for a system for grading proficiency testing performance to determine whether a laboratory is performing acceptably.

The topics to be discussed at this meeting include: a review of minutes from the February 19, 1998, meeting; introduction of newly appointed Board members, discussion of comments on the DRAFT Quality Assurance Standards for Convicted Offender DNA Databasing Laboratories; discussion of certification; and a discussion of topics for the next DNA Advisory Board meeting.

The meeting is open to the public on a first-come, first seated basis. Anyone wishing to address the DAB must notify the Designated Federal Employee (DFE) in writing at least twenty-four hours before the DAB meets. The notification must include the requestor's name, organizational affiliation, a short statement describing the topic to be addressed, and the amount of time requested. Oral statements to the DAB will be limited to five minutes and limited to subject matter directly related to the DAB's agenda, unless otherwise permitted by the Chairman.

Any member of the public may file a written statement for the record concerning the DAB and its work before or after the meeting. Written statements for the record will be furnished to each DAB member for their consideration and will be included in the official minutes of a DAB meeting. Written statements must be type-written on 8½″ X 11″ xerographic weight paper, one side only, and bound only by a paper clip (not stapled). All pages must be numbered. Statements should include the Name, Organizational Affiliation, Address, and Telephone number of the author(s). Written statements for the record will be included in minutes of the meeting immediately following the receipt of the written statement, unless the statement is received within three weeks of the meeting. Under this circumstance, the written statement will be included with the minutes of the following meeting. Written statements for the record should be submitted to the DFE.

Inquiries may be addressed to the DFE, Dr. Dwight E. Adams, Chief, Scientific Analysis Section, Laboratory Division—Room 3266, Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW, Washington, DC 20535–0001, (202) 324–4416, FAX (202) 324–1462

Dated: June 22, 1998.

Dwight E. Adams,

Chief, Scientific Analysis Section, Federal Bureau of Investigation.

[FR Doc. 98–17136 Filed 6–26–98; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10483, et al.]

Proposed Exemptions; Van Ness Plastic Molding Co., Inc.

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, 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 request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, 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. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 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 (43 FR 47713, October 17, 1978) 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.

Van Ness Plastic Molding Co., Inc. Employees' Money Purchase Pension Plan (the Plan) Located in Belleville, NJ

[Application No. D–10483]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) 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 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 (1) the making to the Plan of a restoration payment (the Restoration Payment) with respect to certain defaulted third-party notes (Note 1, Note 2 and Note 3; collectively, the Notes) by the Van Ness Plastic Molding Co., Inc. (the Employer), a party in interest with respect to the Plan; and (2) the potential future receipt by the Employer of recapture payments (the

Recapture Payments) made to the Plan pursuant to bankruptcy proceedings involving the issuer/assignor of the Notes.

This proposed exemption is subject to the following conditions:

(a) Mr. William Van Ness, the Plan trustee (the Trustee), agrees to have excluded from his individual account in the Plan (the Account) any benefit attributable to the Restoration Payment, such that the total Restoration Payment is allocated to the Accounts of the other Plan participants and does not include any portion related to the interest of Mr. Van Ness's Account in the Notes.

(b) The Restoration Payment, which is calculated based upon the Account balances in the Plan of participants other than Mr. Van Ness, covers—

(1) The aggregate unrecovered principal of the Notes plus accrued, but unpaid, interest on the Notes as of the dates of default, calculated through December 31, 1997;

(2) An additional amount representing interest on the unrecovered principal of Notes 2 and 3, originally scheduled for maturity in 1999, from January 1998 until the date the Restoration Payment is made; and

(3) Lost opportunity costs associated with Note 1, which was originally scheduled for maturity in 1997, from January 1998 until the date the Restoration Payment is made.

(c) Any Recapture Payments are restricted solely to the amounts, if any, recovered by the Plan with respect to the Notes in litigation or otherwise.

(d) The Restoration Payment is made to resolve potential claims for breach of fiduciary duty relating to the management of the Plan.

(e) The Employer receives a favorable ruling from the Internal Revenue Service (the Service) that the Restoration Payment does not constitute a ''contribution'' or other payment that will disqualify the Plan.

Summary of Facts and Representations

1. The Plan is a nonstandardized prototype money purchase pension plan having 96 participants and total assets of $1,831,873.27 as of December 31, 1997. The Plan is sponsored by the Employer, a New Jersey corporation that is engaged in the manufacture of plastic molding. Mr. William Van Ness, the Trustee, also serves as the sole shareholder and president of the Employer. As Trustee, Mr. Van Ness has full investment discretion and authority with regard to Plan investments except with respect to those that are under the control of an investment manager.

2. Among the assets of the Plan are three notes that were issued or assigned by The Bennett Funding Group, Inc. (Bennett), an unrelated party. The Notes, which were acquired by the Plan between 1993 and 1995 at the direction of Mr. Van Ness, are in the face amounts of $250,000 (Note 1), $17,688.48 (Note 2), and $13,842.22 (Note 3). In order to purchase the Notes, the Plan paid Bennett an aggregate cash purchase price of $281,530.70. Following acquisition, the Plan did not incur any servicing fees or costs in connection with the administration of the Notes.

The Notes are further described as follows:

(a) *Note 1* represented a contractual or an insurable interest in a pooled investment vehicle that was established and sold by Bennett and its subsidiary, Resort Funding, Inc., on a non-recourse basis to accredited investors. The investment pool consisted of consumer sales agreements, leases and rental agreements, installment sales contracts or consumer sales agreements generated by third party business equipment dealers and others. The amount of the issue was $60 million. Each unit or interest had a minimum purchase price of $10,000. The term of each investment contract or ''note'' ranged from 11 months to 60 months and carried interest at the rate of approximately 6 percent to 9 percent per annum.

On March 15, 1993, the Plan acquired Note 1 from Bennett for the cash purchase price of $250,000. Note 1, which carried interest at the rate of 9 percent per annum, was scheduled to mature on December 15, 1997. Interest under Note 1 was payable to the Plan in monthly installments of $1,875, with payments commencing on April 15, 1993.

(b) *Note 2* was acquired by the Plan from Bennett on August 1, 1995 for a total purchase price of $17,688.48. Note 2 had a term commencing on September 30, 1995 and ending on August 30, 1999. It carried interest at the annualized rate of 9.5 percent. Principal and interest were payable to the Plan in monthly installments of $444.39.

(c) *Note 3* was acquired by the Plan from Bennett on November 16, 1995 for a total purchase price of $13,842.22. Note 3 had a term commencing from January 15, 1996 until December 15, 1999. It carried interest at the annualized rate of 9.5 percent. Principal and interest were payable to the Plan in monthly installments of $337.76.

Each Note was secured by (a) equipment owned by Bennett which Bennett was leasing to unrelated parties; and (b) an assignment of the income stream generated by such leases.[1] The Employer and the Trustee believed that the Notes were relatively low-risk and safe investments.

4. On or about March 29, 1996, Bennett filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Northern District of New York (Case Nos. 96–61376 *et seq.*). Richard C. Breeden, formerly the Chairman of the Securities and Exchange Commission (the SEC), was appointed Bankruptcy Trustee for the Bennett debtors on April 18, 1996. Subsequent to the March 29, 1996 filing, five additional affiliates of Bennett filed for Chapter 11 protection and Mr. Breeden was again appointed as Bankruptcy Trustee for these entities.

5. The Declaration of Bankruptcy by the Bennett debtors stemmed from a lawsuit by the SEC regarding alleged widespread fraudulent practices involving the Bennett debtors. In this regard, (a) over $55 million of fictitious leases were sold to investors and the funds derived from investors were used to service these leases; (b) assignments made of government leases were typically illegal and ineffective; and (c) through certain ''sham'' transactions Bennett appeared to be profitable while it was actually losing money.

6. The Plan filed a Proof of Claim (the Claim) in the amount of $326,355.73 for the ''money loaned and purchase of lease/assignments'' in the Bennett bankruptcy.[2] The Plan's Claim was classified as an unsecured nonpriority claim, since Mr. Breeden noted that there was no collateral or lien on the property of the debtor securing the Claim. The Claim includes both principal and interest payments on the Notes' outstanding balances from the date of the last payment received in 1996 through December 15, 1997. In this regard, the Plan received aggregate payments from Bennett with respect to the Notes of $70,396.67. Such payments can be broken down as follows:

(a) *For Note 1,* the Plan received a final interest payment from Bennett in March 1996 in the amount of $1,875 or total interest payments of $67,500.

(b) *For Note 2,* the Plan received monthly interest payments from Bennett until February 1996 in the amount of $444.39 or a total payment of both principal and interest of $2,221.95.

[1] According to the applicant, the question of whether the Notes were also secured by a master insurance policy issued by Generali Underwriters, Inc., an unrelated party, which guaranteed the income stream from the leases, continues to be the subject of litigation.

[2] The Department expresses no opinion herein on whether the acquisition and holding of the Notes by the Plan violated any of the provisions of Part 4 of Title I of the Act.

(c) *For Note 3,* the Plan received monthly interest payments until February 1996 of $337.36 or a total payment of both principal and interest of $674.72.

At the time of the Bennett bankruptcy proceedings, the amount of unrecovered principal for Notes 1, 2 and 3 were $250,000, $15,825.81 and $13,363.98, respectively.

7. Because of the complexity surrounding the Bennett debtors' bankruptcy, it is unclear whether any recovery of the Notes will occur. Also, due to uncertainty about whether the Notes have actually been insured, the applicant believes it unlikely that any insurance company would pay investors' claims (including individual investors and retirement plans) relating to the individual leases inasmuch as the insured is listed as Bennett. The applicant further represents that whatever amount, if any, that the Plan is able to recover with respect to the Notes through the bankruptcy proceedings, or otherwise, it is likely to suffer significant losses.

8. As stated in Representation 1, as of December 31, 1997, the assets of the Plan totaled $1,831,873.27. This figure reflects the fair market value of the Plan's assets and assumes that the Notes (plus accrued interest) are valued at $0. According to the applicant, the exact fair market value of the Notes is not ascertainable at this time as litigation is ongoing with respect to this matter.

9. At present, the amount of unrecovered principal of the Notes is $279,189.79. In addition, the accrued interest associated with the Notes through the dates of default, calculated through December 31, 1997 is $44,458.89. In order to avoid potential fiduciary claims by Plan participants and others relating to the Plan's investment in the Notes, the Employer proposes to restore the losses to the Plan by making a ''Restoration Payment.'' Therefore, an administrative exemption is requested from the Department.

10. The Restoration Payment will consist, in part, of the aggregate amount of the principal loss on the Notes (i.e., $279,189.79) plus accrued, but unpaid, interest (i.e., $44,458.89), calculated from the time of default through December 31, 1997, and multiplied by 58.38 percent, which percentage reflects the interests in the Plan of participants other than Mr. Van Ness, who has a 41.62 percent interest in the Plan. In other words, 58.38 percent of the unrecovered principal and interest (or $188,946.09) will be paid to the Accounts of the remaining Plan participants. The Restoration Payment will also include an additional amount representing accrued interest on the unpaid principal of Notes 2 and 3, for the period January 1998 until the date the Restoration Payment is made, again attributable to the Accounts of participants in the Plan other than the Account of Mr. Van Ness. Finally, the Restoration Payment will include the lost opportunity costs with respect to the unrecovered principal of Note 1 from the period of its scheduled maturity in December 1997 and ending with the date immediately preceding the date the Restoration Payment is made, again attributable to the Accounts of participants in the Plan other than the Account of Mr. Van Ness. Such opportunity costs will be based on the average rate of return for the Plan, excluding the Notes, for the years 1995 through 1997.[3]

Assuming the Restoration Payment is made to the Plan on June 30, 1998, the applicant represents that the opportunity costs associated with Note 1 is $18,302.13 and would be calculated as follows:

$250,000 (Unrecovered Principal of Note 1) × 58.38% (Plan's Interest in Note 1) × 12.54% (Plan's Average Rate of Return for 1995–1997) = $18,302.13.

Again assuming the Restoration Payment is made to the Plan on June 30, 1998, the applicant represents that the total payment would be approximately $208,321.87. Of this amount,

(a) *$188,946.09* would denote the Restoration Payment as of December 31, 1997, which would be calculated as follows:

$250,000.00	Note 1 Unrecovered Principal
15,825.81	Note 2 Unrecovered Principal
13,363.98	Note 3 Unrecovered Principal
$279,189.79	Total Unrecovered Principal
$44,458.89	Accrued interest on Notes from Default through 12/31/97
$323,648.68	Total Unrecovered Principal and Accrued Interest through 12/31/97

$323,648.68 × 58.38% (Plan's Interest in Notes 1, 2 and 3 plus Accrued Interest) = $188,946.09;

(b) *$18,302.13* would be attributed to the opportunity costs associated with Note 1 from January 1998 through June 30, 1998, as already calculated above;

(c) *$438.86* would be attributed to actual interest accruing on Note 2 from January 1998 through June 30, 1998, calculated as follows: $15,825.81 (Note 2 Unrecovered Principal) × 58.38% (Plan's Interest in Note 2) × 4.75% (½ year interest) = $438.86; and

(d) *$634.79* would represent the additional interest accruing on Note 3 from January 1998 until June 30, 1998, calculated as follows: $13,363.98 (Note 3 Unrecovered Principal) × 58.38% (Plan's Interest in Note 3) × 4.75% (½ year interest) = $634.79.

11. Because Mr. Van Ness has agreed to have excluded from his Account any benefit which may be attributable to the Restoration Payment, each affected Plan participant will have allocated to his or her Account in the Plan the applicable portion of the Restoration Payment as determined by the third-party Plan administrator. However, in no event will a restored Account have assets exceeding the amount that would have been in the Account of the affected Plan participant but for the loss due to the Bennett bankruptcy.

The Plan will be required to refund the Restoration Payment to the Employer only to the extent of any amount or amounts that the Plan is able to recover from Bennett (the Recapture Payment). The Employer will bear all expenses of prosecuting the Plan's claims with respect to the Notes, including those relating to the Bennett bankruptcy proceedings, as well as the costs of the exemption application.

12. Coincident with its filing of the exemption application, the Employer requested a Private Letter Ruling from the Service on the issues of whether the Restoration Payment (a) would constitute a ''contribution'' or other payment to the Plan subject to the provisions of either sections 404 or 4972 of the Code; (b) would adversely affect the qualified status of the Plan pursuant to either Code sections 401(a)(4) or 415; (c) would result in taxable income to affected Plan participants and beneficiaries; and (d) would be deductible in full by the Employer pursuant to section 162 of the Code.[4] In

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[3] The average rate of return earned by the Plan for 1995 through 1997 is 12.54 percent. This figure does not include the Plan's investment in the Notes. In a letter dated September 11, 1997, Mark Shemtob, A.S.A of Abar Pension Services, Inc., an independent actuarial and pension consulting firm, located in Livingston, New Jersey, represented that the Plan had net investment earnings of $198,126 in 1995 and an average account balance of $1,198,876, which would result in a 16.53 percent rate of return for 1995. In 1996, Mr. Shemtob noted that the Plan had net investment earnings of $131,397 and an average account balance of $1,032,459, which would result in a 12.73 percent rate of return for that year.

By letter dated April 29, 1998, the applicant noted that the Plan's rate of return for the year 1997 was 8.41 percent based upon a telephone communication with Mr. Shemtob. Accordingly, the average rate of return for the Plan for the period 1995 through 1997 is 12.54 percent.

[4] Section 401(a)(4) of the Code provides that contributions made by an employer to or under a

Continued

its ruling letter of March 2, 1998, the Service stated that neither the Code nor the Income Tax Regulations provide guidance on whether the Employer's proposed Restoration Payment would constitute a contribution under the Code. However, in the instant case, the Service noted that the Restoration Payment would ensure that the affected participants would recover their Account balances and place such participants in the position in which they would have been in the absence of the Trustee's decision to invest a portion of the Plan's assets in the Notes.

The Service explained that it was reasonable to characterize the Restoration Payment as a ''replacement payment.'' In this regard, the replacement payment would be made by the Employer in response to potential claims against the Employer and those individuals who were responsible for investing the Plan's assets in the Notes. In addition, the replacement payment would be allocated to the Accounts of participants in the Plan who had incurred a principal loss as a result of the Note investment. Thus, the Service concluded that the proposed Restoration Payment (a) would not constitute a contribution or other payment subject to the provisions of Code sections 404 or 4972; (b) would not adversely affect the qualified status of the Plan pursuant to either Code section 401(a)(4) or Code section 415; and (c) would not, when made, result in taxable income to affected Plan participants and beneficiaries.

Finally, the ruling letter is conditioned on two requirements. Firstly, the Restoration Payment must be made to resolve potential claims for breach of fiduciary duty relating to the management of the Plan. Secondly, the ruling letter is based on the representation that no part of the Restoration Payment will be added to the Account of the Trustee.

13. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because: (a) The Restoration Payment will enable the Plan to recover immediately the unpaid principal of the Notes, accrued interest and lost opportunity costs; (b) any Recapture Payments will be restricted solely to the amounts, if any, recovered by the Plan with respect to the Notes in litigation or otherwise; (c) the Employer has received a favorable ruling from the Service that the Restoration Payment does not constitute a ''contribution'' or other payment that will disqualify the Plan; (d) Mr. Van Ness's Account will not share in the Restoration Payment such that the total Restoration Payment will be made to the Accounts of Plan participants other than Mr. Van Ness; and (e) the Restoration Payment will be made to resolve potential claims for breach of fiduciary duty relating to the management of the Plan.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

stock bonus, pension, profit sharing or annuity plan shall be deductible under section 404 subject to certain limitations contained therein.

Section 415 of the Code provides, in relevant part, that a trust which is part of a pension, profit sharing or stock bonus plan shall not constitute a qualified trust under section 401(a)—

(A) in the case of a defined benefit plan, the plan provides for the payment of benefits with respect to a participant which exceeds the limitations of subsection (b), or

(B) in the case of a defined contribution plan, contributions and other additions under the plan with respect to any participant for any taxable year exceed the limitations of subsection (c).

Section 415(e) of the Code provides limitations on employer contributions and benefits where an individual is a participant in both a defined benefit and a defined contribution plan maintained by the same employer.

Section 1.415–6(b)(2) of the Income Tax Regulations provides that the term ''annual additions'' includes employer contributions which are made under the plan. Section 1.415–6(b)(2) further provides that the Commissioner of the Service may treat transactions between the plan and the employer or certain allocations to participants' accounts as giving rise to annual additions.

Section 4972 of the Code imposes on an employer an excise tax on nondeductible contributions to a qualified plan.

Finally, section 402(a) of the Code generally provides that amounts held in a trust that is exempt from tax under Code section 501(a) and that is part of a plan that meets the qualification requirements of Code section 401(a) will not be taxable to participants until such time as such amounts are actually distributed to distributees under the plan.

John Hancock Mutual Life Insurance Company (JHMLIC) Located in Boston, Massachusetts

[Application No. D–10484]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570 subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(b)(2) of the Act shall not apply to:

(1) The proposed purchases and sales of timber properties between various separate accounts (the Accounts), such as the ForesTree Separate Account, that are maintained by JHMLIC and managed by Hancock Natural Resource Group, Inc. (HNRG), John Hancock Timber Resource Corporation (JHTRC), or another Affiliate of JHMLIC; and

(2) The proposed purchases and sales of timber properties between the Accounts where HNRG or another Affiliate of JHMLIC serves as the investment manager and various partnerships (the Partnerships) in which JHTRC or another Affiliate of JHMLIC is the general partner.

Conditions and Definitions

This proposed exemption is subject to the following conditions:

1. ERISA-Covered Plans may participate in the proposed transactions only if they have total assets in excess of $100 million.

2. At least 30 days prior to the proposed transaction, each affected Customer invested in the Accounts or Partnerships participating in the transaction will be provided with information regarding the timber properties involved and the terms of the transaction, including the purchase price and how the transaction would meet the goals and investment policies of the Customer. Notice of any change in the purchase price will be provided to the Customer at least 30 days prior to the consummation of the transaction.

3. An Independent Fiduciary will be appointed by JHMLIC or an Affiliate to represent the interests of the ERISA-Covered Plans as follows:

(a) Where the proposed transaction involves an ERISA-Covered Plan (including a Pooled Separate Account or Partnership holding ''plan assets'' subject to the Act)[5] and a Non-ERISA Plan or other Non-ERISA Customer, an Independent Fiduciary will be appointed to represent the ERISA-Covered Plan (or Pooled Separate Account or Partnership), whether that Account or Partnership is the buyer or the seller of a timber property in the proposed transaction;

(b) Where the proposed transaction involves two ERISA-Covered Plans (or Pooled Separate Accounts or Partnerships holding ''plan assets'' subject to the Act) and the decision to liquidate the timber property is the result of one or more ''triggering events'' described below, an Independent Fiduciary will be appointed by JHMLIC or an Affiliate to represent the purchasing plan (or Pooled Separate Account or Partnership)—i.e. the Buying Account or Buying Partnership. A ''triggering event'' will exist whenever:

(i) JHMLIC or an Affiliate receives a direction from the Customer to liquidate

[5] See 29 CFR 2510.3–101 for the Department's definition of ''plan assets'' relating to plan investments.

all of the Customer's Account or interest in a Partnership;

(ii) JHMLIC or an Affiliate receives a request by the Customer to liquidate a specified timber property; or

(iii) A liquidation of all of the assets held in the Selling Account or Selling Partnership, or a particular property held by such Account or Partnership, is required under the terms of the investment contract, insurance contract or investment guidelines governing the Account or Partnership, and the decision to select any particular timber property to be sold is outside of the control of JHMLIC and its Affiliates; and

(c) Where the proposed transaction involves two ERISA-Covered Plans (or Pooled Separate Accounts or Partnerships holding ''plan assets'' subject to the Act) and there is no ''triggering event'' as described above in Condition 3(b), an Independent Fiduciary will be appointed by JHMLIC or an Affiliate for each Account or Partnership involved in the transaction.

4. With respect to each transaction requiring the participation of an Independent Fiduciary (as described in Condition 3 above), the purchase and sale of a timber property shall not be consummated unless the Independent Fiduciary determines that the transaction, including the price to be paid or received for the property, would be in the best interest of the particular Account or Partnership involved based on the investment policies and objectives of such Account or Partnership.

5. Each Account or Partnership which buys or sells a particular timber property pays no more than or receives no less than the fair market value of the timber property at the time of the transaction, as determined by a qualified independent real estate appraiser experienced with the valuation of timber properties similar to the type involved in the transaction.

6. Each purchase or sale of a timber property between the Accounts or Partnerships is a one-time transaction for cash.

7. Each Account or Partnership involved in the purchase or sale of a timber property pays no real estate commissions or brokerage fees relating to the transaction.

8. JHMLIC or an Affiliate acts as a discretionary investment manager for the assets of the Accounts or Partnerships involved in each transaction.

9. No purchase or sale transaction is designed to benefit the interests of one particular Account or Partnership over another.

10. For purposes of this proposed exemption:

(a) ''Account'' means a Separate Account as defined below, including a ''Non-Pooled Separate Account'' or a ''Pooled Separate Account'';

(b) ''Partnership'' means a limited partnership with assets, that may or may not be considered ''plan assets'' subject to the Act, for which JHTRC or another Affiliate of JHMLIC is the general partner and HNRG or another Affiliate of JHMLIC serves as investment manager;

(c) ''ERISA-Covered Plan'' is an employee benefit plan as defined under section 3(3) of the Act;

(d) ''Non-ERISA Plan'' or ''Non-ERISA Customer'' means an entity or investor not covered by the provisions of Title I of the Act, such as a governmental plan, a university endowment fund, a charitable foundation fund or other institutional investor, whose assets are managed in an Account or Partnership for which JHMLIC or an Affiliate acts as investment manager;

(e) ''Affiliate'' means any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with JHMLIC;

(f) ''Buying Account'' or ''Buying Partnership'' means the Account or Partnership which seeks to purchase timber properties from another Account or Partnership;

(g) ''Selling Account'' or ''Selling Partnership'' means the Account or Partnership which seeks to sell timber properties to another Account or Partnership;

(h) ''Independent Fiduciary'' means a person or entity with authority to both review the appropriateness of the proposed transaction for an Account or Partnership, that is considered to hold ''plan assets'' subject to the fiduciary responsibility provisions of the Act, based on the investment policy established for that Account or Partnership, and to negotiate the terms of the transaction, including the price to be paid for the timber property. An individual or firm selected to serve as an Independent Fiduciary shall meet the following criteria:

(1) The individual or firm may have no current employment relationship with John Hancock or an Affiliate, although a prior employment relationship would not disqualify the individual or firm;

(2) The individual or firm must not have received more than five (5) percent of its annual gross receipts during the preceding calendar year from business with John Hancock and its Affiliates;

(3) The individual or individuals in the firm must have an undergraduate or graduate academic degree in forestry;

(4) The individual or individuals in the firm must have a minimum of five (5) years experience and a demonstrated proficiency in timberland appraisal work;

(5) The individual or individuals in the firm must have a current certification as a Member of the Appraisal Institute, a Senior Real Estate Analyst under the Society of Real Estate Appraisers, or a similar nationally recognized certification;

(6) The individual or firm must have the ability to access appropriate timberland sales comparison data and make appropriate adjustments to the subject property; and

(7) The individual or firm must not have a criminal record involving fraud, fiduciary standards, or securities laws violations;

(i) ''Separate Account'' means a segregated asset Account which receives premiums or contributions from customers, including employee benefit plans subject to the Act, in connection with group annuity contracts and funding agreements, with investments held in the name of JHMLIC, but where the value of the contract or agreement to the Customer (contractholder) fluctuates with the value of the investment associated with such Account;

(j) ''Non-Pooled Separate Account'' or ''Non-Pooled Account'' means a Separate Account established to back a single contract issued to one Customer, which may be an employee benefit plan subject to the Act;

(k) ''Pooled Separate Account'' or ''Pooled Account'' means a Separate Account established to back a group of substantially identical contracts issued to a number of unrelated Customers, including employee benefits plans subject to the Act; and

(l) ''Customer'' means a person or entity that acts as the authorized representative for an Account or Partnership involved in a proposed purchase or sale of timber properties, that is independent of JHMLIC and its Affiliates.

Summary of Facts and Representations

1. *The Applicants.* The applicant for the exemption is John Hancock Mutual Life Insurance Company of Massachusetts (JHMLIC or ''John Hancock'') on behalf of itself and on behalf of its indirect wholly-owned subsidiaries, Hancock Natural Resource Group, Inc. (HNRG) and John Hancock Timber Resource Corporation (JHTRC), both Delaware corporations.

John Hancock ranks as one of the largest insurance companies in the United States and is a registered investment advisor. John Hancock and its subsidiaries had total assets of approximately $58.6 billion as of December 31, 1996, and assets under management of approximately $107 billion as of that date.

John Hancock offers group annuity contracts and funding agreements to Customers, including employee benefit plans subject to the Act. Certain of these contracts and agreements provide that, in accordance with contractholder direction, the premiums or contributions received from the contractholder will be allocated internally on the books of John Hancock to segregated asset accounts or ''Separate Accounts.'' The Separate Account investments are held in John Hancock's name, but the value of the contract or agreement to the contractholder fluctuates with the value of the investments associated with the Separate Account. The direct expenses of managing the investments and John Hancock's fees are charged against the value of the Separate Account.

Separate Accounts may be established to back a single contract issued to one customer (a ''Non-Pooled Separate Account''). In addition, a Separate Account may be established to back a group of substantially identical contracts issued to a number of unrelated customers (a ''Pooled Separate Account'').

2. John Hancock currently maintains a number of Separate Accounts that invest almost exclusively in timberland. These Pooled and Non-Pooled Separate Accounts are known as the ForesTree Separate Accounts. The contractholders of both the pooled and non-pooled ForesTree Separate Accounts include both ERISA-covered plans and non-ERISA governmental plans. As of July 1997, John Hancock had established a total of 14 such pooled and non-pooled ForesTree Separate Accounts in which 32 contractholders participate. Currently, over two million acres of timberland are allocated to the ForesTree Separate Accounts, and these properties have a fair market value in excess of $2.3 billion.

Under the applicable contract or agreement, John Hancock has the right to control, manage and administer each Separate Account, including the sole discretion to select and dispose of investments in accordance with the investment policy established for the Account.

3. John Hancock's management responsibilities under the ForesTree Separate Accounts are performed mostly by its wholly-owned subsidiary, HNRG, which was established in 1995. Prior to its incorporation in 1995, HNRG functioned as a division within John Hancock. HNRG currently manages 2.5 million acres of timberland valued at approximately $2.87 billion. HNRG's managed assets include assets held in the ForesTree Separate Accounts as well as assets managed through other arrangements. HNRG is responsible for all decisions regarding the acquisition and disposition of timberland properties held in the ForesTree Separate Accounts, although such decisions must be reviewed and approved by John Hancock's internal investment committees. HNRG also has sole responsibility for the management of John Hancock's timberland properties, including site preparation and reforestation, road building and construction, maintenance, acquisition of insurance and payment of taxes. On-site work is performed by independent forest managers under contract to HNRG.

4. Assets invested in the ForesTree Separate Accounts are managed by John Hancock and HNRG in accordance with the investment policies established for the Accounts. The investment policy for each Non-Pooled Account is established jointly by John Hancock and the contractholder. For each of the Pooled Accounts, the investment policy is established by John Hancock and adopted by each contractholder when it chooses to participate in a Pooled Account. Under the investment policy of most of the ForesTree Separate Accounts, timberland properties are purchased or sold opportunistically to favor the return of the particular portfolio. However, John Hancock states that as a practical matter the properties allocated to the ForesTree Separate Accounts are fairly illiquid investments, and are considered by its customers to be long-term investments.

HNRG has established certain guidelines that are followed as investments are acquired and allocated to timberland portfolios it manages, including those portfolios for Accounts holding ''plan assets'' subject to the Act such as the ForesTree Separate Accounts. The goal of these guidelines is to enable HNRG to provide its clients with access to a variety of timberland acquisitions through a fair, consistent and unbiased process. The central element of the procedure is a determination of the suitability of an investment for a portfolio. In the event that an investment is suitable for more than one portfolio, priorities are set in accordance with an investment queue procedure.

HNRG states that the first step in determining portfolio suitability is to identify all potential funding sources for a pending acquisition among its existing clients. Each prospective participating Account is evaluated independently. The client's investment policy, setting forth specific objectives and constraints, is the primary determinant of whether or not a particular acquisition is suitable for allocation to the Account. The portfolio ''fit'' is based on financial analysis that projects and measures future portfolio performance, including and excluding the pending acquisition, against established performance targets. Performance targets may include total return, appreciation and income. Different levels of investment in the pending acquisition are reviewed. Consideration is given to diversification by geographic region, timber markets and timber species. The proposed investment is analyzed to determine if it can be broken into appropriate parcels to fit the client portfolio's needs. Portfolio investment recommendations are intended to be consistent with the standards defined by the Association for Investment Management and Research (AIMR), a professional association which has adopted certain standards for best practices by investment managers.

The amount of funding available for any potential acquisition is determined after the portfolio suitability analysis has been completed. As a result, HNRG states that when it comes to funding an acquisition, one of the following three situations will exist: (i) The acquisition will be undersubscribed (i.e. there are not enough funds available to acquire the investment); (ii) the acquisition is fully subscribed (i.e. there are ample funds available to acquire the investment), or (iii) the acquisition is oversubscribed (i.e. client portfolio funding availability exceeds the amount needed to fund the acquisition).

The ''investment queue'' sets the priorities for utilizing funds from existing client Accounts in the event an investment is suitable for more than one client's portfolio. The ''investment queue'' is based on the source of available client funds with the following order of priority:

(a) Client funds committed to timber property acquisitions, but unallocated;
(b) Timberland disposition proceeds designated for reinvestment;
(c) Cash flow from operations; and
(d) Contingent funds.

Within each of the four categories of available funds, the length of time that the funds have been available for investment will determine the level of priority. For example, funds that have been committed to an HNRG timberland investment program, but are unallocated, will receive priority between clients in the chronological order of when each commitment was established.

5. Customers that want to use John Hancock's timber management expertise typically invest in the ForesTree Separate Accounts. These customers include both ERISA-covered plans and non-ERISA plans. Customers may also invest directly in Partnerships that own timber properties. In these cases, JHTRC is usually appointed the general partner of the Partnership holding the property and HNRG serves as investment manager of the Partnership. These management responsibilities are exercised in accordance with the investment guidelines contained in the partnership agreements, which contain HNRG's investment selection and allocation policy procedures (as described in Paragraph 4 above).

For purposes of this proposed exemption, both ForesTree Separate Account contractholders and John Hancock's investment management clients who directly invest in Partnerships holding timber properties, including ERISA-Covered Plans, are referred to as ''Customers'.

The Transactions

6. The Applicants state that occasions may arise when it is appropriate to liquidate timber property held in an Account or Partnership, even though the property remains an attractive investment. For example, a Customer's timber investments may have so increased in value from its initial investment that the timber-related portion of the Customer's aggregate portfolio exceeds the Customer's current asset allocation guidelines for that investment class. In addition, a Customer may request that John Hancock liquidate a portion of its timber portfolio in order to recognize some of the portfolio's gains, even though the particular timber parcel remains an attractive investment. John Hancock may also conclude that a particular timber parcel, through individually an attractive investment, is no longer appropriate for the Customer's Account, in light of the composition of the Account, its liquidity needs and other available investment opportunities.

The Applicants state that in these and other situations in which timber parcels might be sold, the parcels chosen for liquidation could be appropriate investments for other Customers. Under the proposed exemption, John Hancock could satisfy the objectives of a Selling Account or Selling Partnership and a Buying Account or Buying Partnership in a manner that provides advantages to both sides of the transaction. Therefore, John Hancock requests an exemption that would permit it (and its Affiliates) to transfer timber parcels between its Customer Accounts and Partnerships under certain conditions and procedures described herein.

7. If John Hancock determines that it should liquidate any timberland assets held in a Customer's Account or Partnership, or if as the result of certain ''triggering events'' described below such a liquidation must occur, and John Hancock concludes that a particular parcel of timberland to be sold is an appropriate investment for the portfolio of another Account or Partnership, John Hancock will engage independent fiduciaries (the I/Fs) to represent the interests of any ERISA-Covered Plans involved.

Under the procedures described by the Applicants, an I/F will be appointed by JHMLIC or an Affiliate to represent the interests of the ERISA-Covered Plans as follows:

(a) Where the proposed transaction involves an ERISA-Covered Plan (including a Pooled Separate Account or Partnership holding ''plan assets'' subject to the Act) and a Non-ERISA Plan or other Non-ERISA Customer, an I/F will be appointed to represent the ERISA-Covered Plan (or Pooled Separate Account or Partnership), whether that Account or Partnership is the buyer or the seller of a timber property in the proposed transaction.

(b) Where the proposed transaction involves two ERISA-Covered Plans (or Pooled Separate Accounts or Partnerships holding ''plan assets'' subject to the Act) and the decision to liquidate the timber property is the result of one or more ''triggering events'' described below, an I/F will be appointed by JHMLIC or an Affiliate to represent the purchasing plan (or Pooled Separate Account or Partnership)—i.e. the Buying Account or Buying Partnership. A ''triggering event'' will exist whenever:

(i) JHMLIC or an Affiliate receives a direction from the Customer to liquidate all of the Customer's Account or interest in a Partnership;

(ii) JHMLIC or an Affiliate receives a request by the Customer to liquidate a specified timber property; or

(iii) A liquidation of all of the assets held in the Selling Account or Selling Partnership, or a particular timber property held by such Account or Partnership, is required under the terms of the investment contract, insurance contract or investment guidelines governing the Account or Partnership, and the decision to select any particular property to be sold is outside the control of JHMLIC and its Affiliates.

(c) Where the proposed transaction involves two ERISA-Covered Plans (or Pooled Separate Accounts or Partnerships holding ''plan assets'' subject to the Act) and there is no ''triggering event'', an I/F will be appointed by JHMLIC or an Affiliate for each Account or Partnership involved in the transaction.

With respect to each transaction requiring the participation of an I/F, the purchase and sale of a timber property shall not be consummated unless the I/F determines that the transaction, including the price to be paid or received for the property, would be in the best interest of the particular Account or Partnership involved based on the investment policies and objectives of such Account or Partnership. The I/F will have the authority both to review the appropriateness of the proposed purchase or sale in light of the Customer's investment policy and to negotiate the terms of the transaction, including the price to be paid for the property and the allocation of the transaction cost savings to the buyer and seller.[6] The I/F will always be provided with a recent appraisal of the timber property obtained by HNRG from a qualified independent real estate appraiser experienced with the valuation of timber properties similar to the type involved in the transaction. Under the conditions of this proposed exemption, each Account or Partnership which buys or sells a particular timber property must pay no more than or receive no less than the fair market value of the timber property at the time of the transaction, as determined by an independent qualified real estate appraiser.

8. An individual or firm selected to serve as an I/F would be required to meet the following criteria:

(a) The individual or firm may have no current employment relationship with John Hancock or an Affiliate, although a prior employment relationship would not disqualify the individual or firm;

(b) The individual or firm must not have received more than five (5) percent of its annual gross receipts during the preceding calendar year from business with John Hancock and its Affiliates;

[6] The Applicants state that generally all of the transaction expenses for the buyer and the seller would be saved. However, to the extent that there are any expenses that cannot be avoided, such expenses would be negotiated between the independent fiduciary and John Hancock, or a second independent fiduciary, as the case may be.

(c) The individual or individuals in the firm must have an undergraduate or graduate academic degree in forestry;

(d) The individual or individuals in the firm must have a minimum of five (5) years experience and a demonstrated proficiency in timberland appraisal work;

(e) The individual or individuals in the firm must have a current certification as a Member of the Appraisal Institute, a Senior Real Estate Analyst under the Society of Real Estate Appraisers, or a similar nationally recognized certification;

(f) The individual or firm must have the ability to access appropriate timberland sales comparison data and make appropriate adjustments to the subject property; and

(g) The individual or firm must not have a criminal record involving fraud, fiduciary standards, or securities laws violations.

In addition to the appointment of an I/F, the Applicants state that at least 30 days prior to any transaction, each affected Customer involved with the Accounts or Partnerships participating in the transaction will be provided with information regarding the timber properties involved and the terms of the transaction, including the purchase price and how the transaction would meet the goals and investment policies of the Customer. John Hancock will provide an additional notice to Customers should the price of a timber property change following the initial notice. The transaction will not be consummated until 30 days after the second notice has been provided.

Any Customer that is an ERISA-Covered Plan will be responsible for monitoring the performance of John Hancock and its Affiliates as well as the I/F, when an I/F is required, to ensure that the conditions of this proposed exemption are met. The Applicants state that all ERISA-Covered Plans will be large plans with sophisticated fiduciaries capable of monitoring the performance of the parties in the proposed transaction. Under the conditions of this proposed exemption, ERISA-Covered Plans may participate in the proposed transactions only if they have total assets in excess of $100 million.

Justification for Transactions

9. The Applicants represent that the transfer of timber properties from one Account or Partnership to another will have a number of advantages to both the Buying Account or Partnership and the Selling Account or Partnership.

First, when the transfer is between two of John Hancock's ForesTree Separate Accounts, it will not require the transfer of legal ownership of the property. John Hancock has legal title to all assets allocated to its Separate Accounts and may reallocate these assets among Separate Accounts without a change in legal title. This means that significant transaction costs can be avoided, including real property transfer taxes, title insurance policy costs, closing and recording costs and, where required, phase one environmental audits.[7] In addition, each Account or Partnership involved in the purchase or sale of a timber property would not pay any real estate commissions or brokerage fees for the transaction. The allocation of any remaining transaction costs would be negotiated between the buyer and the seller for each transaction. Under the transactions that would be covered by this proposed exemption, the I/Fs would be responsible for negotiating the allocation of any remaining transaction costs for the Accounts or Partnerships for which they are acting.

Second, a transfer of timber properties between the Accounts or Partnerships will often allow a Buying Account or Partnership to invest its assets more quickly and in properties that might not otherwise be available to them. John Hancock believes that investors commit to establishing a timberland investment portfolio because they have identified a current need for such an asset category. Therefore, John Hancock states that once a Customer has committed to a ForesTree Separate Account or to a Partnership, it is important to the Customer to invest its funds as rapidly as is prudent. However, attractive timber properties are relatively scarce, and allowing a transfer of timber parcels in accordance with this proposed exemption would provide an opportunity for the purchasing Customers to invest funds more rapidly than would be possible if the purchase involved a seller having no relationship to John Hancock.

Third, the Applicants represent that because HNRG is the manager of the Selling Account's or Partnership's timber property, much more information about the property would be available to a Buying Account or Partnership than would be if the property were not managed by HNRG. John Hancock states that this situation reduces the risk to its purchasing Customers. In addition, because HNRG is already familiar with the timber property, the Buying Account or Partnership would avoid certain expenses normally associated with the purchase of a new property. These "start-up" expenses include the costs of lot management plan development, aerial photographs and geographical information systems (GIS) mapping.

Finally, each purchase and sale of a timber property between the Accounts and/or Partnerships will be a one-time transaction for cash. No purchase or sale transaction will be designed to benefit the interests one particular Account or Partnership over another.

10. In summary, John Hancock represents that the proposed transactions will meet the statutory criteria of section 408(a) of the Act because: (a) Each purchase or sale of a timber property between the Accounts or Partnerships will be a one-time transaction for cash; (b) each affected Customer involved with the Accounts or Partnerships participating in the transaction will be provided with information, at least 30 days prior to the proposed transaction, regarding the timber properties involved and the terms of the transaction, including the purchase price and how the transaction would meet the goals and investment policies of the Customer; (c) an I/F will be appointed by JHMLIC or an Affiliate to represent the interests of the ERISA-Covered Plans in the proposed transaction, unless the decision to liquidate a timber property from a Selling Account or Selling Partnership is the result of one or more "triggering events'; (d) in a transaction where an I/F is involved, the purchase or sale of the timber property shall not be consummated unless the I/F determines that the transaction, including the price to be paid or received for the property, would be in the best interest of the particular Account or Partnership involved based on the investment policies and objectives of such Account or Partnership; (e) each Account or Partnership which buys or sells a particular timber property will pay no more than or will receive no less than the fair market value of the timber property at the time of the transaction, as determined by an independent qualified real estate appraiser; (f) each Account or Partnership involved in the purchase or sale of a timber property will pay no real estate commissions or brokerage fees relating to the transaction; (g) no purchase or sale transaction will be designed to benefit the interests one particular Account or

[7] For example, in a transaction between Lyons Falls Pulp & Paper, Inc., as seller, and a JHMLIC Non-Pooled Separate Account, as buyer, which involved 67,430 acres of timberland that was sold to the Account for approximately $12.1 million on February 14, 1996, the total transaction costs involved more than 7.15 percent of the acquisition price or over $865,150 ($12,100,000 × .0715). This figure excludes the New York State Gains Tax of over $1,000,000 that was incurred by the seller.

Partnership over another; and (h) ERISA-Covered Plans will be able to participate in the proposed transactions only if they have total assets in excess of $100 million.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

ACRA Local 725 Health & Welfare Fund (the Welfare Plan) and ACRA Local 725 Pension Fund (the Pension Plan; together, the Plans) Located in Macon, Georgia

[Application Nos. L–10536 and D–10537]

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, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(b)(2) of the Act shall not apply to the proposed payment of interest by the Pension Plan to the Welfare Plan on past mistaken contributions (the Mistaken Contributions) pursuant to an indemnification agreement by the Board of Trustees of the Pension Plan with respect to the Mistaken Contributions, provided the following conditions are satisfied: (a) The Mistaken Contributions occurred as a result of an inadvertent clerical error committed by the Plans' independent third party administrator; (b) the principal amount of the Mistaken Contributions was repaid as soon as the error was discovered; and (c) the amount of interest to be paid to the Welfare Plan by the Pension Plan has been determined by a third party bank to be the fair market rate of interest.

Summary of Facts and Representations

1. The Welfare Plan is the ACRA Local 725 Health & Welfare Fund of Dade, Broward and Monroe Counties, Florida, and the Pension Plan is the ACRA Local 725 Pension Fund of Dade, Broward and Monroe Counties, Florida. Each Plan is maintained pursuant to Collective Bargaining Agreements between Air Conditioning Refrigeration Associates, an employer association representing various employers (the Employers), and United Association Local Union Number 725 (the Union), an employee organization whose members are covered by the Plan. The Union represents individuals who perform, as employees of the Employers, construction and service work in the air conditioning and pipe trades.

The Welfare Plan provides health and welfare benefits to participant employees and their families. It is funded solely by Employer contributions and earnings thereon. The Welfare Plan has been in existence since 1961. As of April 30, 1997, the Welfare Plan had 674 participants, and approximately $4,275,000 in assets.

The Pension Plan provides retirement and certain disability benefits to Plan participants and survivor benefits to spouses and/or other beneficiaries that may be designated by the participant in accordance with the Plan's procedures. The Pension Plan has been in existence since 1962. As of April 30, 1997 the Pension Plan had 1,633 participants and assets of approximately $56,100,000.

2. The Board of Trustees of each Plan, all of whom are individuals who serve in that capacity for both Plans, had for a period of several years retained the services of Consolidated Benefit Services, Inc. of Atlanta, Georgia (Consolidated) to serve as administrative manager (the Administrator) for the Plans. Employer contributions are made to the Pension Plan and the Welfare Plan as well as other trust funds and entities to which contributions are required to be paid pursuant to the Collective Bargaining Agreement between the Employers and the Union. These contributions are collected and deposited in an escrow account (the Escrow) under the supervision of the Administrator. The purpose of the Escrow is to receive and deposit Employer contributions, allow for clearance of checks and record each Employer contribution to the Plans in a timely fashion. Sums received by the Escrow are then allocated to the appropriate accounts. Thus, the appropriate amount of contributions due to the Welfare Plan are normally allocated and paid to the Welfare Plan accounts, and the appropriate amount of contributions due to the Pension Plan are normally allocated and paid to the Pension Plan accounts.

3. In approximately September, 1996, the Board of Trustees of each Plan was advised that the parent corporation of Consolidated, Harrington Benefit Corporation (Harrington), which was also the parent corporation of American Benefit Plan Administrators, Inc. (ABPA), had been acquired by Health Services, Inc. (Health Services), a public company. After the acquisition of Harrington by Health Services, all administrative record-keeping for the Plans was transferred from the Atlanta office of Consolidated to the Dallas office of ABPA.

4. In August 1997, the independent accountant for the Plans (the Auditor), in the course of conducting a routine annual audit, discovered that in November 1996, ABPA, as the Administrator for the Plans, withdrew from the Escrow and transferred to the accounts of the Pension Plan, sums which were in excess of the proper contributions allocated to the Pension Plan by the Employers. This excess payment created a shortfall in the proper contributions to the Welfare Plan. This process continued to occur in subsequent months.[8] For purposes of this proposed exemption, all excess amounts of money erroneously allocated to the Pension Plan during this period of time are described herein as ''the Mistaken Contributions''. The applicant represents that payments from the Escrow to the Pension Plan were utilized by ABPA to pay current disbursements by the Pension Plan, including such items as current pension benefits and ongoing operational expenses. Nonetheless, all financial reports from ABPA to the Trustees of each Plan erroneously reflected the proper contributions being allocated to the Pension Plan and the Welfare Plan. These erroneous financial reports, rather than documentation showing the actual amounts transferred to the Pension Plan, were delivered to the respective Boards of Trustees. Accordingly, the Boards of Trustees of the Plans were not aware of the fact that sums of money were being allocated erroneously to the Pension Plan from the Escrow. The Trustees were notified by the Auditor in late August, 1997. At that time, immediate instructions were made to correct the Mistaken Contributions.

5. On October 29, 1997, all excess sums paid erroneously to the Pension Plan were repaid to the Welfare Plan. The period of delay between the time of discovery of the error (i.e., August, 1997) and its correction was the time required by the Auditor to accurately investigate and calculate the amount necessary to correct the error. The total amount of the Mistaken Contributions was $796,983.29. This amount represented approximately 18.6% of the Welfare Plan's assets and 1.4% of the Pension Plan's assets.

[8] In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. With respect to the actions and omissions of ABPA, the Department notes that no relief would be provided under the proposed exemption for any violation of the general fiduciary provisions of Part 4 of Title I of the Act.

6. The applicants represent that since the Mistaken Contributions were the result of unintended erroneous allocations by the Administrator of contributions by the Employers, they may be considered to come within section 403(c)(2)(A)(ii) of the Act, which would permit the return of the contributions within 6 months after the plan administrator discovered that the contributions were made by a mistake of fact or law.[9] As a result, the applicants are not seeking an exemption for the Mistaken Contributions or the repayment of their principal amount. Rather, the applicants are requesting an exemption merely for the proposed payment of interest by the Pension Plan to the Welfare Plan in connection with the treatment of these transactions as ''Mistaken Contributions'' in order to make the Welfare Plan ''whole'' for the Pension Plan's use of the money that was erroneously allocated by ABPA from the Escrow to the Pension Plan.

7. In addition to the Pension Plan's repayment of the principal amount of the Mistaken Contributions to the Welfare Plan, the Board of Trustees of the Pension Plan now proposes to pay interest to the Welfare Plan pursuant to an indemnification agreement (the Indemnification) with the Board of Trustees of the Welfare Plan. The Indemnification consists of an agreement to pay a reasonable rate of interest on the total amount of the Mistaken Contributions to reimburse the Welfare Plan for lost income. The interest rate to be paid by the Pension Plan will be established as a fair market rate by an independent bank. The Liberty Bank (the Bank) in Macon, Georgia, was contacted for the purpose of establishing such a market rate. The Bank is an independent bank which has no other relationship with the Plans. The Bank represents that an appropriate rate for such Mistaken Contributions would be 8.25 to 8.5% per annum. Accordingly, the Trustees of both Plans have agreed to utilize the rate of 8.5% per annum to reimburse the Welfare Plan for losses relating to the period of time it was denied access to the assets (i.e., $796,983.29).

8. The applicants represent that the Trustees of the Plans have repeatedly requested ABPA to provide a written explanation of the manner in which the Mistaken Contributions occurred, but ABPA has failed to provide any response. Due to dissatisfaction with ABPA's performance, the Trustees terminated ABPA's services effective August 31, 1997, and appointed a new administrative manager, Core Management Resources, Inc., of Macon, Georgia.

9. The applicants represent that no participant in either Plan experienced any reduction, deferment or delay in receipt of any benefit due from either Plan as a result of the errors. All benefits and expenses of each Plan were paid in a timely fashion by each respective Plan in the ordinary course of its business.

10. In summary, the applicants represent that the subject transactions satisfy the criteria contained in section 408(a) of the Act because: (a) The Mistaken Contributions were inadvertent transfers that occurred solely through the errors of the Plans' independent third party administrator, ABPA; (b) the Pension Plan repaid the principal amount of the Mistaken Contributions to the Welfare Plan as soon as possible after the error was discovered and properly calculated by the Auditor; (c) the amount of interest to be paid to the Welfare Plan on the Mistaken Contributions has been determined by an independent bank (i.e., the Bank) as a fair market rate of interest to reimburse the Welfare Plan for losses relating to the period of time it was denied access to the assets erroneously allocated to the Pension Plan; and (d) no participant in either the Welfare Plan or the Pension Plan experienced any reduction, deferment or delay in receipt of any benefit due from the Plan as a result of the transactions.

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

William M. Hitchcock SERP (DB) (the Plan) Located in Houston, Texas

[Application No. D–10605]

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, 32847, 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 proposed sale by the Plan of 67,466 shares of stock (the Stock) in Thoratec Laboratories, Inc. (Thoratec) to William M. Hitchcock (Mr. Hitchcock), a disqualified person 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 sales commissions or other expenses in connection with the transaction; (c) the Plan receives the fair market value of the Stock, as determined by reference to its most current listed price on the National Association of Securities Dealers Automated Quotation National Market System (NASDAQ) at the time of the transaction; and (d) Mr. Hitchcock is the only Plan participant to be affected by the transaction, and he desires that the transaction be consummated.[10]

Summary of Facts and Representations

1. The Plan is a defined benefit self-employed retirement plan with one participant, Mr. Hitchcock, who is the sole owner of the Plan sponsor. The Plan sponsor is a sole proprietorship which is engaged in the business of consulting. Mr. Hitchcock is also the Plan's trustee. As of March 18, 1998, the Plan had $468,873 in total assets.

2. On February 14, 1994, the Plan purchased 2,400 shares of the Stock at a price of $2.03 per share (i.e., for a total of $4,872). On April 5, 1995, the Plan purchased 200,000 shares of the Stock at a price of $1.30 per share (i.e., for a total of $260,000). On June 10, 1996, the Stock underwent a reverse stock split of 1/3 and, as a result, the Plan currently holds 67,466 shares of the Stock. Mr. Hitchcock is a director of Thoratec, and together he and the Plan own 1.8% of Thoratec.[11] The Stock currently constitutes approximately 93% of the Plan's assets.[12] The Stock is publicly traded on the NASDAQ.

[9] The Department expresses no opinion in this proposed exemption as to whether the contributions are subject to section 403(c)(2)(A)(ii) of the Act.

[10] Since Mr. Hitchcock is the sole owner of the Plan sponsor 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.

[11] In this proposed exemption, the Department is expressing no opinion as to whether the Plan's acquisitions of the Stock constituted a prohibited transaction under section 4975 of the Code, nor is the Department herein proposing relief for any prohibited transaction which may have occurred as a result of such acquisitions of the Stock by the Plan. However, the purchases and holding of the Stock by the Plan raise questions under section 4975(c)(1)(D) and (E) of the Code. Section 4975(c)(1)(D) and (E) of the Code prohibits the use by or for the benefit of a disqualified person of the assets of a plan and prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Mr. Hitchcock, as a director of Thoratec, may have had an interest in the acquisitions and holding of the Stock which may have affected his best judgment as a fiduciary of the Plan. In such circumstances, the transactions may have violated section 4975(c)(1)(D) and (E) of the Code. *See* Advisory Opinion 90–20A (June 15, 1990). Accordingly, to the extent there were violations of section 4975(c)(1)(D) and (E) of the Code with respect to the purchases and holding of the Stock by the Plan, the Department is extending no relief for these transactions herein.

[12] The Department notes that the Internal Revenue Service has taken the view that if a plan is exposed

3. Mr. Hitchcock now proposes to purchase the Stock from the Plan for cash. No commissions or other expenses will be paid by the Plan in connection with the sale. The Plan will receive the fair market value of the Stock, as determined by its most current listed price on the NASDAQ at the time of the sale. On March 12, 1998, the Stock was trading at a price of $7.00 per share. Therefore, based upon this per share trading price, Mr. Hitchcock would have paid the Plan $472,262 for the Stock (67,466 shares times $7.00 per share).

4. Mr. Hitchcock represents that the proposed sale would be advantageous to the Plan because it would increase the Plan's liquidity and diversify the Plan's assets. In addition, 66,666 shares of the Stock owned by the Plan are unregistered and subject to certain sale restrictions under Rule 144 of the Securities and Exchange Commission (SEC). The restricted Stock can be disposed of only in a private placement or in the public market over a period of years under the timing and volume restrictions of SEC Rule 144. As a result, all of the Plan's shares of the Stock may not be sold on the open market at the present time. These shares of the Stock were purchased by the Plan in a private placement. However, in any sale of the Plan's shares to a third party in a private placement, the purchaser would probably demand a significant discount off the NASDAQ listed price in order to acquire the shares. Therefore, by selling all of the Stock to Mr. Hitchcock for the most current listed price for each share of the Stock on the NASDAQ, the Plan will receive a premium for its shares at the time of the transaction.

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 4975(c)(2) of the Code because: (a) The sale is a one-time transaction for cash; (b) no commissions or other expenses will be paid by the Plan in connection with the sale; (c) the Plan will receive the fair market value of the Stock, as determined by its most current listed price on the NASDAQ at the time of the sale; and (d) Mr. Hitchcock is the only Plan participant to be affected by the transaction, and he desires that the transaction be consummated.

Tax Consequences of the Transaction

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

Notice to Interested Persons: Since Mr. Hitchcock is the only Plan participant to be affected by the proposed transaction, the Department has determined that there is no need to distribute the notice of proposed exemption to interested persons. Comments and requests for a hearing are due within 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

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 of 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 23rd day of June 1998.

Ivan Strasfeld,

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

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to the risk of large losses because of the lack of diversification and the speculative nature of investments made by the Plan, such an investment strategy may raise questions in regard to the exclusive benefit rule under section 401(a) of the Code. For example, see Rev. Rul. 73–532, 1973–2 C.B. 128, which states, among other things, that the safeguards and diversity that a prudent investor would adhere to must be present in order for the "exclusive-benefit-of-employees" requirement to be met. However, the Department is expressing no opinion in this proposed exemption regarding whether violations of section 401(a) of the Code occurred as a result of the Plan's acquisition of investments that may be speculative in nature, such as the purchase of the Stock.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collection described in this notice. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before July 29, 1998.

ADDRESSES: Comments should be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Ms. Maya Bernstein, Desk Officer for NARA, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–713–6730 or fax number 301–713–6913.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13), NARA invites the general public and other Federal