

Hugo Teufel III, Associate General Counsel for General Law, Office of the General Counsel, DHS.

**Mary Kate Whalen,**

*Deputy Associate General Counsel for Regulations, Office of the General Counsel, Department of Homeland Security.*

[FR Doc. 04-24953 Filed 11-5-04; 8:45 am]

BILLING CODE 4410-10-P

## INTERNATIONAL TRADE COMMISSION

[USITC SE-04-030]

### Sunshine Act Meeting

**AGENCY:** United States International Trade Commission.

**TIME AND DATE:** November 10, 2004 at 9:30 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205-2000.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 731-TA-1059 (Final)(Hand Trucks from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before November 22, 2004.)

5. Outstanding action jackets: none. In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 3, 2004.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04-24911 Filed 11-4-04; 11:39 am]

BILLING CODE 7020-02-P

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-11165, et al.]

#### Proposed Exemptions; The National Electrical Benefit Fund (the Plan)

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of

proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

#### Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state:

(1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: [moffitt.betty@dol.gov](mailto:moffitt.betty@dol.gov), or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

#### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in

applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

#### The National Electrical Benefit Fund (the Plan) Located in Rockville, MD

[Application No. D-11165]

#### Proposed Exemption

Based upon the facts and representations set forth in the application, the Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code,<sup>1</sup> shall not apply, effective April 1, 2003, to (1) the collateral assignment (the Collateral Assignment), by the Plan, of its rights and interests in the Stonegate at Bellefaire, LLC (the LLC), a real estate operating company (REOC), to M&T Real Estate, Inc. (the Senior Lender), a party in interest with respect to the Plan; and (2) the guaranty (the Guaranty) by the Plan, executed in favor of the Senior Lender, requiring the Plan to reimburse the Senior Lender for any losses the Senior Lender may incur as a result of certain affirmative "bad acts" that are committed by the Plan as a member (the Member) of the LLC.

This proposed exemption is subject to the following conditions:

(a) The Plan's execution of the Collateral Assignment and the Guaranty

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

was on terms no less favorable to the Plan than those which the Plan could obtain in an arm's length transaction with an unrelated party;

(b) The decisions on behalf of the Plan to invest in the LLC and consent to the terms of the Collateral Assignment and Guaranty in favor of the Senior Lender were made by fiduciaries which were independent of and unaffiliated with the Senior Lender;

(c) At the time of the transactions, the Plan had total assets that were in excess of \$5 billion, and not more than 1% of the Plan's total assets was invested or will be invested in the LLC.

(d) The other member of the LLC (the Managing Member) also executed Guaranties in favor of the Senior Lender;

(e) As a Member of the LLC, the Plan's total potential liability with respect to its investment in the real estate project (the Project), which is being developed and will be owned by the LLC, is limited to:

(1) Capital contributions made by the Plan to the LLC.

(2) Amounts funded by the Plan to the LLC (the Plan Loan).

(3) Rights and interests given to the Senior Lender under the Collateral Assignment.

(f) In the event the Plan engages in any of the specified "bad acts" that are described in the Guaranty, the Plan's total potential liability does not exceed the greater of \$32.98 million or the outstanding principal amount of the loan serving as the primary funding vehicle for the Project (the Senior Loan).

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of April 1, 2003.

### Summary of Facts and Representations

1. The Plan, also referred to herein as "the Applicant," is a multiemployer, defined benefit plan covering approximately 489,261 participants and beneficiaries as of December 31, 2003. As of December 31, 2003, which is the most recent date that financial information is available, the Plan had net assets available for benefits of approximately \$9.5 billion.

2. The fiduciaries generally responsible for investment decisions in real estate matters on behalf of the Plan, including the subject transactions,<sup>2</sup> are

<sup>2</sup> The Plan has an in house real estate division that makes recommendations concerning the Plan's real estate investments, including the subject investment in the Project. With respect to the Plan's investment in the Project, the Trustees also received assistance and advice from The Weitzman Group (Weitzman), a New York-based real estate appraisal/advisory firm, which advises the Trustees on real estate acquisition and divestiture decisions. In

D.R. Borden,<sup>3</sup> Jr. and Jeremiah J. O'Connor (the Trustees). In addition, the Plan currently utilizes CS Capital Management, Inc. (CSM), an unrelated party, to provide advisory services with respect to the management of the LLC investment described herein on an ongoing basis. However, CSM did not review or recommend to the Trustees the making of this investment.

3. The Plan is one of two members of the LLC, a Delaware limited liability company formed in May 2002 for the sole purpose of developing and owning the Project, a senior living facility located at 1104 King Street, Rye Brook, New York. The only other member of the LLC is the Managing Member, FC Bellefair, LLC, a New York limited liability company and an unrelated party. The Plan and the Managing Member are referred to herein collectively as the "Members," or each individually, as a "Member." The Plan and the Managing Member each own 50% of the LLC. Eighty percent of the Managing Member is owned by Forest City Residential Group, Inc. (FCRG), an Ohio corporation whose sole shareholder is Forest City Rental Properties Corporation (FCRPC). The remaining 20% of the Managing Member is owned by Four Corners Ownership II, LLC (FCO), a New York single asset limited liability company. FCRG and FCO are each a "managing member" of FC Bellefair, LLC. The Applicant represents that the LLC qualifies as a "real estate operating company" (*i.e.*, a REOC) under the "plan asset" regulations issued by the Department, 29 CFR 2510.3-101(e).<sup>4</sup>

addition to conducting ongoing discussions with Weitzman, the Trustees relied on the following written reports in making their investment decision for the Plan: (a) An Investment Summary, prepared by the Plan's in house real estate investment staff; (b) an Executive Summary of the Project investment provided by Weitzman; (c) a Real Property Valuation of the Project; (d) a Legal Review Letter regarding a construction loan and equity investment in the Project; and (e) a Closing Update prepared by the Plan's investment staff.

<sup>3</sup> On May 22, 2002, the date the transactions closed, the Trustee was John M. Grau, not D. R. Borden. Mr. Borden replaced Mr. Grau in January of 2003.

<sup>4</sup> As noted above, the Applicant believes that the LLC is a REOC for purposes of the plan asset regulations. Therefore, the Applicant requests no ruling or determination with respect to this issue. Furthermore, the Applicant states that according to the Department's position in 29 CFR 2510.3-101(a), once plan assets are invested in a REOC, they lose their character as "plan assets." Thus, the Applicant explains that the equity it contributed to the REOC in the form of a capital contribution would cease being an asset of the Plan as soon as it is transferred to the REOC. Thereafter, the Applicant indicates that the asset belongs to the REOC, which in turn, may transfer these assets to a party in interest with respect to the Plan without invoking the prohibited transaction provisions of the Act. Accordingly, the Applicant explains that

4. The transactions at issue arise in the context of the financing obtained by the LLC to fund construction of the Project. The Project has a total budget of approximately \$59,805,349, of which \$32,980,000 is being primarily funded in the form of a loan (*i.e.*, the Senior Loan) dated May 24, 2002 from the Senior Lender (*i.e.*, M&T Real Estate, Inc.) to the LLC and another entity known as "FCD Ryebrook, LLC," the operator of the completed facility. In order to comply with New York law, the Senior Loan has been bifurcated into a primary loan in the amount of \$28,750,995 for the "hard" costs evidenced by a Building Loan Agreement, and a smaller loan in the amount of \$4,229,005 for "soft" costs evidenced by a Non-Cost of Improvement Loan. The Senior Loan requires a balloon payment of the outstanding principal and interest on the maturity date of May 1, 2007. The amount of the balloon is projected at \$31,000,000. However, this amount is subject to fluctuation based upon such variables as the actual monthly construction/operating draw, the number of occupied units in the Project, and the market rent for each unit. Interest only payments are being made for the first 3 years the Senior Loan is in effect. Then, these payments will be amortized, commencing June 1, 2005, based on a 25 year amortization schedule. The interest rate, which is an adjustable rate, was initially set at 6 percent per annum. Effective October 31, 2002, the interest rate floor was reduced to 5.25 percent, and then lowered to 4%, effective June 1, 2003.

The Senior Loan is secured by "[a]ll property, tangible or intangible, real or personal, or fixtures, now or hereafter subject to any security instrument or mortgage in favor of the [Senior] Lender securing payment of the obligations of the [LLC], including without limitation membership interests in the [LLC], permits, licenses and the Debt Reserve Account."<sup>5</sup> The documents that specifically collateralize the Senior Loan are (a) the Collateral Assignment; (b) the Guaranty; (c) certain Senior Mortgages; (d) general Security Agreements contained in the Senior Mortgages; and (e) Assignments of

any use of the Plan's capital contribution to repay the Senior Loan described herein would not give rise to a prohibited transaction.

Notwithstanding the Applicant's assumption about the REOC status of the LLC, the Department expresses no opinion herein on whether the LLC would be considered a REOC.

<sup>5</sup> The Debt Reserve Account is an account in which an amount equal to six months of principal and interest payable to the Senior Lender is kept in reserve.

Leases and Rents from Tenants contained in the Senior Mortgages.

During the construction loan period for the Senior Loan, interest was calculated on the basis of a 360 day year consisting of 12 months with the actual number of days of each month.

However, during the permanent loan period, interest is being calculated on the basis of a 360 day year consisting of 12, thirty day months.

Once the Senior Loan was fully funded, an additional \$13,412,674 in Project budget costs were funded by the Plan to the LLC in the form of a loan (*i.e.*, the Plan Loan). The Plan Loan, dated May 24, 2002, requires a balloon payment of the outstanding principal and interest on the maturity date of April 30, 2006. The amount of the balloon will be \$10,747,583. However, this amount is also subject to fluctuation based upon such variables as the actual monthly construction/operating draw, the number of occupied units in the project, and the market rent for each unit. Payments of principal and interest can be made only after the Senior Lender has determined that funds are available to pay the Plan and no default of the Senior Loan has occurred. Interest on the Plan Loan is equal to 15 percent per annum.

Like the Senior Loan, the Plan Loan is bifurcated to comply with New York law. The Plan Loan is thus evidenced by a Building Loan Agreement dated May 24, 2002, in the amount of \$2,956,505 for "hard costs" and a Non-Cost of Improvement Loan of the same date for \$10,456,169 for "soft costs."

In addition, the Plan Loan is secured by "all of the property and interests encumbered by the Security Documents." Such collateral includes (a) certain Subordinate Mortgages on the Project;<sup>6</sup> (b) certain Lease Assignments; (c) the Assignment of Project Documents and Development Rights; (d) the Limited Liability Interest Pledge Agreement; (e) the Guaranty of Completion; (f) the Non-Recourse Exception Guaranty; and (g) certain UCC Financing Statements.

In accordance with a General Subordination and Intercreditor Agreement, dated May 24, 2002, between the Applicant and the Senior Lender, the Senior Loan was made senior in priority to the Plan Loan. The remaining Project budget costs were funded to the LLC by the Plan's initial capital contribution of \$6,706,337 (or 11.2 percent of the total Project budget

costs) and by the Managing Member's initial capital contribution of \$6,706,337 (or 11.2 percent of the total Project budget costs). As of January 31, 2004, each Member had made capital contributions to the LLC totaling \$7,060,774 and the Senior Lender had funded \$27,780,337 of the Senior Loan. The remainder of the Senior Loan was funded as of April 2004. The Plan began making monthly disbursements on the Plan Loan in June 2004.

5. In addition to the Plan's agreement to subordinate the Plan Loan in favor of the Senior Loan, the Plan executed two documents in favor of the Senior Lender which are intended to provide additional comfort to the Senior Lender that the Senior Loan will be repaid. First, on May 24, 2002, both the Plan and the Managing Member executed the Collateral Assignment of Membership Interests Agreement (*i.e.*, the Collateral Assignment) in favor of the Senior Lender, which provided that, in order to induce the Senior Lender to make the Senior Loan, each of the Members agreed to assign all their respective rights and interests to the LLC in such things as compensation, voting, access to the LLC's records, proceeds or payments due the assignors, etc., in the event the LLC defaults on the Senior Loan. Second, the Plan executed an Unconditional and Continuing Limited Liability Guaranty and Indemnity Agreement (*i.e.*, the Guaranty) in favor of the Senior Lender, which provided that the Plan would indemnify the Senior Lender for any losses incurred by the Senior Lender in connection with any affirmative "bad acts"<sup>7</sup> of the Plan

<sup>7</sup> According to Article II, Section 2.1 of the Unconditional and Continuing Limited Guaranty and Indemnity Agreement, "bad acts" include, but are not limited to, the following: fraud, material misrepresentation, concealment, failure to pay real estate taxes, misappropriation of rents, revenues, profits or security deposits by the Guarantor or at the direction of the Guarantor, or other acts of willful misconduct. It should be noted that the Guaranty does not extend to "bad acts" of any other party that could be imputed to the Plan, or to any passive conduct on the part of the Plan (*e.g.*, a failure to investigate or disclose).

Besides the Plan's Guaranty, the Managing Member of the LLC and other entities provided Guaranties to the Senior Lender in the form of (a) Unconditional and Continuing Limited Guaranty and Indemnity Agreements similar to those executed by the Plan (These agreements were entered into by (i) the Managing Member; (ii) FCRG (the 80 percent owner of the Managing Member); (iii) FCO (the 20 percent owner of the Managing Member); (iv) FCRPC (FCRG's parent); and (v) Forest City Enterprises, Inc. (FCEI)(FCRPC Corporation's parent.); (b) a Completion Guaranty (A Guaranty of Completion was executed by the Managing Member's parent, FCEI. This blanket guaranty obligates FCEI (to the extent necessary) to complete the Project in accordance with the plans and specifications); and (c) Guaranties of the Plan Loan and the Plan's Equity Interest in the Project (The Managing Member has provided the following

in its capacity as a Member of the LLC.<sup>8</sup> The subject transactions involve less than 1 percent of the fair market value of the total assets of the Plan.<sup>9</sup>

As a Member of the LLC, the Plan's total potential liability with respect to its investment in the Project, is limited to: (a) Capital contributions it has made to the LLC; (b) amounts funded to the LLC under the Plan Loan; and (c) rights and interests given to the Senior Lender under the Collateral Assignment. Also, in the event the Plan ever engages in any of the specified "bad acts" that are described in the Guaranty, the Plan's total potential liability will not exceed the greater of \$32.98 million or the outstanding principal amount of the Senior Loan.

6. In December 2002, shareholders of M&T Bank (MTB), the Senior Lender's parent company, and Allied Irish Banks, PLC, (AIB) approved MTB's acquisition of Allfirst (Allfirst), AIB's U.S. subsidiary, with the resulting merger (the Merger) being consummated on April 1, 2003. Under the terms of the acquisition agreement, AIB received 26.7 million shares of MTB common stock, plus approximately \$886 million in cash, in exchange for all of the outstanding stock of Allfirst. (For purposes of this proposed exemption, the enlarged entity is referred to as

guaranties in favor of the Plan as the subordinated lender: (i) A Non-Recourse Exception Guaranty; (ii) a Guaranty of Completion; (iii) a Guaranty of Completion (Equity); and (iv) a Guaranty of Fraudulent Acts (Equity)).

<sup>8</sup> In order to induce a construction lender to fund a construction loan, the Applicant states that it is customary for the lending bank to be provided with certain guaranties of repayment from a party other than the borrower. Such a guaranty by a "deep pocket" is often required to make the lender comfortable that all or a portion of the loan it will make to the borrower will be repaid in the event of a default of the borrower. When the borrower is a REOC, the Applicant explains that it is customary for the construction lender to require the guaranty from one or more constituent members of the REOC. In the event that the lender will begin funding the construction loan before the members of the REOC have fully funded their equity commitments to the REOC, as is the case here, the Applicant indicates that the members will assign their interests in the REOC to the lender in the event of default.

<sup>9</sup> According to the Applicant, the Plan's total potential liability in connection with its capital contribution, the Plan Loan, and the Collateral Assignment will not exceed the value of the investment the Plan actually makes in the Project. The total potential investment by the Plan in the Project equals the potential capital contribution of \$7,206,337, plus a maximum Plan Loan of \$13,412,674. Thus, the Plan's total liability in connection with this investment will not exceed \$20,619,011. Although the Guaranty separately provides that the Plan may be liable in connection with any wrongful acts it takes for losses incurred by the Senior Lender in connection with these wrongful acts, this potential liability, according to the Applicant, is akin to liability the Plan would incur with any willful and tortious actions it may take, and would not likely exceed \$32.98 million or the amount of the outstanding loan.

<sup>6</sup> The Subordinate Mortgages refer to two components of the Plan Loan, *i.e.*, the Building Loan Agreement covering the "hard costs" and the Non-Cost of Improvement Loan covering the "soft costs."

MTB/Allfirst). As a result of the Merger, the Senior Lender is now a company that is wholly owned by MTB/Allfirst. The Plan is obligated to the Senior Lender (a) to the extent of the Plan's equity interest in the LLC in the event that the LLC defaults on the Senior Loan pursuant to the Collateral Assignment; and (b) in the form of the Guaranty in that it will reimburse the Senior Lender in the event the Plan commits certain affirmative "bad acts" in connection with the LLC. Accordingly, the Applicant requests an administrative exemption from the Department.

7. The Applicant represents that for reasons unrelated to the transactions described herein, Allfirst is a party in interest with respect to the Plan insofar as it provides two types of banking services to the Plan. First, the Plan maintains an operating checking account with Allfirst that is used to pay day-to-day administrative expenses of the Plan. Second, at least one local collection agent used by the Plan in connection with the collection of employee benefit plan contributions from local covered employers maintains a bank account with Allfirst in which it deposits the pension contributions made by contributing employers in the area. On a regular basis, the Plan sweeps the local Allfirst account of all the contributions that have been accumulated.

8. The Applicant represents that Allfirst does not exercise discretionary authority or discretionary control respecting the management of the funds deposited with it or the administration of the Plan, and thus it is not a fiduciary with respect to the Plan. The Applicant further represents that there are no Plan assets invested in loans to Allfirst, in property leased to Allfirst, or in securities issued by Allfirst. In addition, the Applicant explains that Allfirst is not involved in any manner with the Plan Trustees' decision to engage in these transactions and it will not be involved in any decision making or in an advisory capacity with respect to the Plan.

9. The Applicant represents that prior to the Merger, MTB was not a party in interest with respect to the Plan. Thus, any possible benefits or guarantees given to MTB at the time of the Senior Loan were not prohibited transactions. The Applicant explains that since the Merger, MTB/Allfirst has continued to service the foregoing Allfirst accounts under the name of M&T Bank. As a result, MTB/Allfirst is a service provider to the Plan as defined in section 3(14)(B) of the Act. In addition, the Applicant states that the Senior Lender became a party in interest with respect to the Plan

under section 3(14)(G) of the Act insofar as it is a corporation in which 50 percent or more of the combined voting power is owned post-merger by MTB/Allfirst.

10. Finally, the Applicant states that the transactions were not part of an agreement, arrangement or understanding designed to benefit a party in interest. In this regard, the Applicant explains that the Senior Lender was not, at the time the underlying transactions were being entered into, a party in interest to the Plan, nor did the Plan have an expectation that Allfirst would be merged into the parent of the Senior Lender. The Applicant represents that the Plan's primary intent in executing the Guaranty and the Collateral Assignment was to further its investment in the LLC, not to benefit a party in interest.

11. In summary, the Applicant represents that the transactions have satisfied and will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) The Plan's execution of the Collateral Assignment and the Guaranty was on terms no less favorable to the Plan than those which the Plan could obtain in an arm's length transaction with an unrelated party;

(b) The decisions on behalf of the Plan to invest in the LLC and consent to the terms of the Collateral Assignment and Guaranty in favor of the Senior Lender were made by fiduciaries which were independent of and unaffiliated with the Senior Lender;

(c) At the time of the transactions, the Plan had total assets that were in excess of \$5 billion, and not more than 1% of the Plan's total assets was invested or will be invested in the LLC;

(d) The other member of the LLC also executed Guaranties in favor of the Senior Lender;

(e) As a Member of the LLC, the Plan's total potential liability with respect to its investment in the real estate Project, will be limited to:

(1) Its capital contributions to the LLC.

(2) Amounts funded under the Plan Loan.

(3) Rights and interests given to the Senior Lender under the Collateral Assignment; and

(f) In the event the Plan engages in any of the specified "bad acts" that are described in the Guaranty, the Plan's total potential liability will not exceed the greater of \$32.98 million or the outstanding principal amount of the Senior Loan.

## Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons by either hand delivery or overnight mail within 4 days of the date of publication of the notice of pendency in the **Federal Register**. Such notice will include a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on the proposed exemption. All comments are due within 34 days after publication of the proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Arjumand A. Ansari of the Department, telephone (202) 693-8566. (This is not a toll-free number.)

## Roy A. Herberger Defined Benefit Pension Plan (the Plan) Located in Phoenix, Arizona

[Application No. D-11259]

## Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, 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 three past in-kind contributions (the Contribution(s)) to the Plan of common stock (the Stock) of Pinnacle West Capital Corporation (PNW) by Roy A. Herberger, Jr. (the Applicant), a disqualified party with respect to the Plan,<sup>10</sup> provided that the following conditions are met:

(a) The transactions involved publicly traded securities, the fair market values of which were based upon published prices at the time of each Contribution;

(b) The cumulative value of the Contributions represented no more than 18% of the total assets of the Plan;

(c) The Plan has not paid any commissions, costs or other expenses in connection with the Contributions;

(d) The Applicant, who is the only person affected by the transactions, believes that the transactions were in the best interest of the Plan;

(e) The Applicant made the Contributions based on erroneous advice from his tax adviser; and

<sup>10</sup> Since the Applicant is a sole proprietor and the only participant in the Plan, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

(f) The terms of the transactions between the Plan and the Applicant are no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated third parties.

#### Summary of Facts and Representations

1. The Plan is a defined benefit pension plan. The Plan administrator is the Applicant and is the sole participant in the Plan. The Applicant receives income from serving on various boards of directors. A portion of his fees for serving on the board of directors of PNW is paid in the form of common stock of PNW. The Applicant is a non-employee outside director of PNW. PNW is a public company, whose stock is publicly traded on the New York Stock Exchange. The Applicant beneficially owns 8660 shares of the Stock.

2. On July 23, 2002, the Applicant contributed 900 shares of the Stock from his brokerage account to the Plan. On August 14, 2002, the Applicant contributed another 2700 shares of the Stock from his brokerage account to the Plan. Finally, on July 7, 2003, the Applicant contributed another 900 shares of the Stock to the Plan. However, these 900 shares were transferred back to the Plan months later and cash was contributed in its place when it was discovered that the Contributions constituted prohibited transactions. The Applicant represents that the third transaction was corrected within the meaning of the Code.<sup>11</sup> The values of the Stock used for purposes of the contributions were as follows: (1) July 23, 2002 (900 shares) \$28.05 (Closing Price); (2) August 14, 2002 (2700 shares) \$33.53 (Closing Price); and (3) July 7, 2003 (900 shares) \$37.31 (Closing Price).

3. The Applicant's motivation for contributing the Stock, rather than selling the Stock, contributing the cash proceeds and then repurchasing the Stock, was to save brokerage fees. The Stock contributed to the Plan was and is publicly traded on the New York Stock Exchange and the price was determined based on the closing price of the Stock on the day of each Contribution.

4. Prior to making the first Contribution, the Applicant consulted a Deloitte & Touche LLP (Deloitte & Touche) tax specialist regarding the

Contributions and was mistakenly advised that the Contributions were not prohibited transactions. Deloitte & Touche acknowledges providing the erroneous advice regarding the Contributions.

5. On a cumulative basis, the Contributions never constituted more than 18% of the assets of the Plan. The value of the Stock has increased since the Contributions.

6. In summary, the Applicant represent that the transactions satisfy the statutory criteria for an administrative exemption under section 4975(c)(2) of the Code because: (a) The Stock was valued at its fair market value at the time of each Contribution; (b) the cumulative value of the Contributions represented no more than 18% of the total assets of the Plan; (c) the Plan has not paid any commissions, costs or other expenses in connection with the Contributions; (d) the Applicant, who is the only person affected by the transactions, believes that the Contributions were in the best interest of the Plan; (e) the Applicant made the Contributions based on erroneous advice from his tax adviser; and (f) the terms of the transactions between the Plan and the Applicant are no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated third parties.

#### Notice to Interested Persons

It has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

#### FOR FURTHER INFORMATION CONTACT:

Khalif Ford of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

#### The North Texas Electrical Joint Apprenticeship and Training Trust Fund (the Plan) Located in Grand Prairie, Texas

[Application No. L-11245]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act shall not apply to the sale (the Sale(s)) of (1) a 1.112 acres of land (Parcel 1) to the North Texas Chapter, National Electrical Contractors Association (NECA), a party

in interest to the Plan; and (2) a 5.383 acres of land (Parcel 2) to Local Union #20, International Brotherhood of Electrical Workers (IBEW), a party in interest to the Plan. This proposed exemption is conditioned upon adherence to the material facts and representations described herein and upon the satisfaction of the following requirements:

(a) The Sales are one-time transactions for cash;

(b) The Plan does not pay any commissions, costs or other expenses in connection with the Sale of Parcel 1 and Parcel 2 (collectively the Parcels); and

(c) The Plan will receive an amount equal to the greater of: (i) \$145,000 or the current fair market value of Parcel 1 as established by an independent, qualified, appraiser and updated at the time of the Sale; and (ii) \$655,000; or the current fair market value of Parcel 2 as established by an independent, qualified, appraiser and updated at the time of the Sale; and

(d) The terms of the Sales will be no less favorable to the Plan than terms it would have received under similar circumstances in an arm's length negotiation with an unrelated party.

#### Summary of Facts and Representations

1. The Plan is an apprenticeship training trust fund. The trustees (the Trustees) consist of three members appointed by IBEW and three members representing management appointed by NECA. The Trustees have investment discretion over all assets of the Plan. As of March 25, 2004, the Plan has 230 participants. The Plan's assets have an aggregate fair market value of \$1,807,444.63 as of December 2003. The Parcels have an estimated fair market value of \$800,000 and constitute approximately 44% of the total value of Plan assets. The Plan is organized exclusively for educational purposes within the meaning of section 501(c)(3) of the Code and operates as a tax exempt nonprofit fund solely and exclusively for the purposes of providing a program for the training and education of electrical apprentices, journeymen, or other appropriate persons, and programs in furtherance thereof and to defray the reasonable expense of administering the apprenticeship and training programs established under the provisions of the collective bargaining agreement.

2. The Trustees represent that the Sale is in the interest of the Plan, and its participants and beneficiaries. The Plan participants (the Participants) currently have to drive from the school in Grand Prairie to the IBEW office in Dallas for job referrals, benefit information, and other business that is handled for them

<sup>11</sup> The Department has no jurisdiction with respect to what constitutes correction with respect to a prohibited transaction under section 4975 of the Code. Therefore, the Department expresses no opinion herein on the whether the transfer of 900 shares of the Stock back to the Plan constituted a correction within the meaning of the Code.

by the union as their collective bargaining representative. These offices are approximately twenty-five miles apart. NECA handles the collection and disbursement of benefit funds for the Participants, and their office is in Arlington, TX which is approximately three miles away from the school. IBEW and NECA seek to purchase the Parcels from the Plan and build offices at this location which would be much more convenient for the Participants.

If the exemption is denied, the parties in interest, IBEW and NECA, will not be able to build their buildings next to the Plan facility. This will cause the Plan participants to have to drive approximately twenty-five miles to the IBEW office and three miles to the NECA office in order to conduct business. NECA and IBEW have not indicated any desire to build a new building unless it is next to Plan. The transactions will be in the best interests of the Plan and will also make the school building more accessible to members of the IBEW and NECA for their training needs.

3. On July 26, 2002 an unimproved 11.7 acre of real property (the Land) was conveyed to the Plan by an unrelated third party. Fifty percent of the Land was donated to the Plan and fifty percent was sold to the Plan for \$575,000. The Parcels are sections of the Land that the applicant now seeks to sell. Parcel 1 consists of a vacant unimproved parcel of land containing an area of approximately 1.112 acres located at W. Tarrant Road, Grand Prairie, Dallas County, Texas. Parcel 2 consists of a vacant unimproved parcel of land containing an area of approximately 5.383 acres located at W. Tarrant Road, Grand Prairie, Dallas County, Texas. The remaining Land is road accessible and is surplus property for the Plan.

4. The Parcels were appraised on October 13, 2003, by Donald J. Sherwood (Mr. Sherwood), a MAI Certified General Real Estate Appraiser. Mr. Sherwood is independent of the parties to the transactions and is an appraiser with Integra Realty Resources located in Dallas, Texas.

Mr. Sherwood determined the best use and highest value of the Parcels was associated with valuing the Parcels with the so-called direct sales comparison method. Under this method, sales of similar land in the market area are compared to the subject to arrive at an indication of value. In arriving at value conclusions, the tracts are compared as to the rights conveyed, financing terms, sale conditions, market conditions, location, and physical characteristics. Therefore, based on the valuation

procedures employed by Mr. Sherwood, he determined that the fair market value of the Parcels was as follows: (i) Parcel 1 = \$145,000; and (ii) Parcel 2 = \$655,000.

5. The Plan will receive an amount equal to the greater of: (i) \$145,000; or (ii) the current fair market value of Parcel 1 as established by an independent, qualified, appraiser updated at the time of the Sale. The Plan also will receive an amount equal to the greater of: (i) \$655,000; or (ii) the current fair market value of Parcel 2 as established by an independent, qualified, appraiser updated at the time of the Sale.

6. In summary, the applicant represents that the subject transaction satisfies the statutory criteria contained in section 408(a) of the Act and section 4975(c)(2) of the Code for the following reasons:

(a) The Sale is a one-time transaction for cash;

(b) The Plan does not pay any commissions, costs or other expenses in connection with the Sale;

(c) The Plan will receive an amount equal to the greater of: (i) \$145,000; or (ii) the current fair market value of Parcel 1 as established by an independent, qualified, appraiser and updated at the time of the Sale; and the Plan will receive an amount equal to the greater of: (i) \$655,000; or (ii) the current fair market value of Parcel 2 as established by an independent, qualified, appraiser and updated at the time of the Sale; and

(d) The terms of the Sales will be no less favorable to the Plan than terms it would have received under similar circumstances in an arm's length negotiation with an unrelated party.

**Notice to Interested Persons:** Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

Khalif Ford of the Department, telephone (202) 693-8540 (this is not a toll-free number).

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code,

including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 1st day of November, 2004.

**Ivan Strasfeld,**

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

[FR Doc. 04-24648 Filed 11-5-04; 8:45 am]

BILLING CODE 4510-29-P

**DEPARTMENT OF LABOR**

**Bureau of Labor Statistics**

**Proposal to Revise Method for  
Estimation of Monthly Labor Force  
Statistics for Certain Subnational  
Areas; Request for Comments**

**AGENCY:** Bureau of Labor Statistics, Labor.

**ACTION:** Request for comments on proposed action.