fund #2 would be determined as follows: \$30 million/\$100 million + \$500 million = 5 percent.

Thus, on a "look-through" basis, Plan A would not hold more than a 10 percent interest in Index Fund #2.

2. *Fund transactions.* On page 56716 of the Notice, in Section I(e), and on page 56720 of the Summary, in Representation 14(f), it states that "[n]o transactions by a Fund involve purchases from or sales to, AEFC (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would be otherwise subject to an exemption)." AEFC has requested that the Department clarify that the foregoing language is meant to cover only transactions that are subject to this exemption.

Accordingly, the Department concurs with AEFC's interpretation of the subject language.

3. *Affiliate definition.* On page 56717 of the Notice, Section III(g) of the Definitions provides, in part, that the term "affiliate" means, with respect to AEFC, "an entity which directly or indirectly, through one or more intermediaries, is controlled by AEFC." AEFC believes that this definition is confusing and duplicative because it implies that only those entities controlled by AEFC are affiliates rather than those which AEFC directly or indirectly controls, is controlled by or is under common control with. Therefore, AEFC suggests that Section III(g) be deleted and that Section III(h), which also defines the term "affiliate," be redesignated as Section III(g).

In response, the Department concurs with AEFC's clarification and has modified Section III(g) of the Notice, accordingly. In addition, the Department has redesignated paragraphs (i) through (k) of Section III as paragraphs (h) through (j) in the final exemption.

4. *Miscellaneous revisions.* On page 56717 of the Notice, Representation 1 of the Summary provides a description of AEFC "together with its subsidiaries."

AEFC has requested that the Department modify this phrase to read "together with its affiliates."

In addition, on page 56718 of the Notice, Representation 2 of the Summary states, in part, that "AEFC acts as investment manager of institutional accounts, including employee benefit plans, with assets totaling approximately \$38.3 million." However, AEFC points out that the "\$38.3 million" figure should be revised to read "\$38.3 billion."

In response to the foregoing comments, the Department has noted these revisions to the Summary.

For further information regarding AEFC's comment letter or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10855) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, after giving full consideration to the entire record, including the written comment provided by AEFC, the Department has made the aforementioned changes to the Notice and has decided to grant the exemption subject to the modifications and clarifications described above.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**ING Barings LLC, ING Institutional Trust Company and Affiliates, Located in New York, New York, Exemption**

[Prohibited Transaction Exemption 2001-08 Exemption Application No.: D-10908].

*Section I—Transactions*

Effective as of December 6, 2000, 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,<sup>1</sup> 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

<sup>1</sup> 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.

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;<sup>2</sup> 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,<sup>3</sup> acts as a securities lending agent (or sub-agent) or as a directed trustee or custodian for such Client Plans under either of two securities lending arrangements referred to herein as Plan A and Plan B; and

(b) the receipt of compensation by ING Trust 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 ING Trust 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 ING Trust 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 ING

<sup>2</sup> 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.

<sup>3</sup> ING Institutional, its corporate successors, or any foreign or domestic affiliate of ING are referred to herein collectively as ING Trust.

Trust and the ING Borrower and is negotiated by ING Trust, which acts as a liaison between the lender and the borrower to facilitate the securities lending transaction.<sup>4</sup>

(2) Plan B, under which an ING Borrower directly negotiates an agreement with the Client Plan Fiduciary, including a Client Plan for which ING Trust 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 ING Trust, and ING Trust 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 ING Trust and the ING Borrower must have:

(1) Authorized and approved a securities lending authorization agreement with ING Trust (the Agency Agreement), where ING Trust 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 ING Trust 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 ING Trust.

(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) ING Institutional (or another custodian designated to act on behalf of the Client Plan) as agent for 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 ING Trust 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 ING Trust under Plan A or ING Trust 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 ING Trust, 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, ING Trust 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 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

<sup>4</sup> The Department, herein, is not providing exemptive relief for securities lending transactions engaged in by primary lending agents, other than ING Trust, 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).

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 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 in representation number 19, as published in the Summary of Facts and Representations in the Notice of Proposed Exemption (the Notice), 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 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.

### Written Comments

In the Notice, the Department of Labor (the Department) invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within thirty (30) days of the date of the publication of the Notice in the **Federal Register** on December 6, 2000. All comments and requests for a hearing were due by January 5, 2001.

During the comment period, the Department received no requests for a hearing. However, the Department did receive comment letters from the applicant. In this regard, in a letter dated January 3, 2001, the applicants requested certain modifications and clarifications to the language of the exemption, as proposed, and requested certain amendments to the language of the Summary of Facts and Representations (SFR) in the Notice. Subsequently, in a letter dated January 19, 2001, the applicants revised various portions of the previous comment letter. A discussion of each of the applicant's comments and the Department's responses, thereto, are set forth in the numbered paragraphs below.

1. The applicants have requested that any reference to IITC in the final exemption be changed to “ING Trust.” In this regard, the applicants believe that the use of the term, “IITC,” will be confusing to potential clients when the exemption documents are provided to such clients prior to entering into a securities lending arrangement.

Although the Department concurs with the applicants' request and has changed all references to “IITC” in the final exemption to “ING Trust,” the Department notes that, throughout the proposed exemption, the Department distinguished between the ING Institutional Trust Company (ING Institutional), acting in its individual

capacity, and IITC, a collective term, which refers to ING Institutional, its corporate successors, or any foreign or domestic affiliate of ING Barings LLC. Accordingly, in compliance with the applicants' request the words, “ING Trust,” in the final exemption will collectively refer to ING Institutional, its corporate successors, or any foreign or domestic affiliate of ING Barings LLC.

2. In its revised comment letter, dated January 19, 2001, the applicants requested an amendment of paragraph (f) of Section II, as published in the Notice (65 FR 76294), by replacing the phrase, “Client Plan,” with the words, “ING Institutional.”

The Department concurs and has modified Section II(f) of the final exemption. Words that have been stricken appear in the closed brackets, and additions have been underlined in the text below, as follows:

(f) [Client Plans] *ING Institutional* (or another custodian designated to act on behalf of the Client Plan) *as agent for 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 ING Trust or the ING Borrowers, or any combination thereof, or other collateral permitted under PTCE 81–6 (as it may be amended or superseded);

Further, the Department notes that for the sake of consistency, the text of paragraph 17, as published in the Notice (65 FR 76299), should have been modified by striking the words, “IITC,” and substituting the phrase, “ING Institutional acting as agent.” Accordingly, words that should have been stricken in the first sentence of paragraph 17 in the Notice appear in the closed brackets, and additions are underlined in the text below, as follows:

[IITC] *ING Institutional acting as agent* 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.

3. The applicants have suggested certain deletions and additions to the language in the SFR, as published in the Notice, and have requested that the Department substitute the text which is quoted below for the language that appeared in the Notice. The Department concurs and has made the requested deletions and additions in the language

in the SFR, as published in the Notice. The applicants' deletions to the language that appeared in the SFR are noted below by the words stricken in the closed brackets, and the applicants' additions have been underlined in the text below.

(A) The text of subparagraph (d) of paragraph 36, as published in the SFR in the Notice (65 FR 76303), should have read as follows:

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 (*other than with respect to the investment of cash collateral after the securities have been loaned and the collateral received*), 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.

(B) The applicants seek to strike the entire text of subparagraph (h) of paragraph 36, as published in the SFR in the Notice (65 FR 76303), as set forth, below:

[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;]

and substitute in its entirety the following language:

*The level of collateral is monitored daily either by ING Trust under Plan A or ING Trust or other designee of the Client Plan under Plan B. The market value of the collateral will initially equal 102 percent (102%) of the loaned securities. If the market value of the collateral falls below 100 percent (100%), the ING Borrower will deliver additional collateral on the following day such that the market value of the collateral will again equal 102 percent (102%).*

After giving full consideration to the entire record, including the written comments from the applicants, the Department has decided to grant the exemption, as described, amended, and concurred in above. In this regard, the comment letters submitted by the applicants to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on December 6, 2000, at 65 FR 76293.

**FOR FURTHER INFORMATION CONTACT:** Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (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 to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 8th day of February, 2001.

**Ivan Strasfeld,**

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

[FR Doc. 01-3689 Filed 2-13-01; 8:45 am]

**BILLING CODE 4510-29-P**

#### FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

##### Sunshine Act Meeting

February 8, 2001.

**TIME AND DATE:** 2 p.m., Thursday, February 15, 2001.

**PLACE:** Room 6005, 6th Floor, 1730 K Street, N.W., Washington, D.C.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will consider and act upon the following:

1. Central Sand & Gravel Co., Docket No. CENT 98-230-RM (Issues include whether the judge erred in concluding that the operator violated 30 CFR 56.12045 by failing to maintain clearances between a stockpile and overhead powerlines).

Any person attending an open meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject 20 29 CFR 2706.150(a)(3) and 2706.160(d).

**CONTACT PERSON FOR MORE INFO:** Jean Ellen, (202) 653-5629/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

**Jean H. Ellen,**

*Chief Docket Clerk,*

[FR Doc. 01-3842 Filed 2-12-01; 2:10 pm]

**BILLING CODE 6735-01-M**

#### NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

##### Federal Financial Assistance Management Improvement Act of 1999; Request for Comment; Interim/Draft Plan of Action To Implement Public Law 106-107, the Federal Financial Assistance Management Improvement Act of 1999

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice; request for public comments.

**SUMMARY:** This notice notifies interested parties that the National Archives and Records Administration (NARA) is participating in the joint effort with other Federal grant-making agencies to satisfy the provisions of Public Law 106-107, the Federal Financial Assistance Management Improvement Act of 1999 (henceforth "the Act"). The Act requires each agency to develop and implement a plan that streamlines and simplifies the application, administrative, and reporting procedures for Federal financial assistance programs. The Act also requires the agencies to consult with representatives of non-Federal entities during the development and implementation of their plans. NARA's National Historical Publications and Records Commission (NHPRC) makes grants to state and local archives, colleges and universities, libraries, historical societies, other nonprofit organizations, and individuals in the