

not include investments in securities that are offered by the broker-dealer [or its affiliate] exclusively to IRAs and Keogh Plans.

(e) An affiliate of a broker-dealer includes any person directly or indirectly controlling, controlled by, or under common control with the broker-dealer. The term control means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term *members of his or her family* refers to beneficiaries of the individual for whose benefit the IRA or Keogh Plan is established or maintained, who would be members of the family as that term is defined in Code section 4975(e)(6), or a brother, a sister, or spouse of a brother or sister.

(g) The term *service* includes incidental products of a de minimis value which are directly related to the provision of services covered by the exemption.

(h) The term *fees* means commissions and other fees received by the broker-dealer from the IRA or Keogh Plan for the provision of services, including, but not limited to, brokerage commissions, investment management fees, custodial fees, and administrative fees.

Signed at Washington, D.C., this 25th day of July 1996.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration U.S. Department of Labor.

[FR Doc. 96-19484 Filed 7-30-96; 8:45 am]

BILLING CODE 4510-29-P

[Prohibited Transaction Exemption 96-59; Exemption Application No. D-09818, et al.]

Grant of Individual Exemptions; PaineWebber Incorporated

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.

PaineWebber Incorporated (PaineWebber), Located in New York, NY

[Prohibited Transaction Exemption 96-59; Exemption Application No. D-09818]

EXEMPTION

Section I. Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective August 18, 1995, to the purchase or redemption of shares by an employee benefit plan, a plan described in section 403(b) of the Code (the Section 403(b) Plan), an individual retirement account (the IRA) or a retirement plan for a self-employed individual (the Keogh Plan) (collectively referred to herein as the Plans) in the PaineWebber Managed Accounts Services Portfolio Trust (the Trust)

established in connection with such Plans' participation in the PaineWebber PACE Program (the PACE Program).

In addition, the restrictions of section 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)(E) and (F) of the Code, shall not apply, effective August 18, 1995, to (a) the provision, by PaineWebber Managed Accounts Services (PMAS), a division of PaineWebber, of asset allocation and related services to an independent fiduciary of a Plan (the Independent Fiduciary) or to a directing participant (the Directing Participant) in a Plan that is covered under and permits participant selection as contemplated by the provisions of section 404(c) of the Act (the Section 404(c) Plan), which may result in the selection by the Independent Fiduciary or the Directing Participant of portfolios of the Trust (the Portfolios) in the PACE Program for the investment of Plan assets; and (b) the provision of investment management services by Mitchell Hutchins Asset Management, Inc. (Mitchell Hutchins) to the PACE Money Market Investments Portfolio of the Trust.

This exemption is subject to the conditions set forth below in Section II.

Section II. General Conditions

(a) The participation of each Plan in the PACE Program is approved by an Independent Fiduciary or, if applicable, Directing Participant.

(b) As to each Plan, the total fees paid to PMAS and its affiliates constitute no more than reasonable compensation and do not include the receipt of fees pursuant to Rule 12b-1 under the Investment Company Act of 1940 (the '40 Act) by PMAS and its affiliates in connection with the transactions.

(c) No Plan pays a fee or commission by reason of the acquisition or redemption of shares in the Trust.

(d) The terms of each purchase or redemption of Trust shares remain at least as favorable to an investing Plan as those obtainable in an arm's length transaction with an unrelated party.

(e) PMAS provides written documentation to an Independent Fiduciary or a Directing Participant of its recommendations or evaluations based upon objective criteria.

(f) Any recommendation or evaluation made by PMAS to an Independent Fiduciary or Directing Participant is implemented only at the express direction of such fiduciary or participant.

(g) PMAS provides investment advice in writing to an Independent Fiduciary or Directing Participant with respect to

all Portfolios made available under the Plan.

(h) With the exception of the PACE Money Market Investments Portfolio, any sub-adviser (the Sub-Adviser) appointed by Mitchell Hutchins to exercise investment discretion with respect to a Portfolio is independent of PaineWebber and its affiliates.

(i) The quarterly fee that is paid by a Plan to PMAS for asset allocation and related services rendered to such Plan under the PACE Program (i.e., the outside fee) is offset by such amount as is necessary to assure that Mitchell Hutchins retains 20 basis points as a management fee from any Portfolio (with the exception of the PACE Money Market Investments Portfolio from which Mitchell Hutchins retains an investment management fee of 15 basis points) containing investments attributable to the Plan investor. However, the quarterly fee of 20 basis points that is paid to Mitchell Hutchins for administrative services is retained by Mitchell Hutchins and is not offset against the outside fee.

(j) With respect to its participation in the PACE Program prior to purchasing Trust shares,

(1) Each Independent Fiduciary receives the following written or oral disclosures from PaineWebber:

(A) A copy of the prospectus (the Prospectus) for the Trust discussing the investment objectives of the Portfolios comprising the Trust; the policies employed to achieve these objectives; the corporate affiliation existing between PaineWebber, PMAS, Mitchell Hutchins and their affiliates; the compensation paid to such entities; any additional information explaining the risks of investing in the Trust; and sufficient and understandable disclosures relating to rebalancing of investor accounts.

(B) Upon written or oral request to PaineWebber, a Statement of Additional Information supplementing the Prospectus, which describes the types of securities and other instruments in which the Portfolios may invest, the investment policies and strategies that the Portfolios may utilize and certain risks attendant to those investments, policies and strategies.

(C) An investor questionnaire.

(D) A written analysis of PMAS's asset allocation recommendation of specific Portfolios.

(E) A copy of the agreement between PMAS and such Plan relating to participation in the PACE Program.

(F) Upon written request to Mitchell Hutchins, a copy of the respective investment advisory agreements

between Mitchell Hutchins and the Sub-Advisers.

(G) Copies of the proposed exemption and grant notice describing the exemptive relief provided herein.

(2) In the case of a Section 404(c) Plan, the Independent Fiduciary will—

(A) Make copies of the foregoing documents available to Directing Participants.

(B) Allow Directing Participants to interact with PaineWebber Investment Executives and receive information relative to the services offered under the PACE Program, including the rebalancing feature, and the operation and objectives of the Portfolios.

(3) If accepted as an investor in the PACE Program, an Independent Fiduciary of a Section 403(b) Plan, an IRA or a Keogh Plan, is required to acknowledge, in writing to PMAS, prior to purchasing Trust shares that such fiduciary has received copies of the documents described in paragraph (j)(1) of this Section II.

(4) With respect to a Section 404(c) Plan, written acknowledgement of the receipt of such documents is provided by the Independent Fiduciary (i.e., the Plan administrator, trustee, investment manager or named fiduciary). Such Independent Fiduciary will be required to represent in writing to PMAS that such fiduciary is—

(A) Independent of PaineWebber and its affiliates;

(B) Knowledgeable with respect to the Plan in administrative matters and funding matters related thereto; and

(C) Able to make an informed decision concerning participation in the PACE Program.

(5) With respect to a Plan that is covered under Title I of the Act, where investment decisions are made by a trustee, investment manager or a named fiduciary, such Independent Fiduciary is required to acknowledge, in writing, receipt of such documents and represent to PMAS that such fiduciary is

(A) Independent of PMAS and its affiliates;

(B) Capable of making an independent decision regarding the investment of Plan assets;

(C) Knowledgeable with respect to the Plan in administrative matters and funding matters related thereto; and

(D) Able to make an informed decision concerning participation in the PACE Program.

(k) As applicable, subsequent to its participation in the PACE Program, each Independent Fiduciary receives the following written or oral disclosures with respect to its ongoing participation in the PACE Program:

(1) Written confirmations of each purchase or redemption transaction by the Plan with respect to a Portfolio.

(2) Telephone access to quotations from PaineWebber of such Plan's account balance.

(3) A monthly statement of account from PaineWebber specifying the net asset value of the Plan's investment in such account. Such statement is also anticipated to include cash flow and transaction activity during the month, unrealized gains or losses on Portfolio shares held; and a summary of total earnings and capital returns on the Plan's PACE Portfolio for the month and year-to-date.

(4) The Trust's semi-annual and annual report which will include financial statements for the Trust and investment management fees paid by each Portfolio.

(5) A written quarterly monitoring report that includes (a) a record of the Plan's PACE Program portfolio for the quarter and since inception, showing the rates of return relative to comparative market indices (illustrated in a manner that reflects the effect of any fees for participation in the PACE Program actually incurred during the period); (b) an investment outlook summary containing market commentary; and (c) the Plan's actual PACE Program portfolio with a breakdown, in both dollars and percentages, of the holdings in each portfolio. The quarterly monitoring report will also contain an analysis and an evaluation of a Plan investor's account to assist the investor to ascertain whether the Plan's investment objectives have been met and recommending, if required, changes in Portfolio allocations.

(6) A statement, furnished at least quarterly or annually, specifying—

(A) The total, expressed in dollars, of each Portfolio's brokerage commissions that are paid to PaineWebber and its affiliates;

(B) The total, expressed in dollars, of each Portfolio's brokerage commissions that are paid to unrelated brokerage firms;

(C) The average brokerage commissions per share that are paid by the Trust to brokers affiliated with PaineWebber, expressed as cents per share; and

(D) The average brokerage commissions per share that are paid by the Trust to brokers unrelated to PaineWebber and its affiliates, expressed as cents per share for any year in which brokerage commissions are paid to PaineWebber by the Trust Portfolios in which a Plan's assets are invested.

(7) Periodic meetings with a PaineWebber Investment Executive (or the appropriate PaineWebber representative) by Independent Fiduciaries to discuss the quarterly monitoring report or any other questions that may arise.

(l) In the case of a Section 404(c) Plan where the Independent Fiduciary has established an omnibus account in the name of the Plan (the Undisclosed Account) with PaineWebber, depending upon the arrangement negotiated by the Independent Fiduciary with PMAS, certain of the information noted above in subparagraphs (k)(1) through (k)(7) of this Section II may be provided by PaineWebber to the Directing Participants or to the Independent Fiduciary for dissemination to the Directing Participants.

(m) If previously authorized in writing by the Independent Fiduciary, the Plan investor's account is automatically rebalanced on a periodic basis to the asset allocation previously prescribed by the Plan or participant, as applicable, if the quarterly screening reveals that one or more Portfolio allocations deviates from the allocation prescribed by the investor by the agreed-upon formula threshold.

(n) The books and records of the Trust are audited annually by independent, certified public accountants and all investors are sent copies of an audited financial report no later than 60 days after the close of each Trust fiscal year.

(o) PaineWebber maintains, for a period of six years, the records necessary to enable the persons described in paragraph (p) of this Section II 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 PaineWebber and/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 PaineWebber 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 (p)(1) of this Section II below.

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

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

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

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

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

(p)(2) None of the persons described above in paragraphs (p)(1)(B)–(p)(1)(D) of this paragraph (p) are authorized to examine the trade secrets of PaineWebber or Mitchell Hutchins or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this exemption:

(a) The term “PaineWebber” means PaineWebber Incorporated and any affiliate of PaineWebber, as defined in paragraph (b) of this Section III.

(b) An “affiliate” of PaineWebber includes—

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

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

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

(d) The term “Independent Fiduciary” means a Plan fiduciary which is independent of PaineWebber and its affiliates and is either

(1) A Plan administrator, trustee, investment manager or named fiduciary of a Section 404(c) Plan or a Section 403(b) Plan;

(2) A participant in a Keogh Plan;

(3) An individual covered under a self-directed IRA which invests in Trust shares;

(4) An employee, officer or director of PaineWebber and/or its affiliates covered by an IRA not subject to Title I of the Act;

(5) A trustee, Plan administrator, investment manager or named fiduciary responsible for investment decisions in the case of a Title I Plan that does not permit individual direction as contemplated by Section 404(c) of the Act; or

(e) The term “Directing Participant” means a participant in a Plan covered under the provisions of section 404(c) of the Act, who is permitted under the terms of the Plan to direct, and who elects to so direct, the investment of the assets of his or her account in such Plan.

(f) The term “Plan” means a pension plan described in 29 CFR 2510.3–2, a welfare benefit plan described in 29 CFR 2510.3–1, a plan described in section 4975(e)(1) of the Code, and in the case of a Section 404(c) Plan, the individual account of a Directing Participant.

EFFECTIVE DATE: This exemption will be effective as of August 18, 1995.

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 March 22, 1996 at 61 FR 11882.

Written Comments

The Department received one written comment with respect to the Notice and no requests for a public hearing. The comment was submitted by PaineWebber, PMAS and Mitchell Hutchins (collectively, the Applicants). Their comment is broken down into the areas discussed below.

(1) *Section 403(b) Plan Participation.* In addition to IRAs, Keogh Plans, Section 404(c) Plans and other types of employee benefit plans that will participate in the PACE Program, the Applicants represent that they wish to offer shares in the Trust to Plans that are described in section 403(b) of the Code. Therefore, the Applicants have requested that the Department include references to Section 403(b) Plans in the exemptive language set forth in Section I, in the conditional language set forth in Sections II(j)(3) and III(d)(1) and in Representation 6 of the Summary of Facts and Representations (the Summary). The Department has revised the Notice accordingly.

(2) *Available Portfolios.* Section II(g) of the Notice states that PMAS will provide investment advice in writing to an Independent Fiduciary or a Directing Participant with respect to all available Portfolios offered by the Trust. The Applicants note, however, that, in the case of a Section 404(c) Plan, an Independent Fiduciary will determine the initial array of Portfolios among which the Directing Participants may allocate Plan assets, and that such fiduciary may decide to include less than all of the Portfolios in that array. Therefore, the Applicants have requested that the Department revise Section II(g) of the Notice as follows to

make it clear that "available" Portfolios are those that will be selected by the Independent Fiduciary under such circumstances:

(g) PMAS provides investment advice in writing to an Independent Fiduciary or Directing Participant with respect to all Portfolios made available under the Plan.

The Department has made the change requested by the Applicants.

(3) *Independent Fiduciary Role.* With respect to a Section 404(c) Plan, Section II(j)(4) of the Notice states that written acknowledgement of the receipt of initial disclosures from PaineWebber will be provided by the Independent Fiduciary who may be the Plan administrator, trustee, investment manager or the named fiduciary, as the recordholder of Trust shares. The Applicants wish to clarify that because the trustee of a trust is generally the legal owner of trust assets, the Plan trustee rather than the Independent Fiduciary is the actual recordholder of Trust shares. Therefore, the Applicants request that the Department revise Section II(j)(4) of the Notice to read as follows:

(4) With respect to a Section 404(c) Plan, written acknowledgement of the receipt of such documents is provided by the Independent Fiduciary (i.e., the Plan administrator, trustee, investment manager or named fiduciary).

The Department has amended the Notice in this regard.

(4) *Directing Participant Disclosure.* Section II(l) of the Notice states, in relevant part, that if an Independent Fiduciary of a Section 404(c) Plan has established an Undisclosed Account with PaineWebber, certain disclosures will be provided by PaineWebber to the Directing Participants or to the Independent Fiduciary for dissemination to the Directing Participants, depending upon the arrangement negotiated with PMAS. In an effort to reflect the manner in which that information will be distributed or made available to Directing Participants and/or to the Independent Fiduciaries of Section 404(c) Plans, the Applicants request that the Department modify Section II(l) of the Notice.

The Department has amended Section II(l) of the Notice to read as follows:

(l) In the case of a Section 404(c) Plan where the Independent Fiduciary has established an omnibus account in the name of the Plan (the Undisclosed Account) with PaineWebber, depending upon the arrangement negotiated by the Independent Fiduciary with PMAS, certain of the information noted above in subparagraphs (k)(1) through (k)(7) of this Section II may be provided by PaineWebber to the Directing Participants or to the Independent Fiduciary

for dissemination to the Directing Participants.

(5) *Description of Paine Webber Group and PaineWebber.*

Representation 1(a) of the Summary, states, in part, that the Paine Webber Group is a member of all principal securities and commodities exchanges in the United States and the National Association of Securities Dealers, Inc. It is also represented that Paine Webber Group holds memberships or associate memberships on several principal foreign securities and commodities exchanges. Although the Applicants furnished this information to the Department, they wish to clarify that these representations pertain to PaineWebber rather than to the Paine Webber Group. Therefore, they request that the Department make appropriate changes to the Summary.

The Department has revised the language in Representation 1(b) of the Summary as follows:

PaineWebber is a member of all principal securities and commodities exchanges in the United States and the National Association of Securities Dealers, Inc. It also holds memberships or associate memberships on several principal foreign securities and commodities exchanges.

(6) *Net Asset Value Per Share.* In pertinent part, Representation 2 of the Summary states that with the exception of the PACE Money Market Investments Portfolio, shares in the Trust were initially offered to the public by PaineWebber at a net asset value of \$10 per share and that shares in the PACE Money Market Investments Portfolio are being offered to the public at a net asset value of \$1.00 per share. The Applicants wish to clarify that with the exception of the PACE Money Market Investments Portfolio in which shares are offered to the public at a net asset value of \$1.00 per share, shares in the other Portfolios were initially offered to the public at a net asset value of \$12 per share.

Accordingly, the Department has revised the sixth and seventh sentences of Representation 2 to read as follows:

With the exception of the PACE Money Market Investments Portfolio, shares in each of the Portfolios were initially offered to the public at a net asset value of \$12 per share. Shares in the PACE Money Market Investments Portfolio are offered to the public at a net asset value of \$1.00 per share.

(7) *Minimum Investments.* The second paragraph of Representation 3 of the Summary states, in part, that the minimum initial investment for a prospective investor in the PACE Program is \$10,000. The Applicants note, however, that the minimum initial investment threshold for an investor is

currently \$25,000 and not \$10,000. For Plan investors and Uniform Gift or Transfer to Minors Accounts, the Applicants wish to clarify that the minimum initial investment is presently \$10,000.

The Department has revised part of Representation 3 to read as follows:

* * * The minimum initial investment in the PACE Program currently is \$25,000 (except for Plans and Uniform Gift or Transfer to Minors Accounts, for which the minimum initial investment is currently \$10,000).

(8) *Valuation of Portfolio Shares.*

Footnote 10 of the Summary states, in part, that the net asset value of shares in the PACE Money Market Investments Portfolio is determined as of 12 p.m. each business day. To indicate that the net asset value of all Portfolio shares, including shares of the PACE Money Market Investments Portfolio, is being determined as of the close of regular trading on the New York Stock Exchange (currently 4 p.m., Eastern Time) each business day, the Applicants request that the Department modify Footnote 10 of the Summary.

The Department has modified Footnote 10 to read as follows:

The net asset value of each Portfolio's shares is determined as of the close of regular trading on the New York Stock Exchange (the NYSE) (currently, 4 p.m., Eastern Time) each business day. Each Portfolio's net asset value per share is determined by dividing the value of the securities held by the Portfolio plus any cash or other assets minus all liabilities by the total number of Portfolio shares outstanding.

In addition, the Applicants have requested that Footnote 16 of the Summary be revised to incorporate the following language:

* * * The net asset value of each Portfolio's shares is determined as of the close of regular trading on the NYSE (currently, 4 p.m. Eastern Time) each business day. PaineWebber may, in the future, impose a minimum dollar threshold on rebalancing transactions in order to avoid *de minimus* transactions.

(9) *Payment of Redemption Proceeds.*

Representation 14 of the Summary states, in part, that a Portfolio will be required to transmit redemption proceeds for credit to an investor's account within 5 business days after receipt. Similarly, Representation 17 of the Summary sets forth the same time frame for the payment of the outside fee as well as the applicable fee if additional funds are invested during a calendar quarter. Because Federal Securities laws currently require PaineWebber to settle its obligations within three business days, the Applicants have requested that the

Department revise the Summary to reflect the current timing of such payments.

The Department does not object to these necessary revisions and has deleted references to the five business day requirement and inserted the phrase "three business days" in the fourth sentence of paragraph one of Representation 14, in the first sentence of paragraph two of Representation 17 and in the first sentence of paragraph three of Representation 17.

(10) *Brokerage Commission Information.* Representation 22(i) of the Summary states, in part, that on a quarterly and annual basis, PaineWebber will provide written disclosures to an Independent Fiduciary or, if applicable, a Directing Participant regarding brokerage commissions that are paid to PaineWebber and/or its affiliates or to unrelated parties. The Applicants have requested that the Department revise this representation to reflect that brokerage commission information will be provided to the Independent Fiduciary and, depending on the arrangement negotiated between the Independent Fiduciary of a Section 404(c) Plan and PMAS, to a Directing Participant. The Applicants state that the language set forth in the Summary appears to indicate that PaineWebber will provide such information under all circumstances to Independent Fiduciaries and where applicable, to Directing Participants only.

The Department has revised paragraph (i) of Representation 22 to read, in part, as follows:

(i) On a quarterly and annual basis, PaineWebber will provide written disclosures to an Independent Fiduciary and, depending on the arrangement negotiated with PMAS, a Directing Participant, with respect to (1) the total, expressed in dollars, of each Portfolio's brokerage commissions that are paid to PaineWebber and its affiliates; * * *

After giving full consideration to the entire record, the Department has decided to grant the exemption subject to the modifications or clarifications described above. The Applicants' comment letter has been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department,

telephone (202) 219-8881. (This is not a toll-free number.)

The Everett Clinic Profit Sharing Plan and 401(k) Employee Savings Plan and Trust (the Plan), Located in Everett, Washington

[Prohibited Transaction Exemption 96-60; Exemption Application No. D-10171]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the following transactions between the Plan and the Everett Clinic (the Employer), a party in interest with respect to the Plan: (1) The exchange of cash and real property (Parcel B) owned by the Plan for other real property (Parcel C) owned by the Employer; (2) the grant by the Employer to the Plan of a perpetual easement to run with the land on the Plan's Parcel B to be exchanged and on the Employer's property (Parcel E); (3) the modification and extension of an existing lease (the New Lease) of improved real property by the Plan to the Employer, so as to include Parcel C and, effective January 1, 1997, a parking lot owned by the Employer (Parcel D) to be contributed gratuitously¹ to the Plan; and (4) the potential future purchase of the leased premises by the Employer pursuant to the terms of an option agreement contained in the New Lease.

This exemption is subject to the following conditions:

(1) The Plan is represented in all the transactions by a qualified, independent fiduciary;

(2) The terms and conditions of the transactions are at least as favorable to the Plan as those the Plan could obtain in comparable arm's length transactions with unrelated parties;

(3) Under the purchase agreement (the Purchase Agreement) with respect to the exchange of Parcel B for Parcel C, the Plan pays to the Employer an amount no more than the difference between the

¹ The Department notes the Employer's representation that its contribution of Parcel D to the Plan will not be a prohibited transaction under the Department's regulation at 29 CFR 2509.94-3 because the contribution will not be made pursuant to any legal obligation of the Employer to contribute. The Plan is a profit-sharing plan which provides for a fully discretionary annual contribution by the Employer. It is represented that Parcel D will be contributed to the Plan on December 31, 1996 for the 1996 Plan Year and that no contribution has been declared for the 1996 Plan Year; therefore, the Employer has no existing obligation to contribute any amounts to the Plan. However, the Department expresses no opinion herein as to whether the Employer's contribution of Parcel D to the Plan is fully discretionary.

fair market values of Parcel B and Parcel C as of the date of the exchange, as established by a qualified, independent appraiser, with the Plan receiving full market value for Parcel B (notwithstanding its being transferred subject to an easement);

(4) The rent paid to the Plan under the New Lease is and continues to be no less than the fair market rental value of the leased premises, as established by a qualified, independent appraiser;

(5) The rent is adjusted every three years, based upon an updated independent appraisal, but never falls below the fair market rental amount initially established;

(6) The New Lease is a triple net lease under which the Employer as the tenant is obligated for all operating expenses, including maintenance, repairs, taxes, insurance, and utilities;

(7) The independent fiduciary expressly approves any improvements over \$100,000 to the leased premises and any renewal of the New Lease beyond the initial term;

(8) The New Lease contains a two-way option agreement enabling the Plan to sell the leased premises to the Employer (or the Employer to purchase the leased premises from the Plan), in the event the independent fiduciary determines that such a sale is in the best interests of the Plan, for cash in an amount which is the greater of: (a) the original acquisition cost of the premises to the Plan plus expenses, or (b) the fair market value of the premises as of the date of the sale, as established by a qualified, independent appraiser selected by the independent fiduciary;

(9) At all times, the fair market value of the leased premises represents no more than 25% of the total assets of the Plan;

(10) The independent fiduciary determines that all of the transactions are appropriate for and in the best interests of the Plan and its participants and beneficiaries at the time of the transactions;

(11) At all times, the independent fiduciary monitors and enforces compliance with the terms and conditions of the Purchase Agreement, the New Lease, and the exemption; and

(12) The Plan incurs no commissions, costs, fees, nor other expenses relating to any of the transactions.

EFFECTIVE DATE: This exemption is effective as of June 1, 1996.

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 June 4, 1996 at 61 FR 28237.

Written Comments

The Department received one written comment with respect to the notice of proposed exemption and no requests for a public hearing. The written comment was submitted by the trustees of the Plan (the Trustees) and concerns a clarification of the notice of proposed exemption. The Summary of Facts and Representations, Section 9, Paragraph 2 (page 28240, column 3) states:

The income from the Current Lease has provided the Plan with a stable and favorable rate of investment return (over 9% per annum for the period covering the 1980's and the first half of the 1990's, ranking in the top 5% of the Independent Consultants Cooperative database).

The Trustees desired to make the observation that this representation inaccurately understates the performance of the real estate. A letter dated November 16, 1995, from Wurts, Johnson & Company (Wurts, Johnson), investment consultants to the First Interstate Bank of Washington N.A., the independent fiduciary for the Plan, indicates that the rate of return to the Plan of "over 9% per annum" is actually for the five-year period ending June 30, 1995. Extending the return analysis back to January 1, 1983 for a 12-year period ending December 31, 1994, Wurts, Johnson found that the annual rate of return was 12.8%. Moreover, the most recent report from Wurts, Johnson shows that the annual rate of return for the five-year period ending December 31, 1995 was 14.1%. This rate is significantly higher than that for the five-year period ending June 30, 1995 due to a significant increase in the value of the real estate subsequent to June 30, 1995.

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

The SUP Welfare Plan (the Plan), Located in San Francisco, California

[Prohibited Exemption Transaction 96-61; Exemption Application No. L-10221]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act shall not apply to the sale by the Plan of the remaining term of a one-hundred year pre-paid leasehold interest (the Interest) to the Sailors' Union of the Pacific Building Corporation, a party in interest with respect to the Plan, provided the following conditions are satisfied: (a) the sale is a one-time transaction for cash; (b) the Plan pays no commissions or other expenses in connection with the sale; (c) the Plan receives the greater

of \$438,000 or the fair market value of the Interest as of the date of the sale; and (d) the fair market value of the Interest has been determined by a qualified, independent appraiser.

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 June 4, 1996 at 61 FR 28241.

Written Comments: The Department received three written comments (and no hearing requests) with respect to the proposed exemption. Two of the comments were in favor of granting the exemption as proposed. The third commentator disagreed with the Plan's trustees' decision to eliminate its housing program, and also expressed concern that the transaction would have negative impact on the participants' paychecks and affect their retirement plan.

The applicant responded to this comment by stating that the trustees' decision to terminate the housing benefit does not involve the merits of the subject transaction. Nonetheless, the applicant states that the trustees did act prudently and in the best interest of all participants and beneficiaries in terminating the housing benefit. Over the past 40 years, the number of jobs available for West Coast unlicensed deck hands has declined from several thousand to about a hundred. There is a substantial possibility that further shrinkage will occur if Congress fails to enact a maritime subsidy program. As the declining contribution base squeezes the Plan's finances, the applicant represents that the Plan's trustees properly chose to marshal the Plan's assets to provide benefits to the maximum number of eligible participants for as long as possible. The applicant further states that the elimination of the housing benefit will have no impact on any participant's paycheck, nor will it affect any retirement plan.

The Department has considered the entire record, including the comments submitted and the applicant's response thereto, and has made a final determination to grant the exemption as proposed.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section

4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, D.C., this 26th day of July, 1996.

Ivan Strasfeld,

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

[FR Doc. 96-19482 Filed 7-30-96; 8:45 am]

BILLING CODE 4510-29-P

[Application No. D-10189, et al.]

Proposed Exemptions; Westinghouse Savannah River Company

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions,