

**DEPARTMENT OF LABOR****Employee Benefits Security Administration**

[Prohibited Transaction Exemption 2005–11; Exemption Application No. D–11185, et al.]

**Grant of Individual Exemptions; The UNITE National Retirement Fund**

**AGENCY:** Employee Benefits Security 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.

**The UNITE National Retirement Fund Located in New York, New York**

[Prohibited Transaction Exemption 2005–11; Exemption Application No. D–11185]

**Exemption***I. Covered Transactions*

The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,<sup>1</sup> shall not apply to the purchase(s) by UNITE–HERE<sup>2</sup> and certain regional entities affiliated with and chartered by UNITE–HERE (the UNITE–HERE Affiliates) from the UNITE National Retirement Fund (the Pension Fund) of shares of perpetual cumulative convertible preferred stock (the Preferred Stock) representing fifteen percent (15%) of the outstanding equity interests in the ALICO Services Corporation (ASC), a wholly-owned entity of the Pension Fund; provided the conditions set forth in section II, below, are satisfied.

*II. Conditions*<sup>3</sup>

(a) Prior to entering into the transactions,

(1) An independent, qualified fiduciary (the Independent Fiduciary), as defined in section III (a), below, determines, on behalf of the Pension Fund, whether the Preferred Stock should be sold to UNITE–HERE and to the UNITE–HERE Affiliates;

(2) The Independent Fiduciary approves of the terms underlying the Preferred Stock to be issued by ASC;

(3) The Independent Fiduciary negotiates and approves of the terms of the sales of the Preferred Stock to UNITE–HERE and to the UNITE–HERE Affiliates; and

<sup>1</sup> For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

<sup>2</sup> The applicant represents that the union's official name has been changed from the Union of Needletrades, Industrial, and Textile Employees to UNITE. In addition, the applicant has informed the Department that, effective July 12, 2004, UNITE merged with the Hotel Employees and Restaurant Employees International Union (HERE) to form UNITE–HERE.

<sup>3</sup> In order to provide more clarity, the Department notes that the numbering of the subparagraphs in section II, in the final exemption has been changed from the system used to number the subparagraphs of section II, as set forth in the Notice.

(4) The Independent Fiduciary determines that the terms of the sales of the Preferred Stock are no less favorable to ASC than terms that would be offered to an unrelated third party under similar circumstances;

(b) The Independent Fiduciary determines that the purchase price for the Preferred Stock paid by UNITE–HERE and by the UNITE–HERE Affiliates is no less than the fair market value of such Preferred Stock, as of the date each of the transactions is entered;

(c) The Independent Fiduciary determines the fair market value of the Preferred Stock, as of the date each of the transactions is entered; and

(d) In determining the fair market value of the Preferred Stock, the Independent Fiduciary obtains an appraisal from an independent, qualified appraiser selected by the Independent Fiduciary and ensures that the appraisal and the Independent Fiduciary's analysis of the appraisal are consistent with sound principles of valuation and the elements described in paragraph 8 in the Summary of Facts and Representations in the Notice of Proposed Exemption (the Notice);

(e) The Independent Fiduciary monitors the terms of the transactions and ensures that ASC, UNITE–HERE, and the UNITE–HERE Affiliates comply with the approved terms of the sales of the Preferred Stock; and

(f) The Pension Fund incurs no fees, commissions, or other charges or expenses as a result of its participation in the transactions other than the fees incurred in requesting this exemption and the fee payable to the Independent Fiduciary.

*III. Definitions*

For purposes of this exemption:

(a) The term, "Independent Fiduciary," means an individual or firm which is independent of and unrelated to ASC, UNITE–HERE, the UNITE–HERE Affiliates, and any other party to the subject transactions (the Parties), and which has acknowledged and agreed that it is a fiduciary appointed to act on behalf of the Pension Fund for all purposes related to the subject transactions. For purposes of this exemption:

(1) A fiduciary will not be deemed to be independent of and unrelated to the Parties, if:

(i) Such fiduciary directly or indirectly controls, is controlled by or is under common control with such Parties;

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration from such Parties in connection with the transactions

described in this exemption; except that an Independent Fiduciary may receive compensation for acting as an Independent Fiduciary in connection with the transactions contemplated herein, if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decisions with regard to the subject transactions;

(2) No individual or firm shall serve as an Independent Fiduciary during any year in which annual gross revenues received from business with the Parties for that year exceeds five (5) percent of such individual's or firm's annual gross revenues from all sources for the prior tax year; and

(3) The individual or firm selected as an Independent Fiduciary must be qualified to serve as fiduciary and to carry out the duties and responsibilities, as set forth herein.

#### 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 forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on March 24, 2004. Because the forty-five (45 day) comment period concluded on a weekend, all comments and requests for a hearing were due by Monday, May 10, 2004.

During the comment period, the Department received comment letters, facsimiles, and/or e-mails from 132 commentators. At the close of the comment period, the Department forwarded a copy of each of these comment letters, facsimiles, and e-mails to the applicant and requested that the applicant and the Independent Fiduciary respond in writing to the issues raised by the commentators. The concerns expressed by the commentators and the applicant's and the Independent Fiduciary's responses thereto are summarized in the paragraphs below.

Generally, the comments from commentators have been classified into the following categories: (1) Comments from individuals asking about benefits under the Pension Fund, including but not limited to, benefit entitlement, the level of benefit payments, and missed benefit payments; (2) comments from individuals requesting an explanation of the subject transactions or requesting confirmation that the subject transactions will not affect benefits under the Pension Fund; (3) comments from Cintas Corporation (Cintas) supporting its request that the

exemption be denied; (4) comments from Cintas requesting that if the exemption were granted, additional safeguards be incorporated into the conditions of the exemption; (5) substantive comments from other interested persons; and (6) requests for hearing from interested persons.

#### *I. Comments Concerning Benefits*

With regard to the first category of comments, the applicant represents that all e-mails, facsimiles, and comment letters concerning benefits were forwarded to UNITE Fund Administrators (UFA), the plan administrator for the Pension Fund. It is further represented that UFA has responded in writing either by mail or by e-mail to each of the commentators who expressed concern about benefits under the Pension Fund. In addition, the applicant represents that UFA provided interested persons with a telephone number to call with questions regarding benefits and made available to English, Chinese, and Spanish speaking individuals to answer such calls. In this regard, it is represented that UFA received and responded to more than 4,000 telephone inquiries.

With regard to the first category of comments, the Independent Fiduciary is of the opinion that since the sale of the Preferred Stock does not impact individual benefit determinations these comments are outside the scope of its assignment as independent fiduciary.

#### *II. Comments Requesting an Explanation*

With respect to the second category of comments, it is represented that the applicant either posted or mailed copies of (1) the Notice, (2) the supplemental statement required pursuant to the Department's Regulation section 29 CFR 2570.43, and (3) a cover memorandum which explained the subject transactions in summary form and informed interested persons that the proposed transactions would not affect such persons' entitlement to benefits under the Pension Fund. It is represented that the applicant also posted at the union hall and in other locations customarily used for employee benefits matters Spanish versions of the supplemental statement and the cover memorandum. Based on the foregoing, the applicant maintains that it has provided a clear explanation and adequate notice regarding the subject transactions and should not be required to respond further to comment letters, facsimiles, and e-mails from commentators requesting clarification.

With respect to the second category of comments, the Independent Fiduciary

represents that it does not believe that the subject transactions will threaten the security of the plan participants. In this regard, the Independent Fiduciary represents that it believes the terms of the sale of the Preferred Stock are no less favorable to the Pension Fund than terms negotiated at arm's-length with an unrelated third party under similar circumstances. In fact, the Independent Fiduciary negotiated the terms of the sales, and the Independent Fiduciary's approval of the sales is required under the subject exemption. In this regard, the Independent Fiduciary represents that it will not permit ASC to consummate the transactions, unless the Independent Fiduciary believes ASC is receiving consideration that is no less than fair market value and on terms no less favorable than the terms that would be offered to an unrelated third party under similar circumstances.

#### *III. Cintas' Comments Supporting Denial of the Exemption*

The most extensive comment letter, which included many of the issues raised by other commentators, was filed by Cintas, a contributing employer to the Pension Fund and to other related multiemployer plans. Cintas requests denial of the exemption or, in the alternative, additional safeguards for the protection of the Pension Fund and its participants and beneficiaries.

As a general response, the applicant maintains that Cintas' comments were made within the context of an ongoing labor dispute, and were intended to serve as an indirect attack on UNITE-HERE, rather than to provide meaningful comments regarding the subject transactions.

The specific comments requesting denial of the exemption which were raised by Cintas, and the applicant's and the Independent Fiduciary's responses thereto, are set forth in the numbered paragraphs below.

(1) In its comment, Cintas expresses concern about the proposed sale of the Preferred Stock to UNITE-HERE and about other transactions among UNITE-HERE and its affiliates, the Pension Fund (including ASC and its subsidiaries), and other multiemployer plans that have UNITE-HERE trustees. Cintas believes that the interrelationships among UNITE-HERE and the related plans may raise prohibited transactions issues under sections 406(a) and (b) of the Act. Most of these relate to on-going service relationships among the parties that may be impacted by the proposed ownership of ASC by UNITE-HERE.

Further, Cintas believes that the subject transactions may have

ramifications beyond those present in a sale between a plan and a party in interest. In this regard, Cintas believes it is inappropriate to consider any one of the particular transactions between UNITE–HERE and the related plans by itself without considering the implications raised by other interrelationships.

Cintas maintains that in order to fully evaluate the proposed transactions, it is critical that the Department have an understanding of the many interrelationships among UNITE–HERE and its affiliates, the Pension Fund (including ASC and its subsidiaries), and other multiemployer funds that have UNITE–HERE trustees, some of which Cintas claims it does not know and some of which Cintas notes were not mentioned in the proposed exemption. In Cintas' view, a full review of all of these activities may well be warranted through an audit of these plans.

In response to Cintas' comment, the applicant maintains that it has heretofore disclosed all relevant relationships to the Department in its April 8, 2003, application letter with respect to the proposed transactions and in a prior application for Prohibited Transaction Exemption 2001–13 (PTE 2001–13)<sup>4</sup> for which relief was granted.

In response to the questions raised by Cintas concerning the sale of the Preferred Stock and the relationships between the Pension Fund, UNITE–HERE and its affiliates, and other clients of ASC that are plans whose participants are represented by one or more of such affiliates, the Independent Fiduciary states that it is because of these relationships that it was appointed. In this regard, the Independent Fiduciary represents that it has no relationship with UNITE–HERE and its affiliates. Further, the Independent Fiduciary points out that its only responsibilities have been to the Pension Fund and its participants, and then only with respect to the original acquisition of ASC by the Pension Fund in 2001, pursuant to PTE 2001–13, and to the purchases of the Preferred Stock that are the subject of this exemption.

(2) Cintas expresses concern about the services rendered by affiliates of UNITE–HERE and/or by ASC and its subsidiaries and focuses on the fees charged for such services to various funds sponsored by UNITE–HERE, including the Pension Fund. In this regard, Cintas maintains that the fees paid by such funds are high. In support of its position, Cintas points out the amount of fees paid to UFA by an

underfunded predecessor to the Pension Fund, notwithstanding the fact that UFA is represented to be a tax-exempt, not-for-profit subsidiary of ASC.

In response, the applicant maintains that Cintas' claims are unsubstantiated, reflect a lack of understanding regarding the operation of multiemployer plans and are misleading. In the opinion of the applicant, Cintas fails to provide any support for its assertion concerning the amount of fees charged by UFA. It is the applicant's position that the fees charged are reasonable, particularly considering the complex nature of these multiemployer plans and the level of services provided. In addition, the applicant represents that UFA administers the complicated benefit structures resulting from the numerous fund mergers that have occurred. Further, it is represented that UFA provides services, which are time-intensive and labor-intensive, in an efficient and cost-effective manner.

(3) Cintas is concerned that the amount of fees paid by an underfunded predecessor to the Pension Fund were twice the level of the contributions received by such fund.

In response, the applicant maintains that an evaluation of administrative efficiency or reasonableness of fees using a comparison of fund expenses to employer contributions is misleading. According to the applicant, the amount of contributions to a multiemployer pension fund are, in many cases, driven by factors that are not closely connected with the effort involved in administering the fund. The applicant represents that contribution rates are established through collective bargaining and are not necessarily correlated to costs. It is represented that many related funds have had little or no contribution requirements and that in the past the contribution rate for a significant portion of contributing employers to a predecessor of the Pension Fund was set at a *de minimis* rate that bore no relation to the administrative services required by such fund. It is further represented that these employers now contribute at a higher rate and that contributions currently exceed UFA fees.

(4) Cintas is concerned that a related fund paid UFA in excess of \$5 million in administrative and investment management fees, notwithstanding the fact that such fund was subject to an agreement with the Pension Benefit Guaranty Corporation and was in poor financial condition.

In response, the applicant represents that the fund in question was terminated on December 31, 2003, and that a significant portion of the fees

involved legal issues arising from the termination, the collection of delinquent contributions, and employer withdrawal liability, all of which are cost-intensive undertakings. It is represented that the Pension Benefit Guaranty Corporation is fully aware of the arrangement pursuant to which UFA handles the administration of the fund and has never raised any concerns regarding UFA, its administration of the fund, or the amount of fees charged.

(5) Cintas is concerned that funds affiliated with UNITE–HERE pay fees for services provided by ASC or its affiliates where directors or executives of such subsidiaries are related to UNITE–HERE or its affiliates. For example, Cintas cites to certain funds that receive services or purchase insurance products from a subsidiary of ASC, the Amalgamated Life Insurance Company (ALICO), where Cintas asserts that Mr. Bruce Raynor, the President of UNITE–HERE is the chairman of ALICO, and his son either is or was on the Board of Directors.

In response, the applicant points out that Mr. Bruce Raynor and his brother, Harris Raynor, are members of the Board of Directors of ALICO and ASC, but Mr. Raynor's son has not been and is not on the Board of ALICO.

With regard to the provision of insurance services and products to the related funds by ALICO and the participation of the Raynor brothers on the Board of ALICO, the applicant states that it understands Cintas' concern about the potential conflicts. The applicant believes, however, that if the conflicted trustees recuse themselves from the decision-making process regarding the retention of ALICO, and the services are provided in accordance with section 408(b)(2) of the Act, there should be no prohibited transaction under the Act.<sup>5</sup>

<sup>5</sup> In support of its view, the applicant relies on: (a) Advisory Opinion 99–09A issued on May 21, 1999, in a letter to Patricia A. Shlonsky (the Shlonsky Letter); (b) Advisory Opinion 79–72A issued on October 19, 1979, in a letter to William D. Watters, Esq. (the Watters Letter); and (c) Section 408(b)(2) of the Act.

The Shlonsky Letter cites to the Watters Letter for support for the proposition that a fiduciary may avoid engaging in a transaction described in section 406(b)(1) and 406(b)(2) of the Act "by removing himself or herself from all consideration by the plan of whether or not to engage in such transaction, and by not otherwise exercising, with respect to such transaction, any of the authority, control or responsibility which makes him or her a fiduciary, absent any arrangement, agreement, or understanding with respect to who will ultimately provide the services in question. \* \* \*

Section 408(b)(2) of the Act provides a statutory exemption for "contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the

<sup>4</sup> 66 FR 7810 (Jan. 25, 2001).

(6) Cintas is concerned about the fact that the Amalgamated Bank, an entity owned by UNITE-HERE and certain of its affiliates, provides services to, and receives significant fees from, various funds affiliated with UNITE-HERE, including the Pension Fund. Cintas points out that certain funds, sponsored by the International Ladies Garment Workers Union (ILGWU) prior to the merger of Amalgamated Clothing and Textile Workers Union (ACTWU) and the ILGWU, obtained an exemption for services provided by Amalgamated Bank, but Cintas is unaware of any similar exemption for funds sponsored by ACTWU prior to its merger with ILGWU. Further, Cintas points out that Schedule C of Form 5500 of a predecessor to the Pension Fund and certain other related funds fail to note that UFA and Amalgamated Bank are parties in interest.

In response, the applicant states that Amalgamated Bank is a commercial bank chartered by the State of New York in 1923. Amalgamated Bank is subject to the supervision and examination authority of the New York State Banking Department. It is also subject to supervision and examination by the Federal Deposit Insurance Corporation. As of May 31, 2004, Amalgamated Bank had total assets under custody of approximately \$16.7 billion and total assets under management of approximately \$7.7 billion. It provides certain services to the Pension Fund and to various related funds. Amalgamated Bank also provides investment management and custodial services to more than 150 Taft-Hartley and other labor union-related funds unrelated to or unaffiliated with UNITE-HERE.

With regard to Cintas' concerns, the applicant maintains that the Department was made aware of the relationship between Amalgamated Bank and related funds and the Pension Fund in

plan, if no more than reasonable compensation is paid therefor."

The Department is offering no view, herein, as to the applicant's reliance on the Shlonsky Letter, the Watters Letter, and/or the statutory exemption, as set forth in section 408(b)(2) of the Act and 29 CFR 2550.408(b)(2) of the Department's regulations. Further, the Department is providing no relief, herein, for any prohibited transaction that may arise after the sale of the Preferred Stock, including but not limited to, any that may arise in connection with the participation by members of the Board of Directors of ASC and/or members of the Board of Trustees of the Pension Fund in the decision making process regarding the retention of affiliates of UNITE-HERE and/or ASC and its subsidiaries to provide services to the Pension Fund, or related funds. In this regard the Department notes that these transactions are outside the scope of relief offered by this exemption.

communications with representatives from the Department.<sup>6</sup>

Further, in connection with the recusal discussion in paragraph 8, below, the applicant maintains that the relationship between Amalgamated Bank and several other funds related to a predecessor of UNITE, have been governed by the terms of a letter issued in 1981 by the Department.<sup>7</sup> Among these terms, a "banking committee" composed of conflict-free employer and union trustees was required to make all policy decisions with respect to Amalgamated Bank and to manage the relationship between Amalgamated Bank and such funds.

(7) Cintas also expresses a concern that the "potential for future abuse" will increase as a result of the merger between UNITE and HERE. In this regard, Cintas believes that funds sponsored by HERE may enter into service relationships with UFA, ALICO, and Amalgamated Bank as a result of such merger.

In response, the applicant states that both ALICO and Amalgamated Bank already maintain relationships with certain funds sponsored by HERE. Second, the applicant believes that if the trustees of any fund sponsored by UNITE-HERE exercise their fiduciary duties in accordance with the Act and in a manner that does not violate the prohibited transaction provisions of the Act, the applicant can see no reason why such funds should be prohibited from engaging UFA, ALICO, or Amalgamated Bank whenever such engagement would be to the benefit of the funds and their participants and beneficiaries.

(8) Cintas notes that recusal by union trustees of the Pension Fund who serve on the Board of Directors of ASC is inadequate. Accordingly, in the opinion of Cintas, the union members serving on the boards of trustees of various related funds should also be required to recuse themselves before entering into service arrangements with ASC or its subsidiaries.

In response, the applicant believes that the Department should not disregard established precedent that recusal by an interested party works to eliminate self-dealing concerns under

<sup>6</sup> On January 17, 2003, attorneys for UNITE met with representatives of the Department in connection with the submission on August 11, 2003, of a request for an opinion letter concerning the continued utilization by plans sponsored by UNITE of the services provided by Amalgamated Bank (formerly, Amalgamated Bank of New York).

<sup>7</sup> Letter from Ian Lanoff, Administrator of Pension Welfare Benefit Programs at the Department, to Harry Huges, Esq., on behalf of the Amalgamated Clothing and Textile Workers of America (January 15, 1981).

section 406(b) of the Act. In this regard, the applicant notes that the Department has long taken the position that a fiduciary may avoid engaging in an act described in section 406(b)(1) of the Act, if such fiduciary does not use the authority, control, or responsibility which makes such person a fiduciary to cause the fund to pay a fee for a service furnished by a person in which the fiduciary has an interest which may affect the exercise of the fiduciary's best judgment as a fiduciary. The applicant points out that the Department has on numerous occasions, considered recusal an acceptable means to avoid triggering a breach of sections 406(b)(1) and (b)(2) of the Act, so long as such fiduciary (1) has removed himself or herself from all consideration of whether to engage in such activity and (2) does not otherwise exercise, with respect to the proposed transaction, any of the authority, control, or responsibility which makes him or her a fiduciary, provided there is no arrangement, agreement, or understanding with respect to who will ultimately provide the services in question. It is the applicant's view that so long as the trustees of the Pension Fund and/or the trustees of any related funds act in accordance with the foregoing mandates with respect to the selection and retention of UFA or the selection and retention of any other ASC subsidiary to provide services for such funds, the applicant sees no reason why recusal would not work.

(9) Cintas maintains that, while the applicant asserts otherwise, "it is hardly clear that the Labor Management Relations Act is not violated by recusal of the union trustees."

In response, the applicant states that it has provided supporting authority for its position in the form of a United States Supreme Court decision,<sup>8</sup> while Cintas has failed to provide any support for its statement.

(10) Cintas is concerned that, even if union trustees of the Pension Fund recuse themselves, there will be enormous pressure on management trustees of the Pension Fund to approve a transaction, unless such transaction were completely unjustified, and to agree to service arrangements and fees in order to avoid acrimony with the union trustees and to avoid hostile collective bargaining negotiations with UNITE-HERE.

It is the applicant's view that Cintas fails to understand that the non-interested trustees remain subject to the fiduciary responsibility provisions of the Act and are required, among other

<sup>8</sup> *Local 144 Nursing Home Pension Fund v. Demisay et al.*, 508 U.S. 581 (1993).

things, to act for the benefit of the participants and beneficiaries when making decisions that affect the Pension Fund. If the trustees fail to act properly, they face liability under the Act for breaching their fiduciary duties.

(11) Cintas is concerned that, if the exemption were granted and UNITE-HERE were to have an interest in ASC, there would be a bias for union trustees to increase fees charged for services provided by ASC or its affiliates to funds sponsored by UNITE-HERE. Even if fees charged by ASC were determined on a not-for-profit basis, Cintas believes that such union trustees may take a more aggressive position in determining what costs can be passed through to such funds.

In response, the applicant maintains that as UFA is a non-profit organization, it is treated as having "zero" value when calculating the enterprise value of ASC. In this regard, only the for-profit businesses are assigned any value. Accordingly, the applicant maintains that a fee increase caused by union trustees, acting as directors of ASC, as set forth in Cintas' hypothetical, would not affect the underlying value of the investment in ASC by UNITE-HERE.

(12) Cintas requested that its comment letter be distributed to the other participating employers and possibly all parties in interest.

Although the applicant failed to respond to Cintas' request that its comment letter be distributed to participating employers and parties in interest, the Department notes that the complete application file, including the comment letters, facsimiles, and e-mails from all commentators and the applicant's and Independent Fiduciary's responses thereto are available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

#### *IV. Cintas Comments Requesting Additional Safeguards*

In addition to the issues discussed above, Cintas also commented on the terms of the proposed transactions, the structure of the transactions, and requested modifications to the conditions of the exemption.

Notwithstanding the fact that the applicant acknowledges that the Independent Fiduciary is in the best position to address these issues, the applicant responded to Cintas' comments. Both the applicant's response and the response of the Independent Fiduciary are discussed in the numbered paragraphs below:

(1)(a) In its comment, Cintas questions the need to structure the transactions as sales of the Preferred Stock to related parties. In the opinion of Cintas, such sales may well strip some of the value of ASC from the Pension Fund and give it to UNITE-HERE and its affiliates by virtue of the convertible nature of the Preferred Stock.

In response, the applicant states that, prior to approaching UNITE-HERE and the UNITE-HERE Affiliates about purchasing an interest in the company, ASC offered on two prior occasions to sell minority interests to unrelated third-party purchasers. In this regard, it is represented that every firm approached was offered the same terms as were offered to UNITE-HERE and the UNITE-HERE Affiliates. It is represented that ASC was unsuccessful in finding a buyer because the Pension Fund wanted to maintain control of the operations of ASC. No purchaser was willing to buy a small piece of an illiquid insurance company in which such purchaser would have little or no control.

(b) Cintas acknowledges that the purported motivations for the proposed transactions are the desire of ASC for an increase in working capital, as well as the potential to increase profitability. Cintas also acknowledges that the motivation of UNITE-HERE and its affiliates generally is to invest in vehicles with a fixed rate of return. However, Cintas suggests that there are ways other than the proposed transactions to achieve these goals. In this regard, Cintas suggests that: (i) ASC could have obtained a loan of capital from an unrelated financial institution; (ii) UNITE-HERE or an affiliate could have made a loan to ASC at a fixed rate of return; or (iii) the Pension Fund could have made a direct capital infusion into ASC.

With regard to the purported motivations for the subject transactions, the applicant maintains that Cintas ignores two important reasons for the transactions proffered in the application. First, the applicant wishes to sell a portion of ASC, so that ASC will no longer constitute a plan asset look-through vehicle for purposes of the Department's plan asset regulation. In this regard, the applicant is concerned that other unrelated entities would be unwilling to engage in joint ventures with ASC, if ASC is treated as a plan asset look-through vehicle subject to the Act. Second, while the applicant has existing relationships with over 125 benefit funds unaffiliated with UNITE-HERE, it believes that the addition of UNITE-HERE and the UNITE-HERE Affiliates as co-owners of ASC will

enhance the standing of ASC with existing trade union customers and will serve as an effective tool for obtaining business from other trade unions or trade union sponsored groups that do not currently maintain relationships with ASC or its subsidiaries. In support of this assertion, the applicant points out that Amalgamated Bank has benefited from its affiliation with UNITE-HERE and has developed a significant amount of business from organizations and employee benefit funds not affiliated with UNITE-HERE.

With regard to Cintas' suggestion that ASC borrow the funds needed for working capital from an unrelated financial institution or from UNITE-HERE or its affiliates, the applicant maintains that the rating agencies view debt financing negatively. In the opinion of the applicant, debt financing would affect adversely the risk factors taken into account by the rating agencies when ascertaining the ability of ALICO, a subsidiary of ASC, to satisfy claims. The applicant believes this could jeopardize ALICO's "A" rating. It is represented that ALICO's "A" rating is extremely important for attracting and retaining business.

The Independent Fiduciary confirms that ASC's primary business unit, ALICO, currently has an "A" rating from A.M. Best, which gives ALICO a competitive advantage. Further, the Independent Fiduciary states that this rating is based, in part, on the fact that ASC has no debt.

With regard to Cintas' suggestion that the Pension Fund provide additional capital to fund the expansion of ASC, the applicant represents that the trustees of the Pension Fund have determined that because ASC already represents approximately 2.3 percent (2.3%) of the assets of the Pension Fund, the trustees would prefer not to increase the Pension Fund's investment in this valuable, but illiquid asset.

The Independent Fiduciary acknowledges that the decision to invest additional funds into ASC rests with the trustees of the Pension Fund, not with the Independent Fiduciary. However, the Independent Fiduciary notes that ASC already represents the largest single investment by the Pension Fund in any single privately-held company. In this regard, the Independent Fiduciary estimates that ASC represents approximately 2.7 percent (2.7%) of the Pension Fund's assets, rather than the 2.3 percent figure suggested by the applicant. Notwithstanding the difference in the estimated percentage involved, the Independent Fiduciary acknowledges that the percent of the Pension Fund's assets committed to

ASC is within the limits imposed by the Pension Fund's investment guidelines and is well within the limits on a single investment in the investment guidelines of most large pension plans.

Accordingly, the Independent Fiduciary represents that it would endorse the decision by the trustees of the Pension Fund not to increase the Pension Fund's commitment to ASC.

(c) Cintas notes that one of the conditions of the exemption is that an Independent Fiduciary determines whether the Preferred Stock should be sold to UNITE-HERE. If the exemption were to be granted, Cintas requests that this condition of the exemption be modified to contain an express requirement that the Independent Fiduciary determine that a \$9 million dollar capital infusion is desirable. In this regard, Cintas notes that the Pension Fund has \$1.5 billion in assets and that a capital infusion of \$9 million would constitute less than 1 percent (1%) of the Pension Fund's assets.

In response, the applicant maintains that the authority currently possessed by the Independent Fiduciary is more than adequate to protect the Pension Fund from abuse. The Independent Fiduciary has complete authority to determine whether the Preferred Stock should be sold under the terms of the proposed transactions. Further, assuming the Independent Fiduciary determines that the Preferred Stock may be sold to UNITE-HERE and the UNITE-HERE Affiliates, the Independent Fiduciary may also accept or reject any or all terms applicable to such stock. The purpose of the Independent Fiduciary is to protect the Pension Fund and its participants and beneficiaries from abuse. In the opinion of the applicant, the role of the Independent Fiduciary is not and should not be to run ASC.

Furthermore, in a letter to the Department, dated, August 14, 2003, the Independent Fiduciary represented that the subject transactions, as currently structured, are prudent, in the interest of the participants and beneficiaries of the Pension Fund and are protective of the rights of the participants and beneficiaries of the Pension Fund.

(2) Cintas requests that the Department impose a condition of the exemption that would require that ASC continue to operate as a plan asset look-through vehicle, even after the sales of the Preferred Stock to UNITE-HERE and its affiliates. In this way, Cintas believes that any potential transactions between UNITE-HERE, and its affiliates, and the

Pension Fund<sup>9</sup> will be subject to all applicable regulation under the Act, including the fiduciary prudence requirements, as well as the party in interest rules. The failure to include this condition in the exemption, in Cintas' view, could lead to abuses in potential transactions between UNITE-HERE and the Pension Fund. Further, Cintas maintains that state corporate laws do not provide the same degree of protection from potential abuse that the Act provides with regard to future transactions between UNITE-HERE and the Pension Fund.

In response, the applicant is concerned that unrelated entities will be unwilling to engage in joint ventures with ASC, if ASC were to be treated as a plan asset look-through vehicle subject to the Act. In the view of the applicant, the unprecedented step of imposing this condition on ASC would unnecessarily impede ASC's ability to engage in potential advantageous business opportunities. Furthermore, the applicant maintains that Cintas articulates no reason for imposing such a condition other than an assertion that the condition would prevent abuses in the case of transactions between UNITE-HERE and the Pension Fund.

The Independent Fiduciary does not support Cintas' recommendation that ASC's underlying assets should continue to be treated as plan assets after the sales of the Preferred Stock to UNITE-HERE and its affiliates. In this regard, the Independent Fiduciary points out that the prohibited transactions rules under the Act were designed primarily for passive investments, not operating companies. The Independent Fiduciary believes that plan asset treatment would impede the ability of ASC to grow; and therefore, would not be in the best interest of the Pension Fund, as the principal owner of ASC. In the opinion of the Independent Fiduciary, the Board of Directors of ASC will still be subject to the fiduciary responsibilities to ASC's shareholders under corporate law, and the trustees of the Pension Fund, in exercising their rights and responsibilities as shareholders of ASC, will still be subject to the fiduciary prudence requirements under the Act.

(3) While the applicant has represented that: (a) Each trustee of the Pension Fund affiliated with UNITE-HERE and its affiliates will recuse himself from any decision to vote the

common stock of ASC when the vote concerns the Preferred Stock and where participation by such trustee would give rise to a conflict of interest, and (b) each director of ASC affiliated with UNITE-HERE and its affiliates will recuse himself from participating in any decision or action concerning the Preferred Stock, Cintas questions whether such a representation (rather than a condition of the exemption) offers adequate protection for participants. In this regard, Cintas suggests that the Department require, as a condition of the exemption, that an independent fiduciary be appointed whenever trustees of the Pension Fund vote the common stock of ASC, if the vote concerns the Preferred Stock, as well as, on matters pertaining to the payment of dividends or the redemption of Preferred Stock. Similarly, Cintas suggests that other funds that hire ASC or its subsidiaries should be required to obtain an independent fiduciary when determining whether to do so.

In response, the applicant believes that this proposed condition is unnecessary, because the applicant already addressed this issue in response to the Department's questions. In this regard, the applicant, in a February 10, 2004, letter, stated that once the Preferred Stock has been sold the trustees of the Pension Fund that serve on the ASC Board of Directors will be acting as directors of an operating company. As such, they will be subject to the mandates of New York State law when making decisions, for example, to issue dividends with respect to the Preferred Stock or to redeem the Preferred Stock. The applicant takes the position that New York State corporate laws, with their provisions addressing interested party transactions, provide adequate protection to ASC and the Pension Fund as a shareholder in ASC. Nevertheless, the applicant agrees that all conflicted ASC directors will not participate in any vote regarding the issuance of Preferred Stock dividends or the redemption of the Preferred Stock. For reasons already expressed herein, the applicant does not believe that the Department should ignore years of precedent that allows the use of recusal.

Further, the applicant represents that the Board of Trustees of the Pension Fund, and the Board of Directors of ASC have each issued resolutions stating that each such board shall maintain, or cause to be maintained within the United States for a period of six (6) years in a manner that is convenient and accessible for audit and examination, contemporaneous and comprehensive records of any portion of the meetings of such boards, during which any

<sup>9</sup>In making reference in this paragraph to potential transactions between UNITE-HERE and the Pension Fund, the Department, understands that Cintas meant to refer to potential transactions between UNITE-HERE and ASC, as the Pension Fund owns all of the common stock of ASC.

decision or action is taken with respect to ASC or any of its subsidiaries involving the Preferred Stock to enable such records to be available for inspection and review by any duly authorized employee or representative of the Department of Labor, the Internal Revenue Service, or any other applicable Federal or state regulatory agency.

Such records shall include but not be limited to documents supporting any decision made or action voted upon, who was present at the meeting in which such decision was made or action was voted on, who voted on and who abstained from voting on such decision or action, the result of any such vote, and a summary of any discussion surrounding a decision made or action taken, setting forth an explanation of why a particular decision was made or action was taken.

The Department does not concur with Cintas' comment that an independent fiduciary be appointed whenever trustees of the Pension Fund vote the common stock of ASC in matters concerning the Preferred Stock, or that an independent fiduciary be appointed by the Board of Directors of ASC to make decisions on matters pertaining to the payment of dividends or the redemption of Preferred Stock. Furthermore, the Department does not concur with Cintas' suggestion that related funds that hire ASC or its subsidiaries should be required to obtain an independent fiduciary when determining whether to do so.

The Department notes that the relief provided by this exemption is limited to the purchase by UNITE-HERE from the Pension Fund of the Preferred Stock representing 15% of the outstanding equity interests in ASC. Although commentators have raised a number of issues which are unrelated to the exemption and other issues which have been addressed by the applicant and/or by the Independent Fiduciary, the Department wishes to emphasize that nothing in this exemption should be construed as exempting any of the prohibited transactions described in section 406(a) or 406(b) of the Act other than the sale of the Preferred Stock. Furthermore, the Department is not expressing any views as to whether the administration of the Pension Fund, the operation of ASC and/or its affiliates, or the operation of entities affiliated with or chartered by UNITE-HERE raise issues under ERISA's fiduciary responsibility provisions.

#### *V. Substantive Comments From Other Interested Persons*

In addition to the comment letter filed by Cintas, the Department also received other comment letters expressing substantive concerns regarding the subject transactions. Set forth below in summary form are the issues raised by the commentators and the responses from the applicant and the Independent Fiduciary to these concerns:

(1) Certain commentators expressed concerns regarding the funding status of the Pension Fund and the impact of the subject transactions on such funding.

In response, the applicant represents that the Pension Fund is 85% funded for vested benefits, estimated as of January 1, 2004, and is financially stable. Further, the applicant represents that the sale of Preferred Stock by ASC will have no impact on the funding status of the Pension Fund;

(2) Certain commentators raised concerns regarding self-dealing, including a comment that the only purpose of the subject transactions was to benefit UNITE-HERE.

In response, the applicant maintains that the self-dealing issue has been addressed at length above in response to Cintas' comment letter;

(3) One commentator expressed concerns regarding the loyalty of Willamette Management Associates (WMA), because it was "hired by ASC."

The applicant responds that WMA was retained by the Pension Fund and is independent in that the average percentage of its annual income derived from the Pension Fund over the previous six (6) years has been less than one percent (1%). Further, both the Pension Fund and ASC represent to the Department that compensation received by WMA is not contingent upon the opinion expressed in its valuation reports.

The Independent Fiduciary, in response to this comment, represents that WMA has been retained by the Pension Fund to perform the annual valuations since the Pension Fund acquired ASC in 2001, and that WMA receives less than one percent (1%) of its annual revenue from the Pension Fund. It is represented that WMA is a nationally recognized valuation firm with significant experience valuing closely-held business. The Independent Fiduciary has determined that it is appropriate to retain WMA to perform the valuation for purposes of determining the price of the Preferred Stock. It is represented that this valuation will be reviewed by an officer of the Independent Fiduciary who is a Chartered Financial Analyst with

significant valuations experience, including valuing minority interests, closely-held business, and special situations. In this regard, the Independent Fiduciary represents that any valuation issues will be resolved to this officer's satisfaction before the subject transactions are consummated.

In addition to its response to the commentator, the Independent Fiduciary informed the Department of changes to the preliminary valuation of ASC, effective as of May 31, 2003, but performed by WMA in July 2003. In this regard, it is represented that WMA's preliminary valuation was an estimate of one percent (1%) and fifteen percent (15%), respectively, of the value of ASC on a pre-transaction basis. In December 2003, after the Independent Fiduciary negotiated the terms of the transaction, including the formula for the price of the Preferred Stock based on the value of ASC, WMA provided an updated estimate of the value of ASC on a post-transaction basis, as if the transactions had been consummated on May 31, 2003. As a result of WMA's December 2003 valuation, the Independent Fiduciary represents that the figures, as set forth in the Notice, 69 FR 13897, col. 3, lines 3-49, should have read, as follows:

- 118 shares should have been 101 shares;
- The value of a one percent (1%) ownership interest of \$536,000 and \$624,000, respectively, should have been \$541,000 and \$630,000;
- The aggregate and per share values based on a \$33 million enterprise value and a 15 percent (15%) ownership interest of \$8,040,000 and \$4,557 per share should have been \$9,465,000 and \$5,363 per share; and
- The aggregate and per share values based on a \$38.4 million enterprise value and 15 percent (15%) ownership interest of \$9,360,000 and \$5,303 per share should have been \$11,014,000 and \$6,240 per share.

The Independent Fiduciary further represents that these figures will not affect the price paid for the Preferred Stock, which will be based on the final valuation of ASC at closing, as indicated in the proposed exemption.

(4) Certain comment letters asked how the proceeds of the sale of the Preferred Stock would be utilized.

In this regard, the applicant represents that the proceeds from the sale of Preferred Stock shall be utilized "to invest in the continued growth of ASC and the development of new product lines and markets with the goal of further increasing the value of ASC."

(5) Certain individual commentators requested that the exemption be denied,

because such individuals were denied benefits from the Pension Fund and other funds affiliated with UNITE-HERE.

In response, the applicant maintains that such concerns have no relevance to the subject transactions. Nevertheless, the applicant represents that each commentator's concern was forwarded to UFA for appropriate action.

(6) Two commentators expressed concerns regarding the cancellation of their prescription drug benefits.

The applicant maintains that these comments are not relevant to the subject transactions, because these comments involve the health benefits of the individuals. The applicant represents that such letters, however, were forwarded to UFA for appropriate action.

#### VI. Requests for Hearing

During the comment period, the Department received seven (7) requests from commentators that the Department hold a hearing. These comments were generally from individuals concerned as to how the subject transactions would affect their benefits under the Pension Fund. In this regard, the commentators requested that the Department hold a hearing if, as a result of the requested exemption, pension benefits were to be reduced or eliminated.

In response to the commentators' requests for a hearing, the applicant maintains that because these individuals were notified that the subject transactions would not affect adversely their benefits, and because the parties requesting the hearings failed to demonstrate how they would be adversely affected by the grant of the exemption, a hearing is unwarranted.

The Department has carefully considered the concerns expressed by the commentators who requested a hearing. After a review of these concerns, and the applicant's response, the Department does not believe that there are material factual issues relating to the exemption that were raised by commentators during the comment period which would require the convening of a hearing. Thus, the Department has determined not to delay consideration of the final exemption by holding a hearing on application D-11185. The comments submitted by the commentators to the Department and the responses by the Independent Fiduciary and by the applicant thereto have been included as part of the public administrative record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is available for public

inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Accordingly, after full consideration and review of the entire administrative record, including the written comments from the commentators and the responses thereto by the applicant and the Independent Fiduciary, the Department has determined to grant the exemption. 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 March 24, 2004, at 69 FR 13894.

#### FOR FURTHER INFORMATION CONTACT:

Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

#### **BNP Paribas S.A. (BNP Paribas) and Its French Affiliates (the French Affiliates) Located in Paris, France**

[Prohibited Transaction Exemption 2005-12; Exemption Application No. D-11249]

#### **Exemption**

##### *Section I. Covered Transactions*

A. The restrictions of section 406(a)(1)(A) through (D) of the Act<sup>10</sup> 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 any purchase or sale of a security between BNP Paribas, a bank established under the laws of France and any French Affiliate or branch of BNP Paribas which is a bank regulated by the Commission Bancaire (CB) or a broker-dealer holding a securities dealers license issued by the Comité des Etablissements de Crédit et des Entreprises d'Investissement or registered with the Autorité des Marchés Financiers (AMF) (each, a BNP Entity), and employee benefit plans (the Plans) with respect to which the BNP Entity is a party in interest, including options written by a Plan or the BNP Entity, provided that the following conditions and the General Conditions of Section II, are satisfied:

(1) The BNP Entity customarily purchases and sells securities for its own account in the ordinary course of its business as a bank or broker-dealer, as the case may be;

(2) The terms of any transaction are at least as favorable to the Plan as those which the Plan could obtain in a

comparable arm's length transaction with an unrelated party; and

(3) Neither the BNP Entity nor any of its affiliates has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets, and the BNP Entity is a party in interest or disqualified person with respect to the Plan assets involved in the transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason of a relationship to a person described in such sections. For purposes of this paragraph, the BNP Entity shall not be deemed to be a fiduciary with respect to Plan assets solely by reason of providing securities custodial services for a Plan.

B. The restrictions of sections 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply to any extension of credit to a Plan by a BNP Entity to permit the settlement of securities transactions, regardless of whether they are effected on an agency or a principal basis, or in connection with *the writing of* options contracts, provided that the following conditions and the General Conditions of Section II, are satisfied:

(1) The BNP Entity is not a fiduciary with respect to the Plan assets involved in the transaction, unless no interest or other consideration is received by the BNP Entity or any of its affiliates in connection with such extension of credit; and

(2) Any extension of credit would be lawful under the Securities Exchange Act of 1934, as amended (the 1934 Act), and any rules or regulations thereunder, if the 1934 Act, rules or regulations were applicable and is lawful under applicable foreign law.

C. The restrictions of sections 406(a)(1)(A) through (D) 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 the lending of securities that are assets of a Plan to a BNP Entity, provided that the following conditions and the General Conditions of Section II are satisfied:

(1) Neither the BNP Entity nor any of its affiliates has discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

<sup>10</sup> For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to corresponding provisions of the Code.

(2) The Plan receives from the BNP Entity, either by physical delivery or by book entry in a securities depository located in the U.S., by the close of business on the day on which the securities lent are delivered to the BNP Entity, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, or irrevocable U.S. bank letters of credit issued by persons other than the BNP Entity (or any of its affiliates), or any combination thereof having, as of the close of business on the preceding business day, a market value (or, in the case of letters of credit, a stated amount) equal to not less than 100 percent of the then market value of the securities lent. All collateral shall be held in U.S. dollars, or dollar denominated securities or bank letters of credit and shall be held in physical or book entry form in the United States.

(3) The loan is made pursuant to a written loan agreement (the Loan Agreement), which may be in the form of a master agreement covering a series of securities lending transactions, and which contains terms at least as favorable to the Plan as those the Plan could obtain in an arm's length transaction with an unrelated party;

(4) In return for lending securities, the Plan either (a) receives a reasonable fee which is related to the value of the borrowed securities and the duration of the loan, or (b) has the opportunity to derive compensation through the investment of cash collateral. In the latter case, the Plan may pay a loan rebate or similar fee to the BNP Entity, if such fee is not greater than the Plan would pay an unrelated party in a comparable arm's length transaction with an unrelated party;

(5) The Plan receives at least 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, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities that the Plan would have received (net of tax withholdings) had it remained the record owner of such securities. Where dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings, the BNP Entity will put the Plan back in at least as good a position as it would have been in had it not lent the securities;

(6) If the market value of the collateral as of the close of trading on a business day falls below 100% of the market value of the borrowed securities as of the close of trading on that day, the BNP

Entity delivers additional collateral, by the close of business on the following business day, to bring the level of the collateral back to at least 100% of the market value of all the borrowed securities as of such preceding day. Notwithstanding the foregoing, part of the collateral may be returned to the BNP Entity if the market value of the collateral exceeds 100% of the market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100% of the market value of the borrowed securities;

(7) Prior to entering into a Loan Agreement, the BNP Entity furnishes to the independent Plan fiduciary, who is making decisions on behalf of the Plan with respect to the lending of securities: (a) The most recent available audited statement of its financial condition, (b) the most recent available unaudited statement of its financial condition (if more recent than the audited statement), and (c) a representation by the BNP Entity that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statement that has not been disclosed to the Plan fiduciary. Such representation may be made by the BNP Entity's agreeing that each loan of securities shall constitute a representation that there has been no such material adverse change;

(8) The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the BNP Entity delivers certificates for 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 Plan within (a) the customary delivery period for such securities, (b) five business days, or (c) the time negotiated for such delivery by the Plan and the BNP Entity, whichever is lesser, or, alternatively, such period as permitted by Prohibited Transaction Class Exemption 81-6 (PTCE 81-6, 46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987), as it may be amended or superseded;<sup>11</sup>

(9) In the event that the loan is terminated and the BNP Entity fails to return the borrowed securities or the equivalent thereof within the time

<sup>11</sup> PTCE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the 1934 Act (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein).

described in paragraph (8) above, then the Plan may purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the BNP Entity under the Loan Agreement, and any expenses associated with the sale and/or purchase. The BNP Entity is obligated to pay to the Plan the amount of any remaining obligations and expenses not covered by the collateral (the value of which shall be determined as of the date the borrowed securities should have been returned to the Plan), plus interest at a reasonable rate, as determined in accordance with an independent market source. If replacement securities are not available, the BNP Entity will pay the Plan an amount equal to (a) the value of the securities as of the date such securities should have been returned to the Plan, plus (b) all the accrued financial benefits derived from the beneficial ownership of such borrowed securities as of such date, plus (c) interest at a reasonable rate determined in accordance with an independent market source from such date to the date of payment. The amounts paid shall be reduced by the amount or value of the collateral determined as of the date the borrowed securities should have been returned to the Plan. The BNP entity is obligated to pay, under the terms of the Loan Agreement, and does pay, to the Plan, the amount of any remaining obligations and expenses not covered by the collateral, plus interest at a reasonable rate. Notwithstanding the foregoing, the BNP Entity may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided that such replacement is approved by the independent Plan fiduciary; and

(10) The independent Plan fiduciary maintains the situs of the Loan Agreement in accordance with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1. However, the BNP Entity shall not be subject to the civil penalty, which 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 independent Plan fiduciary fails to comply with the requirements of 29 CFR 2550.404(b)-1.

If the BNP Entity fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the Plan fiduciary which caused the Plan to engage in such transaction shall not be deemed to have

caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the failure on the part of the BNP Entity to comply with the conditions of the exemption.

### Section II. General Conditions

A. The BNP Entity is a registered broker-dealer or bank subject to regulation by a governmental agency, as described in Section III. B, and is in compliance with all applicable rules and regulations thereof in connection with any transactions covered by this exemption.

B. The BNP Entity, in connection with any transactions covered by this exemption, is in compliance with all requirements of Rule 15a-6 of the 1934 Act, and Securities and Exchange Commission (SEC) interpretations thereof, providing foreign affiliates a limited exemption from U.S. broker-dealers registration requirements (17 CFR 240.15a-6).

C. Prior to the transaction, the BNP Entity enters into a written agreement with the Plan in which the BNP Entity consents to the jurisdiction of the courts of the United States for any civil action or proceeding brought in respect of the subject transactions.

D. Each BNP Entity located in the United States is fully responsible for any judgment rendered by a United States court against BNP Paribas, and the U.S. assets of BNP Paribas, including those of any BNP Entities located in the U.S., are subject to the enforcement of any such judgment.

E. The BNP Entity maintains, or causes to be maintained, within the United States for a period of six years from the date of the covered transactions, such records as are necessary to enable the persons described in paragraph F. of this Section II to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in paragraph F. to determine whether the conditions of the exemption have been met are lost or destroyed prior to the end of such year period, due to circumstances beyond the control of the BNP Entity, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the BNP Entity and its affiliates, 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 F. of this Section II.

F. Notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the BNP Entity makes the records referred to above in paragraph E. of this Section II, unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

- (1) The Department, the Internal Revenue Service or the SEC;
- (2) Any fiduciary of a participating Plan;
- (3) Any contributing employer to a Plan;
- (4) Any employee organization any of whose members are covered by a Plan; and
- (5) Any participant or beneficiary of a Plan.

However, none of the persons described above in paragraphs (2)–(5) of this paragraph F. shall be authorized to examine trade secrets of the BNP Entity, or any commercial or financial information which is privileged or confidential.

G. Prior to any Plan's approval of any transaction with a BNP Entity, the Plan is provided with copies of the proposed and final exemption with respect to the exemptive relief granted herein.

### Section III. Definitions

For purpose 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, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and
- (3) Any corporation, partnership or other entity of which such other person is an officer, director or partner. (For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

B. The term "BNP Entity" shall mean BNP Paribas or any branch or affiliate thereof that is a broker-dealer or bank subject to regulation by the (1) *CB* or (2) *AMF*.

C. The term "security" shall include equities, fixed income securities, options on equity and on fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term "security" does not include swap agreements or other notional principal contracts.

D. The term "security" shall include equities, fixed income securities, options on equity and on fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term "security" does not include swap agreements or other notional principal contracts.

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 published on May 13, 2005 at 70 FR 25601.

**FOR FURTHER INFORMATION CONTACT:** Ms. Silvia Quezada of the Department, telephone (202) 693-8553. (This is not a toll-free number.)

### Best Business Products Inc. Employee Stock Ownership Plan (the ESOP) Located in Sioux Falls, SD

[Prohibited Transaction Exemption 2005-13 Application No. D-11305]

### Exemption

The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Employee Retirement Income Security Act (the Act) and the sanctions resulting from the application of section 4975, by reason of section 4975(c)(1)(A) through (E) of the Internal Revenue Code of 1986 (the Code),<sup>12</sup> shall not apply, effective July 7, 2004, to: (1) The purchase from the ESOP by Best Business Products, Inc. (BBP), a party in interest with respect to the ESOP, of shares of the voting common stock of BBP (the Stock) which were allocated to the accounts of the participants in the ESOP; and (2) the transfer to BBP of shares of the Stock which were held by the ESOP in a suspense account in exchange for the assumption by BBP of the ESOP's obligation to pay the balance of a note (the Note) to Betty B. Best (Ms. Best), a party in interest with respect to the ESOP; provided that prior to entering into the subject transactions: (a) An independent fiduciary (the Independent Fiduciary) was responsible for each of the transactions, and in accordance with the fiduciary provisions of the Act, reviewed, analyzed, and determined that the ESOP should enter into each of the transactions; (b) the Independent Fiduciary reviewed, negotiated, and approved the terms of each of the transactions, and determined on behalf of the ESOP and solely in the interest of the ESOP, its participants, and beneficiaries that the terms of each of the transactions were fair and reasonable; (c) the Independent Fiduciary monitored compliance with the terms of each of the transactions by the parties; (d) an independent qualified appraiser determined the fair market value of the Stock as of the date each of the transactions were entered; and (e)

<sup>12</sup> For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

the ESOP incurred no fees, commissions, or other charges or expenses as a result of its participation in each of the transactions.

*Effective Date:* The exemption will be effective July 7, 2004.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on May 13, 2005, 92 FR 25608.

**FOR FURTHER INFORMATION CONTACT:**

Angelena C. Le Blanc of the Department, telephone (202) 693-8551 (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 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) This exemption is 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 this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of August, 2005.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

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**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

[Application No. D-11231, et al.]

**Proposed Exemptions; Wachovia Corporation (Wachovia)**

**AGENCY:** Employee Benefits Security 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 Employee Benefits Security Administration (EBSA), 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 EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffitt.betty@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 Employee Benefits Security 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.

**Wachovia Corporation (Wachovia), Located in Charlotte, NC**

[Application No. D-11231]

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 (or ERISA) 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, August 10, 1990).

**Proposed Exemption**

*Section I. Covered Transactions*

If the proposed exemption is granted, the restrictions of sections 406(a) and 406(b) 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, effective January 2, 2002, to (1) the in kind transfer by the Wachovia Retirement Savings Plan (the

<sup>1</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.