

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration****Proposed Extension of Information Collection Request Submitted for Public Comment and Recommendations; ERISA Procedure 76-1, Advisory Opinion Procedure**

**AGENCY:** Pension and Welfare Benefits Administration, DOL.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, provides the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the proposed extension of a currently approved collection of information included in ERISA Procedure 76-1, Advisory Opinion Procedure. A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted on or before October 4, 1999.

**ADDRESSES:** Gerald B. Lindrew, Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Washington, DC 20210, (202) 219-4782, FAX (202) 219-4745 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****I. Background**

Under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (ERISA), the Secretary of Labor has responsibilities for administering reporting, disclosure, fiduciary and other standards for pension and welfare benefit plans. ERISA Procedure 76-1, Advisory Opinion Procedure (ERISA Procedure) sets forth the administrative procedures to be used by the public (e.g., plan administrators) when requesting a legal interpretation from the Department regarding specific facts and circumstances (an advisory opinion).

The ERISA Procedure informs individuals, organizations, and their authorized representatives of the procedures to be followed when requesting an advisory opinion. The ERISA Procedure promotes efficient handling of these requests. The information required by the ERISA Procedure is used by the Department to determine the substance of the response and to determine whether the Department's response should be in the form of an advisory opinion or information letter. Advisory opinions and information letters issued under this ERISA Procedure help fiduciaries, employers, and other interested parties understand a particular provision of the law and promote compliance with ERISA. Advisory opinions are also useful to the Department as a means of clarifying Departmental policy on certain issues.

**II. Review Focus**

The Department of Labor (Department) is particularly interested in comments which:

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

**III. Current Actions**

The Office of Management and Budget's approval of this ICR will expire on November 30, 1999. The existing collection of information should be continued because the individuals or organizations affected directly or indirectly by ERISA from time to time need legal interpretations from the Department as to their status under ERISA and as to the effect of certain actions and transactions. Requests for advisory opinions are voluntary. The information is used by the Department to determine the substance of the response and to determine whether the Department's response should be in the

form of an advisory opinion or information letter.

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

**Title:** ERISA Procedure 76-1, Advisory Opinion Procedure.

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

**OMB Number:** 1210-0066.

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

**Total Respondents:** 83.

**Total Responses:** 83.

**Frequency of Response:** On occasion.  
**Average Time Per Response:** 12 $\frac{2}{3}$  hours.

**Estimated Total Burden Hours:** 101 hours.

**Total Burden Cost (Operating and Maintenance):** \$87,883.

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

Dated: July 29, 1999.

**Gerald B. Lindrew,**

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

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**BILLING CODE** 4510-29-M

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

[Prohibited Transaction Exemption 99-32; Exemption Application No.D-09708, et al.]

**Grant of Individual Exemptions; RREEF America L.L.C. (RREEF), et al.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at

the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### Statutory Findings

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

(a) The exemptions are administratively feasible;

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

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

### RREEF America L.L.C. (RREEF) Located in San Francisco, California

[Prohibited Transaction Exemption 99-32; Exemption Application No. D-09708]

### Exemption

The Department is 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.)

### Part I—Exemption for Payment of Certain Fees to RREEF

The restrictions of sections 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply, effective as of (i) May 16, 1994, with respect to a single client, separate account established on behalf of the Shell Pension Trust (the Shell Account), and (ii) the date this final exemption is published in the **Federal Register**, with respect to any

single client, separate account (Single Client Account) or any multiple client account (Multiple Client Account) formed on, or after, such a date, to the payment of certain initial investment fees (the Investment Fee), annual management fees based upon net operating income (the Asset Management Fee), and performance fees (the Performance Fee) to RREEF by employee benefit plans for which RREEF provides investment management services (the Client Plans)<sup>1</sup> pursuant to an investment management agreement (the Agreement) entered into between RREEF and the Client Plans either individually, through an establishment (or amendment) of a Single Client Account, or collectively as participants in a newly established Multiple Client Account (collectively, the Accounts), provided that the conditions set forth below in Part III are satisfied.

### Part II—Exemption for Investments in a Multiple Client Account

The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(c)(1)(A) through (D) of the Code, shall not apply to any investment by a Client Plan in a Multiple Client Account managed by RREEF formed on, or after, the date the final exemption is published in the **Federal Register**, provided that the conditions set forth below in Part III are satisfied.

### Part III—General Conditions

(a)(1) The investment of plan assets in a Single or Multiple Client Account, including the terms and payment of any Investment Fee, Asset Management Fee and Performance Fee (collectively, the Fees), shall be approved in writing by a fiduciary of a Client Plan which is independent of RREEF and its affiliates (the Independent Fiduciary).

(2) For purposes of the Fees, the fair market value of the Accounts' real property assets (other than in the case of actual sales) will be based on appraisals prepared by independent qualified appraisers that are Members of the Appraisal Institute (MAI Appraisers). In this regard, every agreement by which an appraiser is retained will include the appraiser's representation that: (1) Its ultimate client is the Account and its underlying Client Plan (and non-Plan) investors,

<sup>1</sup> The Client Plans (including employee benefit plans that may become Client Plans in the future) consist of various pension plans as defined in section 3(2) of the Act and other plans as defined in section 4975(e)(1) of the Code with respect to which RREEF serves as a trustee or an investment manager.

and (2) it will perform its duties in the interest of such Account (and investors). In addition, following the date this final exemption is published in the **Federal Register**, every agreement shall advise the appraiser that it owes a professional obligation to the Account when making an appraisal for properties held by the Account.

(b) The terms of any investment in an Account and of the Fees, shall be at least as favorable to the Client Plans as those obtainable in arm's-length transactions between unrelated parties.

(c) At the time any Account is established (or amended) and at the time of any subsequent investment of assets (including the reinvestment of assets) in such Account:

(1) Each Client Plan in a Single Client Account shall have total net assets with a value in excess of \$100 million, and each Client Plan that is an investor in a Multiple Client Account shall have total net assets with a value in excess of \$50 million; and provided that seventy-five percent (75%) or more of the units of beneficial interests in a Multiple Client Account are held by Client Plans or other investors having total assets of at least \$100 million. In addition, 50 percent (50%) or more of the Client Plans investing in a Multiple Client Account shall have assets of at least \$100 million. A group of Client Plans maintained by a single employer or controlled group of employers, any of which individually has assets of less than \$100 million, will be counted as a single Client Plan if the decision to invest in the Account (or the decision to make investments in the Account available as an option for an individually directed account) is made by a fiduciary other than RREEF, who exercises such discretion with respect to Client Plan assets in excess of \$100 million.

(2) No Client Plan shall invest, in the aggregate, more than 5% of its total assets in any Account or more than 10% of its total assets in all Accounts established by RREEF.

(d) Prior to making an investment in any Account (or amending an existing Account), the Independent Fiduciary of each Client Plan investing in an Account shall have received offering materials from RREEF which disclose all material facts concerning the purpose, structure, and operation of the Account, including any Fee arrangements (provided that, in the case of an amendment to the Fee arrangements, such materials need address only the amended fees and any other material change to the Account's original offering materials).

(e) With respect to its ongoing participation in an Account, each Client Plan shall receive the following written information from RREEF:

(1) Audited financial statements of the Account prepared by independent public accountants selected by RREEF no later than 90 days after the end of the fiscal year of the Account;

(2) Quarterly and annual reports prepared by RREEF relating to the overall financial position and operating results of the Account and, in the case of a Multiple Client Account, the value of each Client Plan's interest in the Account. Each such report shall include a statement regarding the amount of fees paid to RREEF during the period covered by such report;

(3) Periodic appraisals (as agreed upon with the Client Plans) indicating the fair market value of the Account's assets as established by an MAI appraiser independent of RREEF and its affiliates. In the case of any appraisal that will serve as the basis for any "deemed sale" of such property for purposes of calculating the Performance Fee payable to RREEF (as discussed in paragraph (j) below), then:

(i) In the case of any Single Client Account, such MAI appraiser shall be either (A) selected by the Independent Fiduciary of the Client Plan subject to the affirmative approval of RREEF, or (B) selected by RREEF subject to approval by the Independent Fiduciary of the Client Plan;

(ii) In the case of any Multiple Client Account, such MAI appraiser shall be approved in advance by the Responsible Independent Fiduciaries (as defined in Part IV(e) below) owning a majority of the interests in the Accounts, determined according to the latest valuation of the Account's assets performed no more than 12 months prior to such appraisal, which approval may be by written notice and deemed consent by such Fiduciaries' failure to object to the appraiser within 30 days of such notice; and

(iii) In either case, the selected MAI appraiser shall acknowledge in writing that the Client Plan(s) and other investors (in the case of a Multiple Client Account), rather than RREEF, is (are) its clients, and that in performing its services for the Account it shall act in the sole interest of such Client Plan(s) and other investors. In addition, following the date this final exemption is published in the **Federal Register**, every appraiser selected shall acknowledge that it owes a professional obligation to the Client Plan(s) and other investors in the Account in performing its services as an appraiser for properties in the Account. If an MAI

appraiser selected by RREEF, or an appraisal performed by a previously approved appraiser, is rejected by the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for the Multiple Client Account, determined according to the latest valuation of the Account's assets performed no more than 12 months prior to such appraisal, the fair market value of the assets for any "deemed sale", relating to the payment of a Performance Fee (as described in paragraphs (i) and (j) below) shall be determined as follows: (A) the Client Plans shall appoint a second appraiser and, if the value established for the property does not deviate by more than 10% (or such lesser amount as may be agreed upon between RREEF and the Client Plan(s)), then the two appraisals shall be averaged; (B) if the values differ by more than 10%, then the two appraisers shall select a third appraiser, that is independent of RREEF and its affiliates, who will attempt to mediate the difference; (C) if the third appraiser can cause the first two to reach an agreement on a value, that figure shall be used; however, (D) if no agreement can be reached, the third appraiser shall determine the value based on procedures set out in the governing agreements of the Account or, if no such procedures are established, shall conduct its own appraisal and the two closest of the three shall be averaged;

(4) In the case of any Multiple Client Account, a list of all other investors in the Account;

(5) Annual operating and capital budgets with respect to the Account, to be distributed to a Client Plan within 60 days prior to the beginning of the fiscal year to which such budgets relate; and

(6) An explanation of any material deviation from the budgets previously provided to such Client Plan for the prior year.

(f) The total fees paid to RREEF shall constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(g) The Investment Fee shall be equal to a specified percentage of the net value of the Client Plan assets allocated to the Account which shall be payable either:

(1) At the time assets are deposited (or deemed deposited in the case of reinvestment of assets) in the Account; or

(2) In periodic installments, the amount (as a percentage of the aggregate Investment Fee) and timing of which have been specified in advance based on the percentage of the Client Plan's assets invested in real property as of the

payment date; provided that (i) the installment period is no less than three months, and (ii) if the percentage of the Client Plan assets which have actually been invested by a payment date is less than the percentage required for the aggregate Investment Fee to be paid in full through that date (both determined on a cumulative basis), the Investment Fee paid on such a date shall be reduced by the amount necessary to cause the percentage of the aggregate Investment Fee paid to equal only the percentage of the Client Plan assets actually invested by that date. The unpaid portion of such Investment Fee shall be deferred to and payable on a cumulative basis on the next scheduled payment date (subject to the percentage limitation described in the preceding sentence).

(h) The Asset Management Fee shall be payable for each quarter from the net operating income (NOI) of the Account. The amount of the Asset Management Fee, expressed as a percentage of the NOI of the Account, shall be established by the Agreement and agreed to by the Independent Fiduciaries of the Client Plans:

(1) The Asset Management Fee for any Account will be calculated as follows. The Asset Management Fee for a specific Account real property will be based solely on items of operating income and expense that are identified as line items on an operating budget for such property disclosed to each Client Plan that participates in the Account. The disclosures have to be made at least 30 days in advance of the fiscal year to which the budget relates, and approved in the manner described in (2) below;

(2) Each Client Plan must provide affirmative approval of the operating budget. Specifically, when the proposed budget (or any material deviation therefrom) is sent to a Client Plan, it will be accompanied by a written notice that the Client Plan may object to the budget or any specific line item therein, for purposes of calculating the Asset Management Fees for the next fiscal year. The written notice will contain a statement that affirmative approval of the budget is required prior to the end of the 30-day period following such disclosure. In the case of a Multiple Client Account, affirmative approval by a majority of investors (by interest) will constitute approval of the proposed budget (or deviation); and

(3) In the event of any subsequent decrease in previously approved budgeted operating expenses for the fiscal year in excess of the limits previously described (*i.e.*, no more than 15% for any line item or 5% overall), then the resulting increase in NOI (*i.e.*, over and above the allowable deviation)

will not be taken into account in calculating RREEF's management fee *unless* affirmative approval for the payment of such fee is obtained in writing from the Independent Fiduciary for the Client Plan in the Single Client Account or the Responsible Independent Fiduciaries for the Multiple Client Account.

(i) In the case of any Multiple Client Account, the Performance Fee shall be payable after the Client Plan has received distributions from the Account in excess of an amount equal to 100% of its invested capital plus a pre-specified annual compounded cumulative rate of return (the Threshold Amount or Hurdle Rate). However, in the case of RREEF's removal or resignation, RREEF shall be entitled to receive a Performance Fee payable either at the time of removal or, in the event of RREEF's resignation, upon sale of the assets to which the Performance Fee is allocable or upon termination of the Account as the case may be, subject to the requirements of paragraph (l) below, as determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value (in accordance with independent appraisals), only to the extent that the Client Plan would receive deemed distributions from the Account in excess of an amount equal to the Threshold Amount at the time of RREEF's removal or resignation. Both the Threshold Amount and the amount of the Performance Fee, expressed as a percentage of the net proceeds from a capital event distributed (or deemed distributed) from the Account in excess of the Threshold Amount, shall be established by the Agreement and agreed to by the Independent Fiduciaries of the Client Plans.

(j) In the case of any Single Client Account, the Performance Fee shall be determined and paid either: (1) in the same manner as in the case of a Multiple Client Account, as described in paragraph (i) above; or (2) at the end of any pre-specified period of not less than one year, provided that such Fee is based upon the sum of all actual distributions from the Account during such period, plus deemed distributions of the assets of the Account based on an assumed sale of all such assets at their fair market value as of the end of such period (in accordance with independent appraisals performed within 12 months of the calculation) which are calculated to be in excess of the Threshold Amount or the Hurdle Rate through the end of such period. For this purpose, the Performance Fee measuring period shall be established by the Agreement and agreed to by the Independent Fiduciary

of the Client Plan, provided that such period is not less than one year. In addition, RREEF shall provide notice to the Client Plan within 60 days of each Performance Fee calculation for a Single Client Account that the Independent Fiduciary of the Client Plan has the right to request updated appraisals of the properties held by the Account if such Fiduciary determines that the existing independent appraisals (performed within 12 months of the calculation) are no longer sufficient.

(k) The Threshold Amount for any Performance Fee shall include as least a minimum rate of return to the Client Plan, as defined below in Part IV, paragraph (f).

(l) In the event RREEF resigns as investment manager for an Account, the Performance Fee shall be calculated at the time of resignation as described above in paragraph (i) and allocated among each property, based on the appraised value of such property in relationship to the total appraised value of the Account. Each amount arrived at through this calculation shall be multiplied by a fraction, the numerator of which will be the actual sales price received by the Account on subsequent disposition of the property (or in the case of a property which has not been sold prior to the termination of a Multiple Client Account, the appraised value of the property as of the termination date), and the denominator of which will be the appraised value of the property which was used in connection with determining the Performance Fee at the time of resignation, provided that this fraction shall never exceed 1.0. The resulting amount for each property shall be the Performance Fee payable to RREEF upon the sale of such property or termination of the Multiple Client Account, as the case may be.

(m) In cases where RREEF does have discretion to reinvest proceeds from capital events, the reinvested amount shall not be treated as a new contribution of capital by the Client Plan for purposes of the Investment Fee, as described above in paragraph (g), or having been distributed for purposes of the payment of Performance Fee as described above in paragraphs (i) and (j);

(n) RREEF or its affiliates shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (o) of this Part III to determine whether the conditions of this exemption have been met, except that: (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of RREEF or its affiliates, the records are

lost or destroyed prior to the end of the six year period; and (2) no party in interest, other than RREEF, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or 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 (o) below.

(o)(1) Except as provided in paragraph (o)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (n) of this Part III shall be unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of a Client Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any contributing employer to a Client Plan or any duly authorized employee or representative of such employer; and

(iv) Any participant or beneficiary of a Client Plan or any duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above in paragraph (o)(1)(ii)-(iv) shall be authorized to examine the trade secrets of RREEF and its affiliates or any commercial or financial information which is privileged or confidential.

(p) RREEF shall provide a copy of the proposed exemption and a copy of the final exemption to all Client Plans that invest in any Single Client Account or any Multiple Client Account formed on, or after, the date the final exemption is published in the **Federal Register**.

#### Part IV—Definitions

(a) An "affiliate" of a person includes:

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

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

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

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

(c) The term "management services" means:

(1) Development of an investment strategy for the Account and identification of suitable real estate-related investments;

(2) Directing the investments of the assets of the Account, including the determination of the structure of each investment, the negotiation of its terms and conditions and the performance of all requisite due diligence;

(3) Determination of the timing of, and directing, the disposition of assets of the Account and directing the liquidation of the Account upon termination;

(4) Administration of the overall operation of the investments of the Account, including all applicable leasing, management, financing and capital improvement decisions;

(5) Establishing and maintaining accounting records of the Account and distributing reports to Client Plans as described in Part III; and

(6) Selecting and directing all service providers of ancillary services as defined in this Part IV; provided, however, that some or all of the foregoing management services may be subject to the final discretion of the Independent Fiduciary(ies) for the Client Plan(s).

(d) The term "ancillary services" means:

(1) Legal services;

(2) Services of architects, designers, engineers, construction managers, hazardous materials consultants, contractors, leasing agents, real estate brokers, and others in connection with the acquisition, construction, improvement, management and disposition of investments in real property;

(3) Insurance brokerage and consultation services;

(4) Services of independent auditors and accountants in connection with auditing the books and records of the Accounts and preparing tax returns;

(5) Appraisal and mortgage brokerage services; and

(6) Services for the development of income-producing real property.

(e) The term "Independent Fiduciary" with respect to any Client Plan means a fiduciary (including an in-house fiduciary) independent of RREEF and its affiliates. With respect to a Multiple Client Account, the terms "Independent Fiduciary" or "Responsible Independent Fiduciaries" mean the Independent Fiduciaries of the Client Plans invested in the Account and other authorized persons acting for investors in the Account which are not employee benefit plans as defined under section 3(3) of ERISA (such as governmental plans, university endowment funds, etc.) that are independent of RREEF and its affiliates, and that collectively hold more than 50% of the interests in the Account.

(f) The terms "Threshold Amount" or "Hurdle Rate" mean, with respect to any Performance Fee, an amount which equals all of a Client Plan's capital invested in an Account plus a pre-specified annual compounded cumulative rate of return that is at least a minimum rate of return determined as follows:

(1) A "floating" or non-fixed rate which is at least equal to the lesser of seven percent, or the rate of change in the consumer price index (CPI), during the period from the deposit of the Client Plan's assets into the Account until the determination date; or

(2) A fixed rate which is at least equal to the lesser of seven percent or the average rate of change in the CPI over some period of time specified in the Agreement, which shall not exceed 10 years.

(g) The terms "Net Operating Income" or "NOI" means all operating income of the Account (i.e., rents, interest, and other income from day-to-day investment activities of the Account) less operating expenses, determined on an accrual basis in accordance with generally accepted accounting principles, but without regard to depreciation (or other non-cash) expense and capital expenditures and without regard to payments of interest and principal with respect to any acquisition indebtedness relating to the property.

(h) The term "Net Proceeds of a Capital Event" means all proceeds from capital events of an Account (i.e., sales or non-recourse refinances of real property investments owned by the Account) less repayment of debt with respect to such property, closing expenses paid, and reasonable reserves established in connection therewith, whether such reserves are for repayment of existing or anticipated obligations or for contingent liabilities.

**EFFECTIVE DATE:** This exemption is effective as of (i) May 16, 1994, with respect to the Shell Account, and (ii) the date this final exemption is published in the **Federal Register**, with respect to any Single Client Account and any Multiple Client Account formed on, or after, such date.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on June 3, 1999 at 64 FR 29896.

#### *Written Comments*

The Department received one written comment (the Comment) with respect to the Notice and no requests for a public

hearing. The Comment was filed by RREEF and generally requests clarifications and modifications to the Notice. Set forth below in section I is RREEF's discussion concerning RREEF's notification of interested parties. Section II discusses those aspects of the Comment which relate to the language of the final exemption (the Exemption). In addition, section III below discusses those aspects of the Comment which relate to the Summary of Facts and Representations (the Summary) contained in the Notice.

#### *I. Discussion Concerning Notification of Interested Persons*

RREEF represents that RREEF notified all interested parties of the Notice by First Class Mail on June 8, 1999, and informed such persons that they would have thirty-one (31) days from the date of mailing (i.e., 36 days from the date of the Notice's publication in the **Federal Register**) to file comments with the Department. Although the Notice stated that the comment period would be sixty (60) days from the date of publication in the **Federal Register**, it is RREEF's understanding that the Department's purpose in establishing the 60-day period was to give RREEF up to 30 days to mail the Notices and to give interested parties at least thirty (30) days after such mailing to comment. RREEF, however, did not require the initial 30-day period to mail the Notices and, after discussion with the Department staff, shortened the overall time period to reflect the actual date of mailing. All interested parties retained the 30-day comment period and were advised by RREEF that the correct comment deadline date would be July 9, 1999.

Notwithstanding the foregoing, RREEF also had an understanding with the Department that if comments from the general public were received within a reasonable time after July 9, 1999, the Department would require RREEF to respond. However, no such comments were received.

The Department acknowledges RREEF's modification of the notification of interested persons, and, based upon the representations made by RREEF's counsel, has determined that the notice requirements contained in the Department's exemption procedures (see 29 CFR 2570.43) have been met.

#### *II. Discussion Concerning the Exemption*

1. Part I of the Exemption states, in relevant part, that the restrictions of section 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section

4975(c)(1)(E) of the Code, shall not apply, as of the date the final exemption is published in the **Federal Register**, to the subject transactions “\* \* \* with respect to any single client, separate account (Single Client Account) or any multiple Client account (Multiple Client Account) formed on, or after, such a date \* \* \*” (see (ii) of Part I). RREEF wishes to confirm that the phrase “\* \* \* formed on, or after, such a date \* \* \*” refers only to Multiple Client Accounts.

The Department confirms RREEF’s understanding of this phrase.

2. Under Part III(i) of the Exemption, a Performance Fee shall be payable to RREEF after the Client Plan has received distributions from the Account in excess of the applicable Threshold Amount. Part III(i) also discusses the possible payment of a Performance Fee to RREEF in the case of RREEF’s removal or resignation, as determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their market value, but only to the extent that the Client Plan would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of RREEF’s removal or resignation. In this regard, the Comment relates to the phrase in Part III(i) which states, in relevant part, that “\* \* \* the Client Plan would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of RREEF’s removal or resignation.” RREEF suggests adding the word “deemed” to this phrase so that Part III(i) reads, in relevant part, “\* \* \* the Client Plan would receive *deemed* distributions from the Account \* \* \*” [Emphasis added].

The Department acknowledges RREEF’s clarification, and has modified the language of Part III(i) of the Exemption accordingly.

3. Part IV(f) of the Exemption states, in relevant part, that “the terms “Threshold Amount” or “Hurdle Rate” mean, with respect to any Performance Fee, an amount which equals all of a Client Plan’s capital invested in an Account plus a pre-specified annual compounded cumulative rate of return \* \* \*” RREEF wishes to confirm that it may use a Hurdle Rate that is compounded more frequently than annually, e.g., quarterly or monthly, if so negotiated with the Client Plans.<sup>2</sup>

The Department acknowledges RREEF’s confirmation.

### III. Discussion Concerning the Summary

In the Comment, RREEF wishes to clarify the description of the Performance Fees in the Summary as applied to Single Client Accounts. RREEF notes that there is a substantial difference between the proposed Performance Fee calculation as applied to Multiple Client Accounts (described in Part III(i) of the Notice) and the Fee calculation applicable to Single Client Accounts (described in Part III(j) of the Notice). RREEF states that Part III(i) clearly reflects that although distributions from operations serve to reduce the Threshold Amount with respect to Multiple Client Accounts, once the Threshold Amount is reduced to zero the Performance Fee for Multiple Client Accounts is payable only with respect to subsequent distributions from capital events. However, Part III(j) of the Exemption provides that the Performance Fee for Single Client Accounts may be paid “\* \* \* based on the sum of all actual distributions from the Account during such period, plus deemed distributions \* \* \*.”

RREEF represents that the difference in the language was intentional. In the case of a Multiple Client Account, since periodic Performance Fees are not available under the Exemption, RREEF states that it is highly unlikely that any Performance Fee will be calculated and paid until the Account has reached the end of its term and is in liquidation.

In contrast, RREEF states that distributions from any source, including operating revenues, would continue to enter into the Performance Fee calculation for Single Client Accounts even after the Threshold Amount is reduced to zero (as reflected in the language of Part III(j) of the Exemption).

Accordingly, RREEF wishes to make several clarifications to the information contained in the Summary.

1. Paragraph 5(iii) of the Summary contains a description of the Performance Fee. RREEF requests that the word “*certain*” be inserted into Paragraph 5(iii) and that the words “\* \* \* of capital proceeds” be deleted such that it reads, in relevant part, “\* \* \* the Performance Fee, a fee charged upon *certain* actual or deemed distributions from the Account in excess of a Client Plan’s invested capital \* \* \*” [Emphasis added].

2. RREEF requests that the phrase “\* \* \* will not be payable until” be substituted for “will be payable with respect to” in the third section of Paragraph 13 of the Notice, such that the sentence reads, in relevant part, “Because the Threshold Amount has been reduced to \$0 at year 6, an

additional Performance Fee *will not be payable until* any subsequent distribution of cash from a capital event \* \* \*” [Emphasis added].

3. RREEF requests that the word “the” be deleted in the last sentence of Paragraph 14 of the Notice, and that the sentence should read “\* \* \* Such proceeds, net of these expenses and reserves, generally will be distributable net proceeds of capital events upon which the Performance Fee may be payable.”

4. RREEF states it wishes to clarify for the record that because the calculation of the Shell Account’s Performance Fee will be done retroactively, such Fee will be based solely on actual property sales. Accordingly, all references in the Summary to appraisals and appraisers with respect to the Shell Account are irrelevant.

5. RREEF notes that the second section of Paragraph 1 of the Summary requires certain clarifications. RREEF wishes to clarify this information as follows (RREEF’s modifications are in *italic*):

“On January 27, 1998, *substantially all of the assets of RREEF America L.L.C. and its affiliate, RREEF Corporation (collectively, RREEF), were acquired by RoProperty Services, B.V. (RoProperty), a major Dutch investment advisory firm, now known as RoProperty Investment Management, N.V.* As a result, the *assets of RREEF’s advisory entities were combined into a newly created Delaware limited liability company, which continues to use the name “RREEF America L.L.C.”* RREEF operates as an autonomous entity which continues to provide investment management services, and its affiliate, RREEF Management Company, continues to provide property management services.” [Emphasis added].

6. Paragraph 3 of the Summary contains footnote 2 which states:

“\* \* \* The applicant represents that in some instances a Client Plan’s investment in a Multiple Client Account that is a common or collective trust fund maintained by a bank would be exempt from the restrictions of section 406(a) of the Act by reason of section 408(b)(8). The Department expresses no opinion herein whether all the conditions of section 408(b)(8) will be satisfied in such transactions.”

RREEF states that this footnote, while legally accurate, should be deleted because it is inapplicable to RREEF since RREEF is not a bank.

7. RREEF requests that in paragraph 3(f) of the Summary, the phrase “also has” be changed to “also may have” such that the modified paragraph 3(f) reads as follows:

<sup>2</sup> RREEF also notes references to annual compounding in Paragraphs 5 and 12 of the Summary.

"RREEF also *may have* complete discretion in the selection and direction of the ancillary services (Ancillary Services) defined in Part IV, paragraph (d) above." [Emphasis added].

8. RREEF wishes to clarify certain information contained in Paragraph 7 of the Summary, which discusses the services for which RREEF receives an Asset Management Fee. Specifically, RREEF makes the following points:

(a) The Asset Management Fee is not intended to compensate RREEF for selection of properties and other assets for acquisition by an Account; this service is effectively covered by the Investment Fee.

(b) The Asset Management Fee does not compensate RREEF for "performance" (as stated therein) of property management and leasing services, because such services are provided by separate parties for separate compensation. However, this Fee does compensate RREEF for "supervising and overseeing the performance" of such services, including the hiring of those separate parties.

(c) RREEF states that the phrase "\* \* \* and maintaining" should be added to section (v) of paragraph 7 so that the modified section reads as follows: "establishing *and maintaining* tax-exempt title-holding corporations under section 501(a) of the Code for the properties". [Emphasis added].

(d) RREEF also states that the Asset Management Fee also covers supervising the preparation and filing of tax (and other) reports.

9. RREEF also notes that paragraph 8 of the Summary states that RREEF's current property management agreements permit no more than a 15% variance in individual budget line items and 5% overall. However, RREEF states that these figures were used as an example and were not intended to be fixed at such percentages for all property management agreements. In this regard, it is possible that a Client Plan may negotiate a lesser variance in the future, or a lesser variance for a single line item.

RREEF also notes that at the end of the second paragraph in paragraph 8 of the Summary, the last two sentences should be deleted and following two sentences substituted in their place:

"Property management agreements used by RREEF permit no more than a 15% variance between any individual line item expense in the operating budget *and actual expenditures, without the Client's approval.* In addition, *without the Client's approval, actual expenditures for any year typically may not exceed* budgeted expenses by more

than 5% in the aggregate." [Emphasis added].

In this regard, the Department has also modified the language of paragraph (h)(3) of Part III as follows:

"\* \* \* (3) In the event of any subsequent decrease in previously approved budgeted operating expenses for the fiscal year in excess of the limits previously described (i.e., no more than 15% for any line item, or 5% overall), then the resulting increase in NOI \* \* \*." [Emphasis added].

10. RREEF also requests that in the last sentence of Paragraph 12 of the Summary, the word "by" be replaced by the word "to" so that the sentence reads, in relevant part: \* \* \* the Threshold Amount would be increased to the full amount of the deemed distribution \* \* \*." [Emphasis added.]

11. RREEF also requests that the phrase "\* \* \* either the Client Plan(s) or" be added at the beginning of last sentence of paragraph 16 of the Summary to clarify that the discretion used by the appropriate fiduciaries for an Account, as discussed therein, will be exercised by someone other than RREEF. Therefore, the revised sentence should have read as follows:

"*Either the Client Plan(s) or the replacement investment manager of the Account (unrelated to RREEF) will have discretion as to when the property is sold or when the Account is terminated.*" [Emphasis added].

The Department acknowledges all of RREEF's clarifications to the information contained in the Summary, as discussed above, as well as certain other minor discussions and information contained in the Comment.

Accordingly, after giving full consideration to the entire record, including the Comment, the Department has decided to grant the exemption subject as modified herein. The Comment has been included as part of the public record of the exemption application.

Interested persons are invited to review the complete exemption file, which is available for public inspection in the Public Disclosure Room of the Pension and Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ekaterina A. Uzlyan of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

**General Motors Hourly Rate Employees Pension Plan, General Motors Retirement Program for Salaried Employees, Saturn Individual Retirement Plan for Represented Team Members, Saturn Personal Choices Retirement Plan for Non-Represented Team Members, Employees' Retirement Plan for GMAC Mortgage Corporation, Delphi Automotive Systems Hourly Rate Employees Pension Plan, Delphi Automotive Systems Retirement Program for Salaried Employees (collectively, the Plans) Located in New York, New York**

[Prohibited Transaction Exemption 99-33; Exemption Application Nos. D-10473 through D-10476]

*Exemption*

Part I—Covered Transactions

The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply effective December 11, 1998, to a transaction between AEW Industrial, L.L.C. (the LLC), an entity which currently holds "plan assets" of the Plans, or any subsidiary of the LLC (as defined in Part IV(d) below) which may hold "plan assets" of the Plans in the future, as a result of investments made by the Plans in the LLC or any subsidiary through the First Plaza Group Trust (the Trust), and a party in interest with respect to any of the Plans, provided that the Specific Conditions set forth below in Part II and the General Conditions set forth in Part III are met:

Part II—Specific Conditions

(a) In the case of a transaction by the LLC or any subsidiary that involves the acquisition, financing, or disposition of any real property asset, the terms of the transaction are negotiated on behalf of the Plan by AEW Capital Management, L.P. or a successor thereto (AEW), under the authority and general direction of General Motors Investment Management Corporation (GMIMCo), a wholly-owned subsidiary of General Motors Corporation (GM), and GMIMCo makes the decision on behalf of the Plan to enter into the transaction.

Notwithstanding the foregoing, a transaction involving an amount of \$5 million or more, which has been negotiated on behalf of the Plans by AEW and approved by GMIMCo in the manner described above, will not fail to meet the requirements of this Part II(a) solely because GM or its designee retains the right to veto or approve such transaction;



(b) In the case of any transaction by the LLC or any subsidiary that does not involve acquisitions, financings or dispositions of real property assets, the terms of the transaction are negotiated on behalf of the Plans by AEW, under the authority and general direction of GMIMCo, and either AEW or a property manager acting in accordance with written guidelines or business plans (including budgets), adopted with the approval of GMIMCo, makes the decision on behalf of the Plans to enter into the transaction. Notwithstanding the foregoing, a transaction involving an amount of \$5 million or more, which has been negotiated on behalf of the Plans in accordance with the foregoing, will not fail to meet the requirements of this Part II(b) solely because GM or its designee retains the right to veto or approve such transaction;

(c) The transaction is not described in—

(1) Prohibited Transaction Exemption 81-6 (46 FR 7527, January 23, 1981), relating to securities lending arrangements,

(2) Prohibited Transaction Exemption 83-1 (48 FR 895, January 7, 1983), relating to acquisitions by plans of interests in mortgage pools, or

(3) Prohibited Transaction Exemption 88-59 (53 FR 24811; June 30, 1988), relating to certain mortgage financing arrangements;

(d) The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest with respect to any of the Plans;

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

(f) The party in interest dealing with the LLC: (1) is a party in interest with respect to a Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F),(G),(H) or (I) of the Act; and (2) does not have discretionary authority or control with respect to the investment of the Plan's assets in the Trust or the LLC, and does not render investment advice, within the meaning of 29 CFR 2510.3-21(c), with respect to the investment of those assets in the Trust or the LLC;

(g) The party in interest dealing with the LLC is neither GMIMCo or AEW nor a person "related" to GMIMCo or AEW within the meaning of Part IV(c) below;

(h) GMIMCo adopts written policies and procedures that are designed to assure compliance with the conditions of this exemption; and

(i) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act, and who so represents in writing, conducts an exemption audit, as defined in Part IV(f) below, on an annual basis. Following completion of the exemption audit, the auditor issues a written report to each Plan representing its specific findings regarding the level of compliance with the policies and procedure adopted by GMIMCo in accordance with Part II(h) above.

#### Part III—General Conditions

(a) At all times during the term of this exemption (if granted), GMIMCo shall be—

(1) A direct or indirect wholly owned subsidiary of GM, and

(2) An investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has under its management and control total assets attributable to Plans maintained by GM or its affiliates (as defined in Part IV(a) of this exemption) in excess of \$50 million. In addition, Plans maintained by affiliates of GMIMCo must have, as of the last day of each plan's reporting year, aggregate assets of at least \$250 million;

(b) AEW or any successor, as investment manager for assets held by the LLC, meets the conditions for a "qualified professional asset manager" (QPAM) as set forth in section V(a) of Prohibited Transaction Class Exemption 84-14 (49 FR 9494, March 13, 1984);

(c) AEW and GMIMCo, or their affiliates, shall maintain, for a period of six years from the date of each transaction described above, the records necessary to enable the persons described below in Part III(d)(1) to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of AEW or GMIMCo, or their affiliates, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest, other than AEW or GMIMCo, shall be subject to the civil penalty which may be assessed under section 502(i) of the Act or to the taxes imposed by sections 4975 (a) and (b) of the Code, if the records are not available for examination as required by section (d) below; and

(d)(1) Except as provided in subsection (2) of this section (d), and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in section (c) of this Part III shall be made unconditionally available by GMIMCo or AEW, at the customary location for the maintenance and/or retention of such records, for examination during normal business hours by:

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

(B) The persons described in Part II(i) of this exemption (relating to an independent audit of covered transactions as discussed therein); and

(C) Any fiduciary of the Plans or the Trust;

(2) None of the persons described in subsections (1)(B) and (C) of this section (d) shall be authorized to examine trade secrets of AEW or GMIMCo, or commercial or financial information which is privileged or confidential in nature.

#### Part IV—Definitions

For purposes of this exemption:

(a) "Affiliate" of GM means a member of either (1) a controlled group of corporations (as defined in section 414(b) of the Code) of which GM is a member, or (2) a group of trades or businesses under common control (as defined in section 414(c) of the Code) of which GM is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in Code section 414(b) or 414(c) or the regulations thereunder.

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

(c) GMIMCo or AEW are "related" to a party in interest with respect to a Plan for purposes of this exemption if the party in interest (or a person controlling or controlled by the party in interest) owns a five percent (5%) or more interest in GMIMCo or AEW, or if GMIMCo or AEW (or a person controlling or controlled by GMIMCo or AEW) owns a five percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) "Interest" means with respect to ownership of an entity:

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

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



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

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

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

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

(3) "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) "Subsidiary" means any limited liability company or other entity organized by the LLC, through which it acquires and holds title to its real property investments.

(e) An "exemption audit" of each Plan's interest in the LLC must consist of the following:

(1) A review of the written policies and procedures adopted by GMIMCo pursuant to Part II(h) for consistency with each of the objective requirements of this exemption (as described herein);

(2) A test of a representative sample of the Plan's transactions through investments made by the LLC, as described in Part I, in order to make findings regarding whether GMIMCo is in compliance with both: (i) the written policies and procedures adopted by GMIMCo pursuant to Part II(i) of this exemption; and (ii) the objective requirements of this exemption; and

(3) Issuance of a written report describing the steps performed by the independent auditor during the course of its review and the independent auditor's findings regarding the Plan's interest in the LLC.

(f) For purposes of Part IV(e), the written policies and procedures must describe the following objective requirements of Part II of the exemption and the steps adopted by GMIMCo to assure compliance with each of these requirements:

(1) The requirements of Part III;

(2) The requirements of sections (a) and (b) of Part II regarding the discretionary authority or control of GMIMCo with respect to the Plan assets involved in each transaction, in negotiating the terms of the transaction, and with regard to the decision made on behalf of the Plan, as an investor in the LLC, to enter into the transaction;

(3) The requirements of sections (a) and (b) of Part II with respect to any procedure for approval or veto of the transaction;

(4) That:

(A) The transaction is not entered into with any person who is excluded from

relief under sections (f) or (g) of Part II; and

(B) The transaction is not described in any of the class exemptions listed in section (c) of Part II.

(g) "Plan" means an employee benefit plan established and maintained by GM or an Affiliate, as well as the Delphi Automotive Systems Hourly Rate Employees Pension Plan, and the Delphi Automotive Systems Retirement Program for Salaried Employees.

**EFFECTIVE DATE:** This exemption is effective as of December 11, 1998.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on June 3, 1999 at 64 FR 29914.

#### Written Comments

The Department received one written comment (the Comment) with respect to the Notice and no requests for a public hearing. The Comment was filed by AEW and suggests that certain clarifications and modifications be made to the Notice. Set forth below in section I is AEW's discussion concerning the language of the final exemption (the Exemption). Section II discusses those aspects of the Comment which relate to the Summary of Facts and Representations (the Summary) contained in the Notice.

#### I. Discussion of the Comment Regarding the Exemption

1. AEW states that Delphi Automotive Systems Corporation (Delphi) was spun-off by General Motors on May 28, 1999. Delphi maintained two plans, the Delphi Automotive Systems Hourly Rate Employees Pension Plan and the Delphi Automotive Systems Retirement Program for Salaried Employees. The assets of both of these plans are still held in the First Plaza Group Trust and still managed by GMIMCo. Therefore, AEW requests that the Delphi Automotive Systems Hourly Rate Employees Pension Plan and the Delphi Automotive Systems Retirement Program for Salaried Employees be added to the caption of the Exemption, so that the revised caption reads as follows:

"General Motors Hourly Rate Employees Pension Plan, General Motors Retirement Program for Salaried Employees, Saturn Individual Retirement Plan for Represented Team Members, Saturn Personal Choices Retirement Plan for Non-Represented Team Members, Employees' Retirement Plan for GMAC Mortgage Corporation, *Delphi Automotive Systems Hourly Rate Employees Pension Plan, Delphi Automotive Systems*

*Retirement Program for Salaried Employees* (collectively, the Plans)." [Emphasis added].

The Department acknowledges AEW's request and has modified the caption of the Exemption accordingly. In addition, the Department has modified the definition of the term "Plan" in Part IV(g) of the Exemption to include the Delphi Automotive Systems Hourly Rate Employees Pension Plan, and the Delphi Automotive Systems Retirement Program for Salaried Employees.

2. AEW also notes that Part I of the Notice states, in relevant part, that the restrictions of section 406(a)(1)(A) through (D) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, shall not apply to "\* \* \* a transaction between AEW Industrial, L.L.C. (the LLC), an entity which currently holds "plan assets" of the Plans, or any subsidiary of the LLC (as defined in Part IV(d) below) \* \* \*". Since Part I refers to transactions by the LLC or any subsidiary, AEW requests that the phrase "\* \* \* or any subsidiary \* \* \*" also be added immediately after the reference to the LLC in the first sentence of Part II(a) of the Exemption and the first sentence of Part II(b) of the Exemption in order to be consistent with Part I.

Thus, Part II(a) should read, in relevant part, "In the case of transaction by the LLC *or any subsidiary* \* \* \*." [Emphasis added]. Furthermore, Part II(b) should read, in relevant part, "In the case of transaction by the LLC *or any subsidiary* \* \* \*." [Emphasis added].

The Department acknowledges AEW's request and has modified the language of Part II(a) and Part II(b) of the Exemption accordingly.

#### II. Discussion of the Comment Regarding the Summary

1. For the same reasons discussed in the Comment at Section I(1) above, AEW states that the following sentence should be added after the first sentence in paragraph 2 of the Summary, so that the paragraph reads, in relevant part:

"For a portion of their assets, the Plans make investments through an entity known as the First Plaza Group Trust (i.e., the Trust), which is a group trust established pursuant to IRS Revenue Ruling 81-100. *In addition, the Delphi Automotive Systems Hourly Rate Employees Pension Plan and the Delphi Automotive Systems Retirement Program for Salaried Employees (hereinafter these two plans are included in all references to the Plans), which are plans sponsored by a former GM affiliate, make investments through the Trust.*" [Emphasis added].

2. AEW requests that the word "billion" replace the word "million" in the last sentence of paragraph 1 of the Summary so that the sentence reads, in

relevant part, “\* \* \* the Plans had total assets of approximately \$73.2 billion, of which approximately \$4.39 billion were invested in private real estate assets.” [Emphasis added].

3. AEW also requests that the word “billion” replace the word “million” in the third sentence of paragraph 5 of the Summary so that the sentence reads, in relevant part, “\* \* \* [New England Investment Companies] NEIC is a publicly-traded holding company with approximately \$90 billion in assets under management \* \* \*.” [Emphasis added].

The Department acknowledges all of AEW’s clarifications to the information contained in the Summary.

Accordingly, after giving full consideration to the entire record, including the Comment, the Department has decided to grant the exemption subject as modified herein.

**FOR FURTHER INFORMATION CONTACT:** Ekaterina A. Uzlyan of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

#### *General Information*

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of

the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 2nd day of August, 1999.

**Ivan Strasfeld,**

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

[FR Doc. 99-20191 Filed 8-4-99; 8:45 am]

BILLING CODE 4510-29-P

## **NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

### **Nixon Presidential Historical Materials; Opening of Materials**

**AGENCY:** National Archives and Records Administration.

**ACTION:** Notice of opening of materials.

**SUMMARY:** This notice announces the opening of additional Nixon presidential historical materials. Notice is hereby given that, in accordance with section 104 of Title I of the Presidential Recordings and Materials Preservation Act (“PRMPA”, 44 U.S.C. 2111 note) and 1275.42(b) of the PRMPA Regulations implementing the Act (36 CFR Part 1275), the agency has identified, inventoried, and prepared for public access approximately 445 hours of Nixon White House tape recordings among the Nixon Presidential historical materials.

**DATES:** The National Archives and Records Administration (NARA) intends to make the materials described in this notice available to the public beginning October 5, 1999. In accordance with 36 CFR 1275.44, any person who believes it necessary to file a claim of legal right or privilege concerning access to these materials should notify the Archivist of the United States in writing of the claimed right, privilege, or defense on or before September 7, 1999.

**ADDRESSES:** The materials will be made available to the public at the National Archives at College Park research room, located at 8601 Adelphi Road, College Park, Maryland, beginning at 8:45 a.m.

Petitions asserting a legal or constitutional right or privilege which would prevent or limit access must be sent to the Archivist of the United States, National Archives at College

Park, 8601 Adelphi Road, College Park, Maryland 20740-6001.

**FOR FURTHER INFORMATION CONTACT:** Karl Weissenbach, Director, Nixon Presidential Materials Staff, 301-713-6950.

**SUPPLEMENTARY INFORMATION:** NARA is proposing to open approximately 3650 conversations which were recorded at the Nixon White House from February 1971 to July 1971. These tape segments total approximately 445 hours of listening time.

This is the seventh opening of Nixon White House tapes since 1980. Previous releases included conversations constituting “abuses of governmental power” and conversations recorded in the Cabinet Room of the Nixon White House. The tapes now being proposed for opening consist of the first of five segments comprising the remaining hours of conversations, processed for release in chronological order starting with February 1971.

There are no transcripts for these tapes. Tape logs, prepared by NARA, are offered for public access as a finding aid to the tape segments and a guide for the listener. There is a separate tape log entry for each segment of conversation released. Each tape log entry includes the names of participants; date, time, and location of the conversation; and an outline of the content of the conversation.

The tape recordings will be made available to the general public in the research room at 8601 Adelphi Road, College Park, Maryland, Monday through Friday between 8:45 a.m. and 4:30 p.m. Researchers must have a NARA researcher card, which they may obtain when they arrive at the facility. Listening stations will be available for public use on a first come, first served basis. NARA reserves the right to limit listening time in response to heavy demand. No copies of the tape recordings will be sold or otherwise provided at this time. No sound recording devices will be allowed in the listening area. Researchers may take notes. Copies of the tape log will be available for a fee in accordance with 36 CFR 1258.12.

Dated: July 30, 1999.

**John W. Carlin,**

*Archivist of the United States.*

[FR Doc. 99-20154 Filed 8-4-99; 8:45 am]

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