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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10986, et al.]

Proposed Exemptions; Bank of America (BofA)

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 requests 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 requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), 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. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: moffittb@pwba.dol.gov, or by FAX to (202) 219-0204 by the end of the scheduled comment period. 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-1513, 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.

Bank of America (BofA); Located in Bethesda, Maryland

[Application No. D-10986]

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 32,836, 32,847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to (1) the granting to BofA by the Westbrook Real Estate Fund III, L.P. (LP), a Delaware Limited Partnership, of a first, exclusive, and prior security interest in the capital commitments (Capital Commitments), reserve amounts (Reserve Amounts), and capital contributions (Capital Contributions),

whether now owned or after-acquired, of certain employee benefit plans (Plans) investing in the LP; (2) the collateral assignment and pledge by the LP to BofA of its security interest in each Plan's limited partnership interest, whether now owned or after-acquired; (3) the granting by the LP of a first, exclusive, and prior security interest in a borrower collateral account to which all Capital Contributions will be deposited when paid (Borrower Collateral Account); (4) the granting to BofA by Westbrook Real Estate Partners Management III, L.L.C., a Delaware limited liability company and the general partner of the LP (the General Partner), of its right to make calls for cash contributions (Drawdowns) under the Amended and Restated Agreement of Limited Partnership of Westbrook Real Estate Fund III, L.P., dated as of June 10, 1998 (Agreement), where BofA is the representative of certain lenders (the Lenders) that will fund a so-called "credit facility" (Credit Facility) providing credit to the LP, and the Lenders are parties in interest with respect to the Plans; and (5) the execution of a partner agreement and estoppel (Estoppel) under which the Plans agree to honor the Drawdowns; provided that (i) the proposed grants, assignments, and Estoppels are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (ii) the decisions on behalf of each Plan to invest in the LP and to execute such Estoppels in favor of BofA, for the benefit of each Lender, are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BofA; (iii) with respect to Plans that may invest in the LP in the future, such Plans will have assets of not less than \$100 million¹ and not more than 5% of the assets of such Plan will be invested in the LP; and (iv) the General Partner is unrelated to any Plan and any Lender.

Effective Date: If this proposed exemption is granted, it will be effective July 30, 1998.

Summary of Facts and Representations

1. The LP is a Delaware limited partnership, the sole general partner of which is the General Partner. The General Partner is a separate affiliate of Westbrook Real Estate Partners, L.L.C.

¹ In the case of multiple plans maintained by a single employer or a single group of employers treated as a single employer under Sections 414(b), 414(c), 414(m), and 414(o) of the Code, the assets of which are invested on a commingled basis (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans.

(Westbrook), a Delaware limited liability company, which is the sponsor of the LP. The LP shall exist for eight years from the end of its initial investment period, but may be extended. The LP was formed by the General Partner (as sponsor and sole general partner) with the intent of seeking Capital Commitments from a limited number of prospective investors who would become partners (the Limited Partners) of the LP. There are fifty-three current and prospective Limited Partners having, in the aggregate, irrevocable, unconditional Capital Commitments of approximately \$1.2 billion.

2. The LP has been organized to establish an integrated, self-administered and self-managed real

estate operating company (see rep. 11, below) to acquire a broad range of real estate-related assets, portfolios and companies. The LP believes that significant opportunities exist to achieve superior risk-adjusted returns in real estate and generally seeks compounded annual returns on its investments in excess of 18%.

3. Proceeds from the sale or refinancing of properties generally will not be reinvested. The proceeds will be distributed to the Limited Partners on at least a quarterly basis so that the LP will be self-liquidated.

4. The Agreement requires each Limited Partner to make initial contributions of capital up to a specified maximum. The Agreement requires

Limited Partners to make Capital Contributions to fulfill this obligation upon receipt of notice from the General Partner. Under the Agreement, the General Partner may make Drawdowns up to the total amount of a Limited Partner's Capital Commitment upon 15 business days' notice, subject to certain limitations. The Limited Partners' Capital Commitments are structured as unconditional, binding commitments to contribute equity when Drawdowns are made by the General Partner. In the event of a default by a Limited Partner, the LP may exercise any of a number of specific remedies.

Among the Limited Partners and their investments in the LP are:

Name of partner	Capital commitment
BellSouth Master Pension Trust	\$100,000,000
NC/TREIT	100,000,000
New York State Common Retirement Fund	100,000,000
Commonwealth of Pennsylvania State Employees Retirement System	75,000,000
JPMorgan Chase Bank, as Trustee for the IBM Personal Pension Plan Trust	75,000,000
Westbrook Real Estate Fund III Ohio Group Trust	75,000,000

5. The applicant states that the LP will incur short-term indebtedness for the acquisition of particular investments and for working capital purposes (with the expectation that such acquisition indebtedness will be repaid from the Limited Partners' Capital Commitments and/or from mortgage debt). This indebtedness takes the form of the Credit Facility, a revolving credit agreement secured by, among other things, a pledge and assignment of each Limited Partner's Capital Commitment and by a pledge and assignment by the LP and the General Partner of the right to make Drawdowns of the Capital Commitments, and their security interests in the Limited Partners' limited partnership interests in the LP. This type of facility allows the LP to consummate investments quickly without having to finalize the debt/equity structure for an investment or having to arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Limited Partners and the LP. Under the Agreement, the General Partner may encumber Limited Partners' Capital Commitments, Reserve Amounts, and Capital Contributions, including the right to make Drawdowns, to one or more financial institutions as security for the Credit Facility. Each of the Limited Partners has appointed the General Partner as its attorney-in-fact to execute all documents and instruments of transfer necessary to implement the

provisions of the Agreement. In connection with this Credit Facility, each of the Limited Partners is required to execute documents customarily required in secured financings, including an agreement to honor Drawdowns unconditionally.

6. BofA is the agent for a group of Lenders providing a \$400 million revolving Credit Facility to the LP. BofA is also a participating Lender. Some of the Lenders may be parties in interest with respect to some of the Plans that invest in the LP by virtue of such Lenders' (or their affiliates') provision of services to such Plans for assets other than the Plans' interests in the LP. BofA is requesting an exemption to permit the Plans to enter into security agreements with BofA, as the representative of the Lenders, whereby such Plans' Capital Commitments, Reserve Amounts, and Capital Contributions to the LP, as well as the Plans' limited partnership interests, are used as collateral for loans made by the Credit Facility to the LP, when such loans are funded by Lenders who are parties in interest to one or more of the Plans.

The Credit Facility is used to provide immediate funds for real estate acquisitions made by the LP, as well as for the payment of LP expenses. Repayments are secured generally by the Limited Partners' Capital Contributions, Reserve Amounts, Drawdowns on the Limited Partners' Capital Commitments, and the Limited

Partners' limited partnership interests. The Credit Facility was originally intended to be available until 2001 and has been extended to May 9, 2003. The applicant has requested that the proposed exemption, if granted, be retroactive to July 30, 1998, which is the date the Credit Facility originally became effective. The LP can use its credit under the Credit Facility by direct or indirect borrowings or by requesting that letters of credit be issued. All Lenders participate on a pro rata basis with respect to all cash loans and letters of credit up to the maximum of the Lenders' respective commitments. All such loans and letters of credit are issued to or for the benefit of the LP or an entity in which the LP owns a direct or indirect interest (a Qualified Borrower), and not to any individual Limited Partner. All payments of principal and interest made by the LP or a Qualified Borrower are allocated pro rata among all Lenders.

7. The Credit Facility is a recourse obligation of the Partnership. To secure the Credit Facility, the LP has granted to BofA, for the benefit of each Lender, a first, exclusive, and prior: (1) Security interest and lien in and to the Capital Commitments, Reserve Amounts, and Capital Contributions of the Limited Partners; (2) collateral assignment and pledge of the LP's security interest in each Limited Partner's limited partnership interest; and (3) security interest and lien in the Borrower

Collateral Account. Additionally, to secure the Credit Facility, the General Partner has: (1) pledged, through a partner agreement and estoppel, its partnership interest to BofA for the benefit of each Lender; and (2) granted to BofA, for the benefit of each Lender, its right to make Drawdowns of the Capital Commitments and Reserve Amounts, and all other rights, titles, powers and privileges related to, appurtenant to or arising out of the General Partner's right under the Agreement to require or demand that Limited Partners make Capital Contributions and fund Drawdowns.

8. Each Limited Partner has executed or will execute an agreement pursuant

to which it acknowledges that the LP and the General Partner have pledged and assigned to BofA, for the benefit of each Lender which may be a party in interest (as defined in ERISA Section 3(14)) of such Limited Partner, all of their rights under the Agreement relating to Capital Commitments, Reserve Amounts, Drawdown notices, and Capital Contributions. Such agreement will include an acknowledgment and covenant by the Limited Partner that, if an event of default exists, such Limited Partner will, consistent with its obligations under the Agreement, honor any Drawdown made by BofA in accordance

with the Agreement. Such an agreement and covenant by a Limited Partner effectively limits the assertion of any defense which the Limited Partner might have against the LP or the General Partner with respect to the funding of any Drawdown made by BofA.

9. The applicant represents that at the present time the following Plans are Partners in the LP:

(1) *The SBC Master Pension Trust (formerly Ameritech Pension Trust)*. The SBC Master Pension Trust (Boston Safe Deposit and Trust Company, as Trustee) holds the assets of the following Plans, all of which have EIN 43-1301883.

Plan	Type	Plan No.	Approx. number participants	12/31/98 Approx. net fair market value (in thousands)
Ameritech Management Pension Plan	Def. Benefit	001	41,685	\$7,599,667
Ameritech Pension Plan	Def. Benefit	002	76,227	7,197,371
Employees' Pension Plan of Ameritech Publishing Ventures, Inc	Def. Benefit	011	160	2,189,091

The fiduciary of these Plans generally responsible for investment decisions in the real estate area for internally managed assets was the Ameritech Corporation Asset Management Committee, the Chief Investment Officer of Ameritech Corporation, and/or the Ameritech Corporation Investment Management Department's Real Estate Committee (comprised of the staff real estate professionals and another Investment Management Department Director), depending on the size and type of investment. The fiduciary responsible for reviewing and authorizing the Ameritech Pension Trust's investment in the partnership to which this proposed exemption relates, an internally managed asset of the Ameritech Pension Trust, was collectively the Chief Investment Officer of Ameritech Corporation, and the members of the Ameritech Corporation Investment Management Department's Real Estate Committee.

(2) *BellSouth Master Pension Trust*. The BellSouth Master Pension Trust (State Street Bank Company, as Trustee) holds the assets of two employee benefit Plans. First is the BellSouth Personal Retirement Account Pension Plan; type of plan—defined benefit; EIN: 58-1533433; Plan No. 012; number of plan participants—51,029. The approximate fair market value of the total assets of the BellSouth Personal Retirement Account Pension Plan was approximately \$7.232 billion as of December 31, 1998. Second is the

BellSouth Pension Plan; type of plan—defined benefit; EIN: 58-1533433; Plan No. 005; number of plan participants—90,302. The approximate fair market value of the total assets of the BellSouth Pension Plan was approximately \$10.7 billion as of December 31, 1998. The fiduciary generally responsible for investment decisions in real estate matters on behalf of both the BellSouth Personal Retirement Account Pension Plan and the BellSouth Pension Plan is the BellSouth Corporation Treasurer. The fiduciary responsible for reviewing and authorizing the investment in the LP is the BellSouth Corporation Treasurer.

(3) *BP Master Trust for Employee Pension Plans*. The BP Master Trust for Employee Pension Plans (JPMorgan Chase Bank, as Trustee) (the "BP Trust") is the successor to the BP America Inc. Retirement Trust (the "Prior Trust") pursuant to a merger of the Prior Trust into the BP Trust. The Prior Trust made the decision to invest in the LP and the BP Trust assumed that investment pursuant to the merger. At the time of the investment, the Prior Trust held the assets of two Plans. First was the BP America Retirement Accumulation Plan; type of plan—defined benefit; EIN: 94-2257553; Plan No. 001; approximate number of plan participants—22,279. The approximate fair market value of the total assets of the BP America Retirement Accumulation Plan was approximately \$1.415 billion as of December 31, 1998. Second was the BP

America Master Hourly Plan for Represented Employees; type of plan—defined benefit; EIN: 94-2257553; Plan No. 018; approximate number of plan participants—13,872. The approximate fair market value of the total assets of the BP America Master Hourly Plan for Represented Employees was approximately \$703.8 million as of December 31, 1998.

The fiduciary of these Plans generally responsible for investment decisions at the time of the investment was the Chief Executive Officer, BP America Inc. (the "Chief Executive Officer"). The fiduciary responsible for reviewing and authorizing the investment in the LP was also the Chief Executive Officer. The Investment Committee of BP Corporation North America Inc. is the successor fiduciary to the Chief Executive Officer.

(4) *IBM Personal Pension Plan Trust*. The IBM Personal Pension Plan Trust (JPMorgan Chase Bank, as Directed Trustee) holds the assets of the IBM Personal Pension Plan; type of plan—defined benefit; EIN: 13-0871985; Plan No. 001; approximate number of plan participants—324,808. The approximate fair market value of the total assets of the IBM Personal Pension Plan was approximately \$41.7 billion as of December 31, 1998.

The fiduciary of this Plan generally responsible for investment decisions is the Retirement Plans Committee, IBM Corporation. The fiduciary responsible for reviewing and authorizing the

investment in the LP is the Retirement Plan Committee, IBM Corporation.

(5) *United States Steel Group Trust*. The United States Steel Retirement Trust (United States Steel and Carnegie Pension Fund, as Trustee) holds the assets of two employee benefit pension Plans investing in the LP. First is the United States Steel Corporation Plan for Employee Pension Benefits (the U.S. Steel Plan); type of plan—defined benefit; EIN: 25-0996816; Plan No. 001; number of plan participants—98,916. The approximate fair market value of the total assets of the U.S. Steel Plan was \$5.922 billion as of December 31, 1998.

Second is the United States Steel Corporation Plan for Non-Union Employee Pension Benefits As Amended (the U.S. Steel Non-Union EE Plan); type of plan—defined benefit; EIN: 25-0996816; Plan No. 100; number of plan participants—31,262. The approximate fair market value of the total assets of the U.S. Steel Non-Union EE Plan was \$4.293 billion as of December 31, 1998.

The fiduciary of these Plans generally responsible for investment decisions is the United States Steel and Carnegie Pension Fund. The fiduciary responsible for reviewing and authorizing the investment in the LP is the United States Steel and Carnegie Pension Fund.

(6) *Marathon Oil Group Trust*. The Marathon Oil Group Trust (United States Steel and Carnegie Pension Fund, as Master Trustee) holds the assets of three employee benefit pension Plans investing in the LP. First is the Retirement Plan of Marathon Oil Company (the Marathon Plan); type of plan—defined benefit; EIN: 25-1410539; Plan No. 001; approximate number of plan participants—6,841. The approximate fair market value of the total assets of the Marathon Plan was \$798 million as of December 31, 1998.

Second is the Petroleum Marketing Retirement Plan; type of plan—defined benefit; EIN: 31-1551430; Plan No. 001; approximate number of plan participants—11,548. The approximate fair market value of the total assets of the Petroleum Marketing Retirement Plan was \$26.5 million as of January 1, 1998.

Third is the Marathon Ashland Petroleum LLC Retirement Plan (the Marathon Ashland Plan); type of plan—defined benefit; EIN: 31-1537655; Plan No. 001; number of plan participants—5,960. The approximate fair market value of the total assets of the Marathon Ashland Plan was \$528 million as of December 31, 1998.

The fiduciary of these Plans generally responsible for investment decisions is the United States Steel and Carnegie Pension Fund. The fiduciary responsible for reviewing and authorizing the investment in the LP is the United States Steel and Carnegie Pension Fund.

(7) *UPS Retirement Plan Trust*. The UPS Retirement Plan Trust (Bankers Trust Company, as Trustee) holds the assets of the UPS Retirement Plan; type of plan—defined benefit; EIN: 95-1732075; Plan No. 001; approximate number of plan participants—86,254. The approximate fair market value of the total assets of the UPS Retirement Plan was approximately \$5.027 billion as of December 31, 1998. The fiduciary of this Plan generally responsible for investment decisions is the Administrative Committee of the UPS Retirement Plan. The fiduciary responsible for reviewing and authorizing the investment in the LP is the Administrative Committee of the UPS Retirement Plan.

10. The applicant represents that the Plans in the trusts (the Trusts) listed in Representation 9 are currently the only employee benefit Plans subject to the Act that are Limited Partners of the LP and will be included in this exemption. However, the applicant states that it is possible that one or more other Plans will become Limited Partners of the LP in the future. Thus, the applicant requests relief for any such Plan under this proposed exemption, provided the Plan meets the standards and conditions set forth herein. In this regard, such Plan must be represented by an independent fiduciary and the General Partner must receive from the Plan one of the following:

(1) a representation letter from the applicable fiduciary with respect to such Plan substantially identical to the representation letter submitted by the fiduciaries of the other Plans, in which case this proposed exemption, if granted, will apply to the investments made by such Plan if the conditions required herein are met; or

(2) evidence that such Plan is eligible for a class exemption or has obtained an individual exemption from the Department covering the potential prohibited transactions which are the subject of this proposed exemption.

11. BofA represents that the LP has obtained an opinion of counsel that the LP constitutes an “operating company” under the Department’s plan asset regulations [see 29 CFR 2510.3-101(c)] if the LP is operated in accordance with the Agreement and the private placement memorandum distributed in

connection with the private placement of the LP interests.²

BofA represents that the security and Estoppel constitute a form of credit security which is customary among financing arrangements for real estate limited partnerships or limited liability companies, wherein the financing institutions do not obtain security interests in the real property assets of the partnership or limited liability companies. BofA also represents that the obligatory execution of the Estoppel by the Limited Partners for the benefit of the Lenders was fully disclosed in the Private Placement Memorandum as a requisite condition of investment in the LP during the private placement of the partnership interests. BofA represents that the only direct relationship between any of the Limited Partners and any of the Lenders is the execution of the Estoppel. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, are exclusively between the Lenders and the LP. BofA represents that the proposed execution of the Estoppel do not affect the abilities of the Trusts to withdraw from investment and participation in the LP. The only Plan assets to be affected by the proposed transactions are any funds which must be contributed to the LP in accordance with requirements under the Agreement to make Drawdowns to honor a Partner’s Capital Commitments and the Plan’s Limited Partnership interest in the LP.

12. BofA represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to the Plans’ investment in the LP. BofA is independent of and unrelated to the fiduciaries (the Trust Fiduciaries) responsible for authorizing and overseeing the Trusts’ investments in the LP. The Trust Fiduciaries represent independently that their authorization of the Trusts’ investments in the LP was free of any influence, authority or control by the Lenders. The Trust Fiduciaries represent that the Trusts’

² The Department notes that the term “operating company” as used in the Department’s plan asset regulation cited above includes an entity that is considered a “real estate operating company” as described therein (see 29 CFR 2510.3-101(e)). However, the Department expresses no opinion in this proposed exemption regarding whether the LP would be considered either an operating company or a real estate operating company under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the LP or for transactions involving third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to carefully examine all aspects of the LP’s proposed real estate investment program in order to determine whether the requirements of the Department’s regulations will be met.

investments in and Capital Commitments to the LP were made with the knowledge that each Limited Partner would be required subsequently to grant a security interest in Drawdowns and Capital Commitments to the Lenders and to honor unconditionally Drawdowns made on behalf of the Lenders without recourse to any defenses against the General Partner. The Trust Fiduciaries individually represent that they are independent of and unrelated to BofA and the Lenders and that the investment by the Trusts for which the Trust Fiduciaries are responsible continues to constitute a favorable investment for the Plans participating in that Trust and that the execution of the Estoppel is in the best interests and protective of the participants and beneficiaries of such Plans. In the event another Plan proposes to become a Limited Partner, the applicant represents that it will require similar representations to be made by such Plan's independent fiduciary. Any Plan proposing to become a Limited Partner in the future and needing to avail itself of the exemption proposed herein will have assets of not less than \$100 million, and not more than 5% of the assets of such Plan will be invested in the LP.

13. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The Plans' investments in the LP were authorized and are overseen by the Fiduciaries, which are independent of the Lenders, and other Plan investments in the LP from other employee benefit Plans subject to the Act will be authorized and monitored by independent Plan fiduciaries; (2) none of the Lenders has any influence, authority or control with respect to any of the Trusts' investment in the LP or the Trusts' execution of the Estoppel; (3) each Fiduciary invested in the LP on behalf of a Plan with the knowledge that the Estoppel is required of all Limited Partners investing in the LP, and all other Plan fiduciaries that invest their Plan's assets in the LP will be treated the same as any other Limited Partners are currently treated with regard to the Estoppel; (4) any Plan which may invest in the LP in the future, which needs to avail itself of the exemption proposed herein, will have assets of not less than \$100 million, and not more than 5% of the assets of any such Plan will be invested in the LP, and (5) the General Partner is unrelated to any Plan and any Lender.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department,

telephone (202) 693-8546. (This is not a toll-free number.)

A. Raimondo Inc. Pension Plan, (the Plan); Located in Greensburg, PA;

[Application No. D-11085]

Proposed Exemption

Based on the facts and representations set forth in the application, 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).³ If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective May 1, 2002, to (1) the past and continued leasing (the Lease) of certain improved real property (the Property) by the Plan to A. Raimondo Inc. (the Employer), a party in interest with respect to the Plan; and (2) the exercise, by the Employer, of options to renew the Lease, for two additional terms, provided that the following conditions have been and continue to be met:

(a) The terms and conditions of the Lease have been, and continue to be, no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Plan has been, and continues to be, represented for all purposes under the Lease, and during each renewal term, by a qualified, independent fiduciary.

(c) The Plan's independent fiduciary has negotiated, reviewed, and approved the terms and conditions of the Lease and the options to renew the Lease on behalf of the Plan and has determined that the transactions are appropriate investments for the Plan and are in the best interests of the Plan and its participants and beneficiaries.

(d) The rent paid to the Plan under the Lease, and during each renewal term, is no less than the fair market rental value of the Property, as established by a qualified, independent appraiser.

(e) The rent is adjusted annually to reflect changes in the Consumer Price Index (the CPI) and the Property is re-appraised at least every three years by a qualified, independent appraiser who

³ For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

is selected by the independent fiduciary to determine the appropriate fair market rental value (but in no event is the rental rate less than that established for the preceding rental term).

(f) The Lease is triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by the Employer, as lessee.

(g) The Plan's independent fiduciary has monitored, and continues to monitor, compliance with the terms of the Lease throughout the duration of the Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of the Employer under the terms of the Lease.

(h) The Plan's independent fiduciary expressly approves any renewal of the Lease beyond the initial term.

(i) At all times throughout the duration of the Lease and each renewal term, the fair market value of the Property has not exceeded, and does not exceed, 25 percent of the value of the total assets of the Plan.

EFFECTIVE DATE: If granted, this proposed exemption will be effective as of May 1, 2002.

Summary of Facts and Representations

1. The Employer is a family owned and operated Pennsylvania corporation specializing in the field of exterior masonry restoration and preservation. The Employer performs work in the tri-state area of Pennsylvania, West Virginia and Ohio, while maintaining its principal place of business in Greensburg, Pennsylvania.

2. The Plan, which is sponsored and administered by the Employer, is a money purchase pension plan. The Plan covers three participants and had total assets of \$1,170,999 as of December 31, 2001. The accounts in the Plan are participant-directed and the Employer serves as the Plan's named fiduciary.

3. Among the assets of the Plan is the Property, which consists of 6.679 acres of land improved by a warehouse, containing 6,150 square feet of space, and an office addition, containing 1,800 square feet of space. These structures were built by the Employer in 1986, with 726 feet of road frontage, located on Echo Valley Road (T/R 513) in Hempfield Township, Westmoreland County, Pennsylvania. The fair market value of the Property currently represents approximately 21.35 percent of the Plan's total assets. Further, the Property is not located in close proximity to other real estate that is owned by the Employer and/or its principals.

4. The Plan originally leased the Property to the Employer for an initial term of ten years, followed by an additional five-year renewal period, for a combined 15 years which expired on April 30, 2002, pursuant to the same terms and conditions used for the current Lease. In response to an exemption application filed by the Employer, the Department granted an exemption covering the original lease (the Original Lease): Prohibited Transaction Exemption 87-63 (PTE 87-63), 52 FR 24078 (June 26, 1987).

5. The parties request an administrative exemption from the Department in order to continue the Original Lease under the provisions of a new lease. The Lease has an initial term of five years, which commenced on May 1, 2002 and ends on April 30, 2007, with options to renew for two additional five year terms, only with the express approval of the Plan's independent fiduciary. The Lease is triple net and requires the Employer to pay all real estate taxes on the Property, as well as all expenses that are associated with insurance, maintenance and utilities. The applicant represents that the Plan's independent fiduciary will select a qualified, independent appraiser to reappraise the Property at least every three years to determine the appropriate fair market rental value. However, in no event will the rent be adjusted below the rental amount for the preceding Lease term. In addition, during each year of the initial term of the Lease and each renewal term, the rental rate will be increased by an amount equal to the most recent percentage increase in the CPI. Currently, the Employer is paying the Plan \$4,550 per month in rent.

6. In an independent appraisal report dated July 16, 2001 (the 2001 Appraisal), H. Kenneth Gehr, a qualified, independent real estate broker/appraiser with Shrader & Gehr Real Estate Agency, of Jeannette, Pennsylvania, updated an August 26, 2000 independent appraisal that was prepared by his firm, in which the Property's fair market value, monthly fair market rental value, and annual fair market rental value were placed at \$248,000, \$3,500, and \$42,000, respectively as of August 17, 2000. Mr. Gehr states that he is familiar with real estate sales of all types, including those for commercial and industrial properties in the Westmoreland County area, since he explains that he has sold and appraised real estate since 1947, and has given court testimony as an expert real estate witness. In addition, Mr. Gehr certifies that he has no interest in the Property, except as a fee appraiser, and that the fee he received for the 2001

Appraisal and the values reported therein were in no way related to, nor influenced by, any interested parties to the subject transactions.

In the 2001 Appraisal, Mr. Gehr determined that the Property had a fair market value of \$250,000 as of July 31, 2001, utilizing the Replacement Cost Approach to valuation. As of the same date, Mr. Gehr also placed the monthly fair market rental value of the Property at \$3,800 and its annual fair market rental value at \$45,600.⁴

7. An independent party, Mr. Lawrence W. Walter, has served as the Plan's independent fiduciary since he replaced the former independent fiduciary, Halliwell & Associates, on March 25, 1997. Mr. Walter represents that he is qualified to act as an independent fiduciary for the Plan because he is a Licensed Public Accountant, subject to the requirements of the CPA profession, as well as a Certified Financial Planner. Mr. Walter further states that he holds a Nasdaq Series Six License for securities, and has been licensed in the past to sell property/casualty and life insurance. Mr. Walter also asserts that many of his clients are involved in the real estate industry, and that, because he regularly serves as executor, estate administrator, or trustee for trusts and estates, he is experienced in acting in a fiduciary capacity. Mr. Walter confirms that he is not affiliated with the Employer, and derives less than one percent of his gross annual income from the Employer.

In addition, Mr. Walter states that, to the best of his knowledge, there was no period of time in which the interests of the Plan were not represented by an independent fiduciary, and that, since the inception of the Original Lease, the Employer has complied with all of the terms and conditions of the Original Lease and PTE 87-63.

8. Mr. Walter, acting as the Plan's independent fiduciary, represents that the transactions are feasible, in the interest of, and protective of, the Plan and its participants and beneficiaries. Mr. Walter certifies that the terms and conditions of the Lease, including CPI adjustments to the rent, are no less favorable to the Plan than those obtainable by the Plan in an arm's length transaction with unrelated third parties. In reaching this conclusion, Mr.

⁴ Although the \$4,550 per month paid by the Employer to the Plan under the Lease exceeds the \$3,800 per month fair market rental value that was established by Mr. Gehr in the 2001 Appraisal, the applicant represents that to the extent that the rent paid by the Employer to the Plan exceeds fair market rental value, such excess rent will not, when added to the balance of the annual additions to such Plan, exceed the limitations prescribed by section 415 of the Code.

Walter states that he has considered the terms of similar leases between unrelated parties, the Plan's overall investment portfolio, and the Plan's liquidity and diversification requirements.

Moreover, Mr. Walter believes that the transactions pose little risk to the Plan since the business of the Employer primarily involves restoration work on existing structures, which continues to be in high demand in the greater Pittsburgh area due to the relatively old age of the neighborhoods and structures.

Finally, Mr. Walter represents that he will monitor compliance with the Lease terms throughout the duration of such Lease, and each renewal term, and, if necessary, will take the appropriate actions to enforce the payment of the rent and the proper performance of all other obligations of the Employer under the terms of the Lease.

9. In summary, it is represented that the transactions have satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The terms and conditions of the Lease have been, and will continue to be, no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Plan has been, and continues to be represented for all purposes under the Lease, by a qualified, independent fiduciary.

(c) The Plan's independent fiduciary has negotiated, reviewed, and approved the terms and conditions of the Lease and the options to renew the Lease on behalf of the Plan and has determined that the transactions are appropriate investments for the Plan and are in the best interests of the Plan and its participants and beneficiaries.

(d) The rent paid to the Plan under the Lease and during each renewal term will be no less than the fair market rental value of the Property, as established by a qualified, independent appraiser.

(e) The rent will be adjusted annually to reflect changes in the CPI and the Property and will be re-appraised at least every three years by a qualified, independent appraiser who has been selected by the independent fiduciary to determine the appropriate fair market rental value (but in no event will the rental rate be less than that established for the preceding rental term).

(f) The Lease is triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by the Employer.

(g) The Plan's independent fiduciary has monitored, and will continue to monitor, compliance with the terms of the Lease throughout the duration of the Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of the Employer under the terms of the Lease.

(h) The Plan's independent fiduciary will expressly approve any renewal of the Lease beyond the initial term.

(i) The fair market value of the Property has not exceeded, and will not exceed, 25 percent of the value of the total assets of the Plan.

Tax Consequences of the Transactions

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and, therefore, must be examined under applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

Notice to Interested Persons

The Employer will provide notice of the proposed exemption to all interested persons by first class mail within three days of the date of publication of the notice of proposed exemption in the **Federal Register**. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments regarding the proposed exemption and requests for a public hearing are due within 33 days of the date of publication of the notice of pendency in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Anna M.N. Mpras of the Department, telephone (202) 693-8565. (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 18th day of September, 2002.

Ivan Strasfeld,

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

[FR Doc. 02-24135 Filed 9-20-02; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2002-45; Exemption Application No. D-10924 et al.]

Grant of Individual Exemptions; Deutsche Bank AG (DB)

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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is 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 exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.