

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, effective August 23, 1999, to the sale of two parcels of unimproved real property (the Properties) by the Plan to Doctor G.D. Castillo (the Sales), a party in interest with respect to such Plan, provided that the following conditions are met:<sup>2</sup>

(a) The terms and conditions of the Sales were at least as favorable to the Plan as those obtainable in similar arm's-length transactions involving unrelated parties;

(b) Each Sale was a one-time transaction for cash;

(c) The amount of cash received by the Plan for each Property was not less than the fair market value of such Property as of the date of the Sales as determined by a qualified, independent appraiser; and

(d) The Plan did not pay any fees or commissions in connection with the Sales.

#### Written Comment

The Department received one comment letter from an accountant (the Commenter) representing Doctor G.D. Castillo (Dr. Castillo) in response to the proposed exemption. In the letter, the Commenter noted that in addition to the Sales, the initial application (see footnote 1 above) requested relief for the acquisition (the Acquisition) of certain improved real property located in Golden, Colorado (the Improved Property) by the Plan and Dr. Laura Diaz Del Castillo Vraney (Dr. Vraney), the daughter of Dr. Castillo.<sup>3</sup>

In the initial application, Dr. Castillo stated that the purpose of Dr. Vraney's participation in the Acquisition was to enable the Plan to acquire a suitable investment. In this regard, Dr. Castillo represented that he directed the Plan to acquire the Improved Property upon extensively researching improved real properties located in areas of high growth. In a letter to the Department dated April 27, 2001, Dr. Castillo stated that, subsequent to the Acquisition, he has retained control over all decisions relating to the Improved Property. In addition, Dr. Castillo has represented that Dr. Vraney's role with respect to such property is limited to that of a passive investor.

<sup>2</sup> The application for this exemption, which was filed on January 19, 2001, was initially assigned the number D-10967 before being reassigned the above-referenced application number on July 22, 2002.

<sup>3</sup> On August 27, 1999, the Plan (at the direction of Dr. Castillo) and Dr. Vraney acquired the Improved Property from an unrelated third party for \$690,000. Of this amount, the Plan paid \$650,253.20 and Dr. Vraney paid \$36,746.80.

The Commenter seeks clarification from the Department regarding whether the acquisition of the Improved Property by the Plan and Dr. Vraney requires additional exemptive relief. As the Department noted in the preamble to a proposed individual exemption (52 FR 30965, 30973 (August 18, 1987)), section 406(a)(1)(D) of the Act prohibits the transfer to, or use by or for the benefit of, a party in interest (including the daughter of a plan fiduciary), of the assets of a plan. The Department further stated that section 406(a)(1)(D) is not violated merely because the party in interest may derive some incidental benefit from a transaction involving the simultaneous equity investment in an asset with the plan. We are assuming, for purposes of this analysis, that: (1) The fiduciary (or its designee) does not rely upon, and is not otherwise dependent upon, the participation of the plan in order to undertake its share of the investment; and (2) the terms of the transaction that are applicable to the plan are identical to the terms applicable to the party in interest.

Thus, with respect to the acquisition of the Improved Property through the co-investment of Plan assets and assets provided by Dr. Vraney, to the extent that the initial co-investment satisfied the criteria described above, it is the view of the Department that such transaction does not require additional relief pursuant to this exemption.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 22, 2003 at 68 FR 3046.

#### FOR FURTHER INFORMATION CONTACT:

Christopher Motta of the Department, telephone (202) 693-8544. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must

operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

Signed at Washington, DC, this 30th day of April, 2003.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-10992, et al.]

### Proposed Exemptions; Local 705 International Brotherhood of Teamsters Pension Plan (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: "moffittb@pwba.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.

#### Local 705 International Brotherhood of Teamsters Pension Plan (the Plan) Located in Chicago, Illinois

[Application No. D-10992]

#### 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 sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed purchase of a 10 ft. x 52.6 ft. parcel of real property (the Property) by the West Side Realty Corporation (West Side), a wholly owned affiliate of the Plan from Local 705 Building Corporation (the Building Corporation), a party in interest with respect to the Plan, provided that the following conditions are met:

(a) The purchase of the Property by the Plan is a one-time transaction for cash;

(b) The Plan pays no more than the lesser of: (i) \$147,000; or (ii) the fair market value of the Property as determined at the time of the transaction;

(c) The fair market value of the Property is established by an independent, qualified, real estate appraiser that is unrelated to the Building Corporation or any other party in interest with respect to the Plan;

(d) The Plan will not pay any commissions or other expenses with respect to the transaction; and

(e) The Townsend Group, Institutional Real Estate Consultants (the Townsend Group), acting as an independent, qualified, fiduciary for the Plan, determines that the proposed transaction is in the best interest of the Plan and its participants and beneficiaries.

#### Summary of Facts and Representations

1. The Plan is a defined benefit plan. The approximate aggregate fair market value of the total assets of the Plan is \$1,035,500,093. The percentage of the fair market value of the total assets of the Plan that is involved in the exemption transaction is .0001% as of April 12, 2001. The Plan has eight (8) trustees, four (4) of whom are selected by employers who are parties to

collective bargaining agreements with the Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) and four (4) of whom are selected by the Union. These eight (8) individuals who serve as trustees of the Plan also serve as directors of West Side, which is an Illinois corporation wholly owned by the Plan.

2. The Building Corporation, a nominee corporation controlled by the Union owns the Property which consists of a 10 ft. x 52.6 ft. parcel in Chicago, Illinois. In 1992, the Plan completed construction, at 1645 West Jackson Boulevard, Chicago, Illinois, of a multi-tenant office building which is owned by West Side and which is currently leased to the Union and many other tenants. Sometime thereafter, the Plan became aware that the multi-tenant office building encroached, in part, on the Property.

As a result, the Plan now proposes, through West Side, to purchase the Property from the Building Corporation. The Property is contiguous to other parcels owned by the Building Corporation, and the parties contemplate granting each other cross-easements for parking and ingress and egress over their respective parcels pursuant to a reciprocal easement agreement.<sup>1</sup>

3. The proposed purchase is in the interest of the Plan and its participants and beneficiaries since it resolves any concerns involving ownership boundaries between the Property and the multi-tenant office building. The applicant represents that the proposed purchase by the Plan from the Building Corporation is the most equitable and convenient method to resolve this matter. The purchase of the Property will enhance the future marketability of the Property and will avoid the expense of possible future litigation. The rights of the Plan participants and beneficiaries are adequately protected by the transaction in question. The Building Corporation has offered to sell the Property to the Plan for cash in the amount of \$147,000.<sup>2</sup>

4. The Property was appraised by Michael S. MaRous, an employee of MaRous and Company (the Appraiser), a real estate appraisal firm located in Park Ridge, Illinois. The Appraiser

<sup>1</sup> The Department is providing no relief herein with respect to any prohibited transactions that may arise in connection with any cross-easement agreements.

<sup>2</sup> The Building Corporation has determined that a price of \$147,000 in cash for the Property would be acceptable.

utilized a sales comparison methodology in valuing the Property. To develop the opinion of value, the Appraiser performed a complete appraisal process as defined by the Uniform Standards of Professional Appraisal Practice. The Appraiser concluded that the unencumbered fee simple interest in the Property would have a fair market value of approximately \$402,300, as of July 17, 2001.

5. The Townsend Group has been appointed by the Plan trustees to act as an independent fiduciary for the Plan for purposes of the transaction. The Townsend Group is an institutional real estate consulting company based in Cleveland, Ohio. Townsend acknowledges and represents that in serving as an independent fiduciary, the Townsend Group is a fiduciary of the Plan within the meaning of section 3(21) of the Act. Townsend is familiar with the duties imposed on fiduciaries under the Act, including the requirement that a fiduciary act solely and exclusively in the interest of a plan's participants and beneficiaries. Townsend's familiarity with the Act stems from its provision of a diverse array of real estate consulting services to a large base of domestic pension funds, as well as through transactional assignments for other institutional investors during the firm's history. The Townsend Group represents that it is an independent fiduciary and not an affiliate of, or related to, the entities involved in the subject transaction. In this regard, the Townsend Group certifies that less than one (1) percent of its annual income (measured on the basis of the prior year's income) comes from business derived from The Building Corporation and its affiliates.

7. The Townsend Group has reviewed all of the terms and conditions of the proposed purchase of the Property by the Plan.

Based on this review and analysis, the Townsend Group concluded that the transaction is in the best interests of the Plan and its participants and beneficiaries.

8. In summary, the applicant states that the transaction will satisfy the statutory criteria of section 408(a) of the Act because: (a) The proposed purchase of the Property by the Plan is a one-time transaction for cash; (b) the Plan will not pay more than the lesser of either \$147,000, or the fair market value of the Property as determined at the time of the transaction; (c) the fair market value of the Property was established by an independent, qualified, real estate appraiser; (d) the Plan will not pay any commissions or other expenses with

respect to the transaction, other than the services of an independent fiduciary (as described herein); and (e) the Townsend Group, acting as the Plan's independent fiduciary, determined that the proposed transaction is in the best interest of the Plan and its participants and beneficiaries.

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

**Skandinaviska Enskilda Banken AB (SEB) Located in Stockholm, Sweden**

[Application No. D-11133]

*Proposed Exemption*

Based on 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).<sup>3</sup>

**Section I. Covered Transactions**

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, shall not apply, effective October 23, 2002, to: (1) The lending of securities that are assets of a plan (the Plan) to SEB's head office in Stockholm (the Borrower) in accordance with the conditions set forth below (the foregoing being Part One of this proposed exemption); and (2) the lending of securities, under certain exclusive borrowing arrangements, to the Borrower by Plans including commingled investment funds holding assets of such Plans with respect to which SEB or any of its affiliates is a party in interest; and (3) the receipt of compensation by SEB or any of its affiliates in connection with these exclusive borrowing transactions (the foregoing being Part Two of this proposed exemption).

<sup>3</sup> For the 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.

This proposed exemption is subject to the conditions contained below in Sections II, III, and IV.

**Section II. Conditions Applicable to Part One of the Proposed Exemption—Securities Lending Between Plans and the Borrower**

(a) Neither the Borrower nor any of its affiliates has discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to such assets.

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

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

(d) In return for lending securities, each Plan either

(1) receives a reasonable fee which is related to the value of the borrowed securities and the duration of the loan, or (2) has the opportunity to derive compensation through the investment of cash collateral. In the latter case, the Plan may pay a loan rebate or similar fee to the Borrower, if such fee is not greater than the Plan would pay an unrelated party in a comparable arm's length transaction with an unrelated party.

(e) Each Plan receives at least the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to

purchase additional securities that the Plan would have received (net of tax withholdings)<sup>4</sup> had it remained the record owner of such securities.

(f) If the market value of the collateral on the close of trading on a business day falls below 100 percent of the market value of the borrowed securities at the close of trading on that day, the Borrower delivers additional collateral, by the close of business on the following business day to bring the level of the collateral back to at least 100 percent of the market value of all the borrowed securities as of such preceding day. Notwithstanding the foregoing, part of the collateral may be returned to the Borrower if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100 percent of the market value of the borrowed securities.

(g) Prior to entering into a loan agreement, the Borrower furnishes to the independent fiduciary of the Plan who is making decisions on behalf of the Plan with respect to the lending of securities: (1) The most recently available audited statement of the Borrower's financial condition, (2) the most recent available unaudited statement of the Borrower's financial condition, and (3) a representation by the Borrower that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statement that has not been disclosed to the Plan fiduciary.

Such representation may be made by the Borrowers' agreeing that each loan shall constitute a representation by the Borrower that there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(h) Each Loan Agreement and any securities loan outstanding may be terminated by the applicable Plan at any time, whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within (1) the customary delivery period for such securities; (2) five business days; or (3) the time negotiated for such

delivery by the Plan and the Borrower, whichever is lesser, or, alternatively such period as permitted by Prohibited Transaction Class Exemption (PTE) 81-6 (43 FR 7527, January 23, 1981), as it may be amended or superseded.<sup>5</sup>

(i) In the event that the loan is terminated and the Borrower fails to return the borrowed securities or the equivalent thereof within the time described in paragraph (h) above, then the Plan may purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the Borrower under the Loan Agreement, and any expenses associated with the sale and/or purchase. The Borrower indemnifies the Plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date the loan is declared in default, together with expenses not covered by the collateral plus applicable interest at a reasonable rate. Notwithstanding the foregoing, the Borrower may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then-current market value of the collateral, provided that such replacement is approved by the independent plan fiduciary.

(j) Each Plan maintains the situs of any Loan Agreement in accordance with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1. However, the Borrower shall not be subject to the civil penalty, which may be assessed pursuant to section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the independent plan fiduciary fails to comply with the requirements of 29 CFR 2550.404(b)-1.

If the Borrower fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the Plan fiduciary which caused the Plan to engage in such transaction shall not be deemed to have caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the failure on the part of the Borrower to comply with the conditions of the proposed exemption.

### Section III. Conditions Applicable to Part Two of the Proposed Exemption—Exclusive Borrowing Arrangements Between Plans and the Borrower

(a) For each Plan, neither the Borrower nor any affiliate has or exercises discretionary authority or control over the Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) The Borrower is a party in interest with respect to each Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act.

(c) The Borrower directly negotiates an exclusive borrowing agreement (the Borrowing Agreement) with a Plan fiduciary which is independent of the Borrower and its affiliates.

(d) The terms of each loan of securities by a Plan to the Borrower are at least as favorable to such Plan as those of a comparable arm's length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting the Borrower the exclusive right to borrow certain securities, each Plan receives from the Borrower either (1) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (2) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (3) any combination of (1) and (2) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the applicable Plan that a percentage of the earnings on the collateral may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the applicable Plan a lending fee (the Lending Fee, together with the Shared Earnings Compensation, is referred to as the Transaction Lending Fee). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and

<sup>4</sup> The Department notes that the Applicant's representation that dividends and other distributions on foreign securities payable to a lending Plan may be subject to foreign tax withholdings and that the Borrower will always put the Plan in at least as good a position as it would have been in had it not loaned the securities.

<sup>5</sup> PTE 81-6 as amended at 52 FR 18754, May 19, 1987, provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to certain broker-dealers or banks which are parties in interest.

the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to each Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day the loaned securities are delivered to the Borrower, each Plan receives from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than SEB or any affiliate thereof, or any combination thereof, or other collateral permitted under PTE 81-6, as amended or superseded. Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of a Plan by an affiliate of the Borrower that is the trustee or custodian of such Plan.

(h) The market value (or in the case of a letter of credit, the stated amount) of the collateral initially equals at least 102 percent of the market value of the loaned securities on the close of business on the day preceding the day of the loan and, if the market value of the collateral at any time falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of a Plan may agree upon) of the market value of the loaned

securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent. The level of the collateral is monitored daily by each Plan or its designee, which may be SEB or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the applicable Borrowing Agreement. Such Borrowing Agreement shall give the applicable Plan title to the collateral until such collateral is redelivered to SEB pursuant to the terms of the Borrowing Agreement.

(i) Before entering into any Borrowing Agreement, the Borrower furnishes to the applicable Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement.

(j) Each Borrowing Agreement contains a representation by the Borrower that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(k) Each Plan receives the equivalent of all distributions made during the applicable loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)<sup>6</sup> had it remained the record owner of the securities.

(l) Each Borrowing Agreement and any outstanding securities loans with respect thereto may be terminated by either party at any time without penalty (except for, if a Plan has terminated its Borrowing Agreement, the return to the Borrower of a *pro rata* portion of the Exclusive Fee paid by the Borrower to the Plan), whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the applicable Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

(m) In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the applicable Plan has the right under the Borrowing Agreement to purchase

securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of the securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan, except to the extent that such losses or damages are caused by the Plan's own negligence.

(n) Except as otherwise provided herein, all procedures regarding the securities lending activities, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States and/or Sweden, as appropriate.

(o) Only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrower; provided, however, that—

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which

<sup>6</sup> See Footnote 2, *infra*.

entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

(p) Prior to any Plan's approval of the lending of its securities to the Borrower, a copy of this exemption, if granted (and the notice of pendency), are provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.<sup>7</sup>

(q) The independent fiduciary of each Plan receives monthly reports with respect to the securities lending transactions, including but not limited to the information set forth in the following sentence, so that an independent Plan fiduciary may monitor such transactions with the relevant Borrower. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the

security is loaned, and the number of days the security has been on loan. At the request of a Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of a Plan, the relevant Borrower will provide the Plan with daily confirmations of securities lending transactions.

#### Section IV. General Conditions

(a) In addition to the conditions set forth above in sections II and III of this proposed exemption, all loans involving the Borrower must satisfy the following supplemental requirements:

(1) The Borrower is a bank which is subject to regulation by the Swedish Financial Supervisory Authority (Finansinspektionen) (the SFSA).

(2) The Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 CFR 240.15a-6) under the Securities Exchange Act of 1934, as amended (the 1934 Act) which provides foreign broker-dealers a limited exception from United States registration requirements.

(3) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit, or other collateral permitted under PTE 81-6 (as amended or superseded).

(4) All collateral is held in the United States and the situs of the applicable Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1.

(5) Prior to entering into a transaction involving the Borrower, the Borrower must:

(i) Agree to submit to the jurisdiction of the United States;

(ii) Agree to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent);

(iii) Consent to the service of process on the Process Agent; and

(iv) Agree that enforcement by a Plan of the indemnity provided by the Borrower will occur in the United States courts.

(b) The Borrower maintains, or causes to be maintained, within the United States for a period of six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (c)(1) to determine whether the conditions of the exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of SEB and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than the Borrower shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required below by paragraph (c)(1). (c)(1) Except as provided in subparagraph (c)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (b) are unconditionally available at their customary location or examination during normal business hours by—

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

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

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

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

(2) None of the persons described above in subparagraphs (c)(1)(ii)-(c)(1)(iv) of this paragraph (c)(1) are authorized to examine the trade secrets of SEB or its affiliates or commercial or financial information which is privileged or confidential. (d) Prior to any Plan's approval of any transaction with the Borrower, the Plan is provided copies of the proposed and final exemptions covering the exemptive relief described herein.

#### Section V. Definitions

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

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. (For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, employee or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

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

<sup>7</sup> The Department notes the SEB representation that, under the proposed exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, *i.e.*, SEB will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities or the fiduciary who decides to lend securities pursuant to either a general securities lending arrangement or an exclusive borrowing arrangement. However, SEB or its affiliates may monitor the level of collateral and the value of the loaned securities.

or employee, or in which such person is a partner.

(b) For purposes of the securities lending arrangements described in Part One of this exemption, the term "Borrower" includes SEB and any other current or future non-U.S. broker-dealer or bank affiliate of SEB. For purposes of the exclusive borrowing arrangements described in Part Two of this exemption, the term "Borrower" includes SEB and any other affiliate of SEB that now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or U.S. bank.

**EFFECTIVE DATE:** This proposed exemption, if granted, will be effective as of October 23, 2002.

### Summary of Facts and Representations

1. SEB (the Applicant), one of the principal Swedish banking institutions and one of the largest banking institutions in Europe, is regulated by the Swedish Financial Supervisory Authority (Finansinspektionen) (the SFSA). As of December 31, 2001, SEB (Consolidated Balance Sheet) had approximately \$111,246,000,000 USD in assets and \$4,236,000,000 USD in stockholder's equity. SEB currently conducts its securities borrowing and lending activities principally through its head office in Stockholm. Under the European laws applicable to banks, SEB is authorized to engage in a broad range of financial services, including acting as a securities broker or dealer. With respect to the transactions described herein, SEB will not act as a lending agent.

2. The Borrower, acting as principal, actively engages in the borrowing and lending of securities. The Borrower utilizes borrowed securities either to satisfy its own trading requirements or to re-lend to other broker-dealers and entities which need a particular security for a certain period of time. The Applicant represents that in the United States, as described in the Federal Reserve Board's Regulation T, borrowed securities are often used in short sales, for non-purpose loans to exempted borrowers, or in the event of a failure to receive securities that a broker-dealer is required to deliver.

The largest holding of equities, both domestic as well as international, are to be found in the United States. Currently, SEB can only access ERISA Plan assets by borrowing through a U.S. bank and/or broker-dealer which substantially increases the cost of borrowing. By being able to borrow directly, SEB can reduce this cost. SEB's more efficient presence in the ERISA marketplace should increase the base of potential

borrowers which ERISA Plans can access, thus, also benefitting the Plans.

3. SEB represents that it is regulated and supervised by the SFSA. The SFSA supervises the worldwide business of SEB (head office and branches). In addition, in jurisdictions outside the European Economic Area, the business of SEB is subject to supervision by the local regulators. The SFSA has the power to license banks (with the exception for cases of special importance where license is granted directly by the Government) in Sweden. The SFSA also has the power to issue warnings and directives to address violations by or irregularities involving banks, to require information from a bank or its auditor regarding supervisory matters and to revoke bank licenses. SEB also states that the SFSA ensures that SEB has procedures for monitoring and controlling SEB's worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, risk management, recordkeeping, and administration and financial resources. SEB further states that it is required to provide the SFSA on a recurring basis with information regarding capital adequacy,<sup>8</sup> country risk exposure and foreign exchange exposures as well as periodic, consolidated financial reports on the financial condition of SEB and its affiliates. The SFSA continuously conducts inspections and examinations with respect to the SEB business. The SFSA will appoint one or more auditors to participate in the audit of the bank together with the auditors elected by the General Meeting of Shareholders.

Although SEB is not a broker-dealer registered with the SEC, SEB has a Swedish broker-dealer license which is included in the banking license. SEB represents that its broker-dealer activities are governed by the rules and regulations of SFSA. Further, SEB is a member of the self regulatory organization Swedish Securities Dealer's Association (SSDA) and is accordingly subject to the rules and membership requirements imposed by SSDA.

<sup>8</sup> The rules for capital adequacy are applicable to each company and on all consolidation levels within the SEB Group with a license to conduct banking, investment, leasing, mortgage, or security business. Insurance business is excluded since special laws apply to insurance activity. In addition, the capital adequacy regulation is applicable to the financial group of undertakings (i.e., most of the companies in the SEB Group which are not involved in the insurance business, and credit institutions which are consolidated in the financial group of undertakings).

4. The Applicant further represents that the Borrower is subject to the rules of SFSA relating to, among other things, minimum capitalization, reporting requirements, periodic examinations. In addition, the Applicant states that SFSA rules impose reporting requirements with respect to risk management, internal controls, and transaction reporting and record-keeping requirements. In this regard, required records must be produced at the request of SFSA at any time. The Applicant further states that the rules and regulations of SFSA are backed up by potential fines and penalties as well as rules which establish a comprehensive disciplinary system.

5. The Applicant represents that in addition to the protections afforded by the SFSA, compliance by the Borrower with the requirements of Rule 15a-6 of the 1934 Act (and the amendments and interpretations thereof) will offer further protections to the Plans.<sup>9</sup> SEC Rule 15a-6 provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor," provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Act if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association,

<sup>9</sup> According to the Applicant, section 3(a)(4)(A) of the 1934 Act defines "broker" to mean "any person engaged in the business of effecting transactions in securities for the account of others." Banks engaging in certain enumerated activities are excepted from the definition of "broker." Section 3(a)(4)(B) of the 1934 Act. Section 3(a)(5)(C) of the 1934 Act provides a similar exception for "banks" engaging in certain activities from the definition of the term "dealer." However, section 3(a)(6) of the 1934 Act defines "bank" to mean a banking institution organized under the laws of the United States or a State of the United States. Further, Rule 15(a)(6)(b)(2) provides that the term "foreign broker or dealer" means "any non-U.S. resident person \* \* \* whose securities activities, if conducted in the United States, would be described by the definition of 'broker' or 'dealer' in sections 3(a)(4) or 3(a)(5) of the [1934] Act." Therefore, the test of whether an entity is a "foreign broker" or "dealer" is based on the nature of such foreign entity's activities and, with certain exceptions, only banks that are regulated by either the United States or a State of the United States are excluded from the definition of the term "broker" or "dealer." Thus, for purposes of this exemption request, the Borrower is willing to represent that it will comply with the applicable provisions and relevant SEC interpretations and amendments of Rule 15a-6.



insurance company or registered investment advisor, or (b) the employee benefit plan has total assets in excess of \$5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term "major U.S. institutional investor" is defined as a person that is a U.S. institutional investor that has total assets in excess of \$100 million or accounts managed by an investment adviser registered under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of \$100 million.<sup>10</sup> The Applicant represents that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

6. The Applicant represents that under Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance with Rule 15a-6<sup>11</sup> must, among other things:

(a) Consent to service of process for any civil action brought by, or proceeding before, the SEC or any self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to the transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker-dealer through which the transactions with the U.S. institutional and major U.S. institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating the terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

(4) Maintain required books and records relating to the transactions, including those required by SEC Rules 17a-3 (Records to be Made by Certain Exchange Members) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

(5) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection-Reserves and Custody of Securities); and

(6) Participate in certain oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the major U.S. institutional investor), and accompany the foreign associated person on certain visits with both U.S. institutional and major U.S. institutional investors. Under certain circumstances, the foreign associated person may have direct communications and contact with the U.S. Institutional Investor. (See April 9, 1997 No-Action Letter.)

7. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee while continuing to enjoy the benefits of owning the securities (e.g., from the receipt of any interest, dividends, or other distributions due on those securities and from any appreciation in the value of the securities). The lender generally requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash or high quality liquid securities, such as U.S. Government or Federal Agency obligations or irrevocable bank letters of credit. If the Borrower deposits cash collateral, and the lender invests the collateral, then the applicable borrowing agreement may provide that the lender pay the Borrower a previously-agreed upon amount or rebate fee and keep the excess of the earnings on the collateral over the rebate fee as compensation. If the Borrower deposits government securities, the Borrower is entitled to the earnings on its deposited securities and may pay the lender a lending fee. If the Borrower deposits irrevocable bank letters of credit as collateral, the Borrower pays the lender a fee as compensation for the loan of its securities. These fees, defined below as the Transaction Lending Fee, may be

determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

#### *Securities Lending Between Plans and the Borrower*

8. SEB requests exemptive relief, effective October 23, 2002, for the lending of securities, equivalent to that provided under the terms and conditions of PTE 81-6, a class exemption permitting certain loans of securities by Plans. However, since PTE 81-6 provides an exemption only for U.S. registered broker-dealers and U.S. banks, the securities lending transactions at issue herein (with the Borrower, acting as principal, and engaging in the borrowing and lending of securities, typically foreign securities from institutions, including Plans) may fall outside the scope of relief provided by PTE 81-6.

9. The Borrower represents that it will utilize borrowed securities to either satisfy its own trading requirements or to re-lend to other affiliates and entities which need a particular security for a certain period of time. The Applicant represents that in the United States, as described in the Federal Reserve Board's Regulation T, borrowed securities are often used to meet delivery obligations in the case of short sales or the failure to receive securities that the Borrower is required to deliver, and SEB represents that foreign broker-dealers and banks are the most likely entities that seek to borrow foreign securities. Thus, the proposed exemption will increase the lending demand for such securities and provide the Plans with increased securities lending opportunities.

10. Neither the Borrower nor any of its affiliates has or shall have discretionary authority or control with respect to the investment of Plan assets involved in a transaction or render investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to such assets.

11. Each Plan will receive, from the Borrower, either by physical delivery, book entry in a securities depository located in the United States, wire transfer or similar means, by the close of business on the day the loaned securities are delivered to the Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies, irrevocable U.S. bank letters of credit issued by persons other than the Borrower (or any of its affiliates) or any combination thereof, having, as of the close of trading on the preceding business day, a market value (or, in the

<sup>10</sup> Note that the categories of entities that qualify as "major U.S. institutional investors" has been expanded by a Securities and Exchange Commission No-Action letter. See SEC No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997, expanding the definition of "Major U.S. Institutional Investor" (the April 9, 1997 No-Action Letter).

<sup>11</sup> If it is determined that applicable regulation under the 1934 Act does not require SEB or the Borrower to comply with Rule 15a-6, both entities will, nevertheless, comply with subparagraphs (a) and (b) of Representation 6.



case of letters of credit, a stated amount equal to same) equal to or not less than 100 percent of the then market value of the securities lent. (The collateral referred to in this Representation will be in U.S. dollars or dollar-denominated securities or U.S. bank irrevocable letters of credit and will be held in the United States.)

12. Each loan will be made pursuant to a written Loan Agreement which may be in the form of a master agreement covering a series of securities lending transactions. The terms of the Loan Agreement will be at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party. The Loan Agreement will also contain a requirement that the Borrower pay all transfer fees and transfer taxes relating to the securities loans.

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

14. Each Plan shall receive at least the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities that the Plan would have received (net of tax withholdings). The Department notes the Applicant's representation that dividends and other distributions on foreign securities payable to a lending Plan may be subject to foreign tax withholdings and the Borrower will always put the Plan back in at least as good a position as it would have been in had it not lent the securities and remained the record owner of such securities.

15. If the market value of the collateral as of the close of trading on a business day in a certain transaction falls below 100 percent of the market value of the borrowed securities as of the close of trading on that day, the Borrower will deliver additional collateral, by the close of business on the following business day to bring the level of the collateral back to at least 100 percent. Notwithstanding the foregoing, part of the collateral may be returned to the Borrower if the market value of the collateral exceeds 100 percent of the

market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100 percent of the market value of the borrowed securities. Matters relating to the return of the collateral, the substitution of collateral and the termination of loans, will be determined by applicable provisions of the Loan Agreement.

16. Prior to the making of any securities loan, the Borrower will furnish to the independent fiduciary for the Plan who makes decisions on behalf of the Plan with respect to lending of securities (a) the most recently available audited and unaudited statements of such entity's financial condition, and (b) a representation from the Borrower that, as of each time such entity borrows securities, there has been no material change in the financial condition of such entity since the date of the most recently furnished financial statement that has not been disclosed to the Plan.

17. The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the Borrower will deliver securities identical to the borrowed securities (or the equivalent thereof in the event of a reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the time period specified by PTE 81-6 as it may be amended from time to time.

18. In the event that a loan is terminated and the Borrower fails to return the borrowed securities, or the equivalent thereof, within the time described in Representation 18 above, the Plan may purchase securities identical to the borrowed securities, or the equivalent thereof, and may apply the collateral to the payment of the purchase price, any other obligations of the Borrower under the Loan Agreement and any expenses associated with replacing the borrowed securities. The Borrower shall indemnify the Plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date the loan is declared in default, together with expenses not covered by the collateral plus applicable interest at a reasonable rate.

Notwithstanding the foregoing, the Borrower may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the current market value of the collateral, provided that, such replacement is approved by the independent Plan fiduciary.

19. Each Plan will maintain the situs of the Loan Agreement in accordance with the indicia of ownership requirements of section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1. However, the Borrower will not be subject to the civil penalty which may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code, if the Plan fails to comply with the requirements of 29 CFR 2550.404(b)-1.21.

#### *Exclusive Borrowing Arrangements Between Plans and the Borrower*

20. The Borrower also requests an exemption for the lending of securities, under certain exclusive borrowing arrangements, by Plans with respect to which SEB or any of its affiliates is a party in interest, for example, by virtue of its providing investment management, custodial, or other services to such Plans. For each Plan, neither the Borrower nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan, nor will they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.<sup>12</sup> However, because the Borrower, by exercising its contractual rights under the proposed exclusive borrowing arrangements, will have discretion with respect to whether there is a loan of particular Plan securities to the Borrower, the lending of securities to the Borrower may be outside the scope of relief provided by PTE 81-6.

Generally, the Borrower is a party in interest with respect to Plans, if at all, solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider under section 3(14)(F), (G), (H), or (I) of the Act.

21. For each Plan, the Borrower will directly negotiate a Borrowing Agreement with a Plan fiduciary which is independent of the Borrower. Under the Borrowing Agreement, the Borrower will have exclusive access for a specified period of time to borrow certain securities of the Plan pursuant to certain conditions. The Borrowing Agreement will specify all material terms of the agreement, including the basis for compensation to the Plan under each category of securities available for loan. The Borrowing Agreement will also contain a requirement that the Borrower pay all

<sup>12</sup> Condition 1 of PTE 81-6 requires, in part, that neither a borrower nor an affiliate of the borrower may have discretionary authority or control over the investment of the applicable plan assets involved in the transaction.

transfer fees and transfer taxes relating to the securities loans. The terms of each loan of securities by a Plan to a Borrower will be at least as favorable to such Plan as those of a comparable arm's length transaction between unrelated parties, taking into account the exclusive arrangement.

22. The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

23. In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay each Plan either (a) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement), (b) a periodic payment that is equal to a percentage of the value of the total balance outstanding on the borrowed securities, or (c) any combination of (a) and (b) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the applicable Plan that a percentage of the earnings on the collateral may be retained by such Plan or such Plan may agree to pay the Borrower a rebate fee and retain the excess of the earnings on the collateral over the rebate fee paid by such Plan to the Borrower (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral will be returned to the Borrower and the Borrower may, but shall not be obligated to, agree to pay the applicable Plan a lending fee (the Lending Fee, together with the Shared Earnings Compensation, the Transaction Lending Fee). The Transaction Lending Fee, if any, may be in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to a Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an

objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

The Plan will be entitled to the equivalent of all distributions made to holders of the borrowed securities during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities that the plan would have received (net of tax withholdings in the case of foreign securities), had it remained the record owner of the securities.

24. By the close of business on or before the day the loaned securities are delivered to the Borrower, each Plan will receive from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by U.S. banks other than SEB or its affiliates, or other collateral permitted under PTE 81-6 (as amended or superseded). Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of a Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan. The market value (or in the case of a letter of credit, a stated amount) of the collateral on the close of business on the day preceding the day of the loan will be at least 102 percent of the market value of the loaned securities. The independent fiduciary of each plan or its designee, which may be SEB or any of its affiliates, will monitor the level of the collateral daily and, if the market value of the collateral on the close of a business day falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities at the close of business on such day, the Borrower will deliver additional collateral by the close of business on the following day to bring the level of the collateral back to at least 102 percent.

If the Borrower deposits cash collateral, and the Plan invests the

collateral, then all earnings on such cash collateral shall be returned to the Borrower; provided that the applicable Borrowing Agreement may provide that the Plan receive Shared Earnings Compensation, which, as discussed above, may be a percentage of the earnings on the collateral which may be retained by the Plan or the excess of the earnings on the collateral over a rebate fee paid by the Plan to the Borrower. The terms of the rebate fee for each loan will be at least as favorable to the Plan as those of comparable arm's length transactions between unrelated parties taking into account the exclusive arrangement, and will be based upon an objective methodology which takes into account several factors, including potential demand for the loaned securities, the applicable benchmark cost of fund indices (typically, the U.S. Federal Funds rate established by the Federal Reserve (the Federal Funds), the overnight REPO<sup>13</sup> rate, or the like) and anticipated investment return on overnight investments permitted by the independent fiduciary of the Plan. If the Borrower deposits non-cash collateral, such as government securities or irrevocable bank letters of credit, the Borrower is entitled to the earnings on its non-cash collateral and the Plan may receive a Lending Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

The Borrower will provide a monthly report to each such Plan showing, on a daily basis, the aggregate market value of all outstanding security loans to the Borrower and the aggregate market value of the collateral.

25. Before entering into a Borrowing Agreement, the Borrower will furnish to each Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the applicable independent fiduciary to determine whether the Plan should enter into or renew the applicable Borrowing Agreement. Further, the Borrowing Agreement will contain a representation by the Borrower that as of each time it

<sup>13</sup> An overnight REPO is an overnight repurchase agreement that is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes and bonds. The dealer or bank sells securities to an investor with a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a rate below the Federal Funds rate (the rate charged by the banks lending funds to each other).

borrowers securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

26. Prior to any Plan's approval of the lending of its securities to the Borrower, a copy of this exemption, if granted, (and the notice of pendency) is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.

27. With regard to those Plans for which SEB or any of its affiliates provides custodial, clearing and/or reporting functions relative to securities loans, SEB and a Plan fiduciary independent of SEB and its affiliates, will agree in advance and in writing to any fee that SEB or any of its affiliates is to receive for such services. Such fees, if any, would be fixed fees (e.g., SEB or any of its affiliates might negotiate to receive a fixed percentage of the value of the assets with respect to which it performs these services, or to receive a stated dollar amount) and any such fee would be in addition to any fee SEB or any of its affiliates has negotiated to receive from any such Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement for SEB or any of its affiliates to provide such functions relative to securities loans to the Borrower will be terminable by the Plan within five (5) business days of the receipt of written notice without penalty to the Plan, except for the return to the Borrower of a *pro rata* portion of the Exclusive Fee paid by the Borrower to the Plan, if the Plan has also terminated its exclusive borrowing arrangement with the Borrower.

28. Each Borrowing Agreement and any outstanding securities loans with respect thereto may be terminated by either party at any time without penalty (except for, if a Plan has terminated its Borrowing Agreement, the return to the Borrower of a *pro rata* portion of the Exclusive Fee paid by the Borrower to the Plan). Upon termination of any securities loan, the Borrower will return the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

If the Borrower fails to return the securities or the equivalent thereof within the designated time, the applicable Plan will have certain rights under the Borrowing Agreement to

realize upon the collateral. In the event that the Borrower defaults on a loan, the independent fiduciary of the Plan or its agent will have the right to liquidate the loan collateral to purchase identical securities for the Plan. If the collateral is insufficient to accomplish such purchase, the Borrower will indemnify the Plan for any shortfall in the collateral plus interest on such amount and any transaction costs incurred (including reasonable attorney's fees of the Plan for legal actions arising out of the default on the loans or failure to properly indemnify under such provisions). Alternatively, if such replacement securities cannot be obtained on the open market, the Borrower shall pay the Plan the difference in U.S. dollars between the market value of the loaned securities and the market value of the related collateral on the date of the Borrower's breach of its obligation to return the loaned securities.

29. In the event the Borrower fails to return securities in accordance with a Borrowing Agreement, the applicable Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan except to the extent that such losses or damages are caused by the Plan's own negligence.

30. Except as provided herein, all the procedures under each Borrowing Agreement will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States and Sweden, as appropriate. In addition, in order to ensure that the independent fiduciary representing a Plan has the experience, sophistication, and resources necessary to adequately review the Borrowing Agreement and the fee arrangements thereunder, only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrower; provided, however, that—

(a) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(b) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(1) Has full investment responsibility with respect to plan assets invested therein; and

(2) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

The Applicant represents that the opportunity for the Plans to enter into exclusive borrowing arrangements with the Borrower under the flexible fee

structures described herein is in the interests of the Plans because the Plans will then be able to choose among an expanded number of competing exclusive borrowers, as well as maximizing the volume of securities lent and the return on such securities.

#### *Supplemental Requirements*

31. In addition to the conditions set forth in Parts One and Two of the proposal, all loans involving the Borrower must satisfy the following supplemental requirements:

(a) The Borrower is a bank which is subject to regulation by the SFSA.

(b) The Borrower is in compliance with all applicable provisions of Rule 15a-6 under the 1934 Act which provides foreign broker-dealers a limited exception from United States registration requirements.

(c) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit, or other collateral permitted under PTE 81-6 (as amended or superseded).

(d) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1.

(e) Prior to entering into a transaction involving the Borrower, the Borrower must:

(1) Agree to submit to the jurisdiction of the United States;

(2) Agree to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent);

(3) Consent to the service of process on the Process Agent; and

(4) Agree that enforcement by a Plan of the indemnity provided by SEB or the Borrower will occur in the United States courts.

32. The Applicant represents that only English or New York law securities lending agreements will be used. Such agreements provide for submission to English or New York courts. As a result, the Applicant expects judgments to be obtained under English law or New York law, depending on the form of securities lending agreement used.

According to the Applicant, if collateral provided by SEB in connection with the relevant securities lending transaction is located in the United States, the Plan can exercise its set-off rights under a securities lending agreement governed by English law, or it may foreclose on the collateral and apply the proceeds of such foreclosure

to satisfy SEB's obligations under a securities lending agreement governed by New York law. All collateral pertaining to this exemption will be held in the United States.

If for any reason there is no collateral available in connection with the relevant securities lending transaction, the Applicant states that the Plan may seek to enforce a judgment from a New York court or English court against the assets located in the United States of SEB's New York branch. A judgment from a New York court can be enforced in New York, or any sister state pursuant to the "Full Faith and Credit" clause of the U.S. Constitution and the Implementing Act of 1790. Almost all states have adopted the Uniform Enforcement of Foreign Judgments Act, which provides for either filing or registration of sister state judgments.

The Applicant represents that a foreign money judgment from an English court can be enforced in any state where the property of SEB or SEB's New York branch may be attached as a basis of jurisdiction. Foreign judgments are recognized and enforced pursuant to the relevant state law which will either be based on common law or the Uniform Foreign Money-Judgments Recognition Act, which provides that foreign country money judgments that are final, conclusive, and enforceable where rendered will be enforceable in the same manner as a judgment of a court of a sister state which is entitled to "Full Faith and Credit." The State of New York, as well as 30 other states, has adopted the Uniform Foreign Money-Judgments Recognition Act. Thus, the Applicant concludes that the Plan can bring an enforcement action, under an expedited procedure, on a foreign money judgment in New York to attach the assets of SEB's New York branch located in New York.

33. In addition to the protections cited above, the Borrower will maintain, or cause to be maintained, within the United States for a period of six years from the date of a transaction, such records as are necessary to enable the Department and others to determine whether the conditions of the exemption have been met.

34. In summary, the Applicant represents that the transactions have satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Borrower has negotiated or will directly negotiate a Borrowing Agreement with an independent fiduciary of each Plan;

(b) The Plans have been permitted or will be permitted to lend to the Borrower, a major securities borrower

who will be added to an expanded list of competing exclusive borrowers, enabling the Plans to earn additional income from the loaned securities on a secured basis, while continuing to enjoy the benefits of owning the securities;

(c) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower has paid or will pay each Plan the Exclusive Fee, which as discussed above may be either (1) a flat fee (which may be equal to a percentage of the value of the total securities subject to the applicable Borrowing Agreement), (2) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (3) any combination of (1) and (2). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral have been returned or will be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the applicable Plan that such Plan receive Shared Earnings Compensation, which as discussed above may be a percentage of the earnings on the collateral and may be retained by such Plan or the excess of the earnings on the collateral over the rebate fee paid by such Plan to the Borrower. The Shared Earnings Compensation, if any, shall be in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Shared Earnings Compensation may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the applicable Borrowing Agreement;

(d) Any change in the Exclusive Fee or Shared Earnings Compensation that the Borrower pays to the Plan with respect to any securities loan has required or will require the prior written consent of the independent fiduciary, except that consent will be presumed where the Exclusive Fee or Shared Earnings Compensation changes pursuant to an objective formula specified in the Borrowing Agreement and the independent fiduciary is notified at least 24 hours in advance of such change and does not object in writing thereto, prior to the effective time of such change;

(e) The Borrower has provided or will provide sufficient information concerning its financial condition to a Plan before a Plan lends any securities to the Borrower;

(f) The collateral posted with respect to each loan of securities to the Borrower initially has been or will be at least 102 percent of the market value of

the loaned securities and will be monitored daily by each independent fiduciary;

(g) Each Borrowing Agreement and any outstanding securities loans with respect thereto has been terminated or will be terminated by either party at any time without penalty, except for the return to the Borrower of a *pro rata* portion of the Exclusive Fee paid by the Borrower to the applicable Plan, and the Borrower has returned or will return any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to such Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities;

(h) Neither the Borrower nor any of its affiliates has or will have discretionary authority or control over the Plan's investment in the securities available for loan;

(i) The minimum Plan size requirement has ensured or will ensure that the Plans have the resources necessary to adequately review and negotiate all aspects of the exclusive borrowing arrangements; and

(j) At a minimum, all the procedures have conformed or will conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as applicable securities laws of the United States and Sweden, as appropriate.

#### Notice to Interested Persons

The Applicant represents that because those potentially interested Plans cannot all be identified, the only practical means of notifying such Plans of this proposed exemption is by publication in the **Federal Register**. Therefore, comments must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Blessed ChukSORJI of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

#### Arizona Machinery Group, Inc. (AMG) Located in Avondale, Arizona

[Application No. D-11142]

#### 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).

#### Section I. Transactions Covered

If the exemption is granted, the restrictions of sections 406(a), (b)(1) and (b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (a) The acquisition by the Arizona Machinery Group Employees' Profit Sharing Retirement Plan (the Plan) of customer notes acquired from the Plan sponsor, AMG, or from any successor employer which sponsors the Plan at the time of the acquisition of such customer note, or from any other employer which at the time of the acquisition of such customer note has adopted the Plan (including employers which adopt the Plan subsequent to the proposed exemption being granted) and which generates customer notes as defined herein in section III (B), or from any affiliate of any such employer, (b) the Plan's holding of the customer notes, if the notes acquired and held by the Plan are guaranteed by the respective employer or affiliate, which accepted and held the customer notes prior to their acquisition by the Plan, as well as by AMG (when the customer note was accepted and held by an employer other than AMG); and (c) the repurchase of customer notes from the Plan by the employer or affiliate which initially transferred those notes to the Plan; provided that, with respect to each such transaction, the conditions set forth below in section II are met.

#### Section II. Conditions

(a) The transaction is on terms that are at least as favorable to the Plan as an arm's-length transaction with an unrelated party.

(b) Prior to the consummation of a transaction described in section I of this proposed exemption, the transaction is approved on behalf of the Plan by a qualified fiduciary who is independent of any of the sponsoring or adopting employers or affiliates of the employer(s) (Independent Fiduciary), upon a determination made by such Independent Fiduciary that the other conditions of this exemption will be satisfied. The Independent Fiduciary shall acknowledge his or her plan fiduciary status under the Act in writing with respect to the transactions. For purposes of this paragraph, a person is independent of an employer even though he or she was selected by AMG or an adopting employer (or by a person with an interest in such employer) if he or she has no other interest in the transaction for which an exemption is

sought that might affect his or her best judgment as a fiduciary under the Act.

(c) The Plan's continuing rights under the terms and conditions of the acquired customer notes, and under this proposed exemption, shall be monitored and enforced on behalf of the Plan by the same or another Independent Fiduciary who is independent of any of the sponsoring or adopting employers and who has acknowledged his or her fiduciary status and liability as described in paragraph (B) of this section. The Independent Fiduciary shall be responsible for taking all appropriate actions necessary to protect the Plan's rights with regard to the safety and collection of the notes purchased by the Plan. These actions shall include, but not be limited to, ascertaining that payments are received timely, diligently pursuing the receipt of delinquent payments and enforcing the employer's or affiliates' guarantees to repurchase delinquent notes, with accrued interest, as described in paragraph (e) of this section.

(d) The acquisition of a customer note from AMG, an adopting employer, or an affiliate, shall not cause the Plan to hold immediately following the acquisition: (i) More than twenty-five percent (25%), in the aggregate, of the current value (as defined in section 3(26) of the Act) of Plan assets in customer notes of AMG, adopting employers or affiliates, or (ii) more than five percent (5%) of the current value of Plan assets in the notes of any one customer who is the obligor under such notes.

(e) An employer or affiliate from which the Plan acquires a customer note, as well as AMG (when the customer note was acquired from an employer other than AMG), guarantees in writing the immediate repayment of the outstanding balance of the notes and accrued interest in the event that the note is more than 60 days in arrears or if other events occur that, in the opinion of the Independent Fiduciary referred to in paragraph (b) and (c) of section II, impair the safety of the note as a Plan investment. The Independent Fiduciary may, at his or her discretion, grant an additional 30-day extension before repurchase of the note by an employer or affiliate is necessary upon a petition by the employer or affiliate, if the fiduciary determines, after consultation with the employer or affiliate, that such an extension is in the best interests of the participants and beneficiaries of the Plan. The other events (of impairment) referred to above include, but are not limited to, the following:

(1) The obligor on the note fails to comply with any terms or conditions of the note;

(2) The obligor becomes insolvent, commits an act of bankruptcy, makes an assignment for the benefit of creditors or a liquidating agent, offers a composition or extension to creditors or makes a bulk sale;

(3) Any proceeding, suit or action at law, in equity, or under any of the provisions of Title 11 of the United States Bankruptcy Code [11 U.S.C. 101 *et seq.*] or amendments thereto for reorganization, composition, extension, arrangements, receivership, liquidation or dissolution is begun by or against the obligor;

(4) A receiver of any property of the obligor is appointed under any jurisdiction at law or in equity; or

(5) The obligor fails to take proper care of or abandons the property being financed by the note.

(f) The Plan receives adequate security for the note. For purposes of this proposed exemption, the term "adequate security" means that the note is secured by a perfected security interest in the property purchased by the obligor on the note so that if the security is foreclosed upon, or otherwise disposed of, in default of repayment of the loan, the value and liquidity of the security is such that it may reasonably be anticipated that loss of principal or interest will not result. In no event shall "adequate security" mean an interest in intangible personal property, such as, but not limited to, accounts, contract rights, documents, instruments, chattel paper, and general intangibles.

(g) Insurance against loss or damage to the collateral from fire or other hazards will be procured and maintained by the obligor until the note is repaid or repurchased by the employer or affiliate from which the Plan originally acquired the note, and the proceeds from such insurance will be assigned to the Plan.

(h) Repayment must be provided for in the following manner:

(1) Where the note is secured by heavy equipment, the term of the note shall in no event exceed 60 months. For purposes of this proposed exemption, heavy equipment shall include machinery sold by equipment distributors such as, but not limited to, earth moving, material handling, pipe laying, power generation, and construction machinery manufactured according to standard specifications, but shall not include such equipment which has been specifically designed and manufactured to a user's specifications and which cannot reasonably be resold in the ordinary course of the equipment distributor's business;

(2) Where the note is secured by passenger automobiles and light-duty highway motor vehicles, the term of the

note shall in no event exceed 48 months. For purposes of this proposed exemption, passenger automobiles and light-duty highway motor vehicles are defined as vehicles which have a gross weight of 10,000 pounds or less, are propelled by means of their own motor and are a type used for highway transportation; and

(3) Where the note is secured by tangible personal property, other than heavy equipment or motor vehicles described in paragraph (h)(1) and (2) of this section, the term of the note shall in no event exceed 36 months.

(i) All records, information and data required to be maintained which relate to Plan investments in customer notes covered by this proposed exemption shall be unconditionally available at the customary location for examination during normal business hours by:

(1) The Department of Labor,

(2) The Internal Revenue Service,

(3) Plan participants and beneficiaries, or

(4) Any duly authorized employee or representative of a person described in subparagraph (1) through (3) above.

### Section III. Definitions

For purposes of this proposed exemption, the following definitions shall apply:

(a) The terms, "affiliate" or "affiliates," mean, with respect to an employer of employees covered by the Plan, any corporation that is, at the time the Plan acquires a customer note, a member of a controlled group of corporations (as defined in section 407(d)(7) of the Act and section 1563(a) of the Code), along with AMG and any other adopting employer.

(b) The term "customer note," means a two-party instrument, executed along with a security agreement for tangible personal property, which is accepted and held in connection with, and in the normal course of, an employer's (or affiliates's) primary business activity as a seller of such property. A two-party instrument is a promissory instrument used in connection with an extension of credit in which one party (the maker) promises to pay a second party (the payee) a sum of money.

(c) The term "Independent Fiduciary" means a person or entity which is qualified to serve in that capacity (*i.e.*, knowledgeable as to the duties and responsibilities as a fiduciary under the Act and knowledgeable as to the subject transaction) and which is independent of the party in interest engaging in the transaction and its affiliates.

(d) The terms "employer" or "adopting employer" mean those entities which currently sponsor, or in

the future will sponsor, the Plan and who have, or will have, employees that are participants in the Plan, and are considered an "employer" as that term is defined in section 3(5) of the Act.

### Summary of Facts and Representations

1. AMG is an Arizona corporation that deals in and services farming equipment and machinery. AMG sponsors the Arizona Machinery Group Employee's Profit Sharing Retirement Plan (*i.e.*, the Plan), which is a multiple employer plan with several adopting companies. Although all the adopting employers are related, only two employers (AMG and Arizona Machinery, L.L.C.) are members of a "controlled group" of companies pursuant to the applicable provisions of the Code.<sup>14</sup>

2. The Plan is a defined contribution profit sharing plan that was established in 1969. The trustee of the Plan, Mr. Roy Miller (the Trustee), is an Independent Fiduciary who will also be responsible for overseeing the proposed consolidated customer notes fund. The Plan provides pension benefits to approximately 161 active participants and 41 terminated vested participants. For the year ending December 31, 2001, net assets for the Plan totaled approximately \$6,265,256. Effective as of January 1, 1993, the Plan established the AMCO Customer Notes Fund, which later became the AMG Customer Notes Fund (the AMG Notes Fund).<sup>15</sup> Currently, the AMG Notes Fund invests exclusively in customer notes purchased from AMG. As of December 31, 2001, the Plan had approximately twenty-nine percent (29%) of the fair market value of its total assets invested in the AMG Notes Fund.

3. The Plan provides for individual participant accounts and permits participants (or beneficiaries, where applicable) to exercise investment control over the assets in their

<sup>14</sup> As of the date of this proposed exemption, five related companies have adopted the Plan. The applicant states that the requisite level of common ownership does not exist among the remaining adopting employers for them to constitute a "controlled group", as that term is defined under section 1563(a) of the Code. In this regard, the Department notes that section 407(d)(7) of the Act states that a corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in 1563(a) of the Code, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe.

<sup>15</sup> Effective April 1, 2002, Arizona Machinery Company, Inc. changed its name to "Arizona Machinery Group, Inc.," and the name of the Plan was recently amended to reflect the new name of the Plan sponsor, and to reflect the new Plan name.

accounts.<sup>16</sup> The AMG Notes Fund is invested in customer notes relating to farming equipment and machinery that is sold by AMG to customers, who are persons or entities unrelated to AMG, in the ordinary course of its business as a dealer in such equipment and machinery.<sup>17</sup> The applicant represents that customers often purchase such items from AMG by giving AMG a note (*i.e.*, a "customer note" as defined herein). The applicant also represents that for several years the Plan has offered the AMG Notes Fund as one of several investment options available to participants who are employed by AMG. The other investment options available under the Plan consist of stock and bond mutual funds, a money market fund, and a real estate fund.

4. According to the applicant, the current operation of the AMG Notes

<sup>16</sup> The applicant represents that the Plan is a 404(c) plan, pursuant to the applicable provisions of the Act. Section 404(c) of the Act provides that if a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his or her account and that participant or beneficiary in fact exercises control over assets in his or her account, then the participant or beneficiary shall not be deemed a fiduciary by reason of his or her exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control.

The Department is providing no opinion in this proposed exemption as to whether the Plan would be considered an "ERISA section 404(c) plan" pursuant to section 404(c) of the Act and the regulations thereunder (*see* 29 CFR 2550.404c-1).

The Department notes further that if a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his or her individual account, in the manner described in the regulations thereunder (*see* 29 CFR 2550.404c-1(c)), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of Part 4 of Title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control. However, the regulations specify, in pertinent part, that this provision does not apply with respect to any instruction which, if implemented, would result in a direct or indirect sale, exchange, or lease of property between a plan sponsor or any affiliate of the sponsor and the plan except for the acquisition or disposition of any interest in a fund, subfund or portfolio managed by a plan sponsor or an affiliate of the sponsor, or the purchase and sale of any "qualifying employer security" (as defined in section 407(d)(5) of the Act) which meets the conditions of 408(e) of the Act and conditions specified further in such regulations (*see* 29 CFR 2550.404c-1(d)(2)(ii)(E)(4)).

<sup>17</sup> For purposes of the proposed exemption, the term "customer note" has the same meaning as set forth in Prohibited Transaction Exemption (PTE) 85-68, 50 FR 13293 (April 3, 1985). Section I of PTE 85-68 provides that a "customer note" is a two-party instrument, executed along with a security agreement for tangible personal property, which is accepted in connection with, and in the normal course of, an employer's primary business activity as a seller of such property. A two-party instrument is a promissory instrument used in connection with the extension of credit in which one party (the maker) promises to pay a second party (the payee) a sum of money.

Fund complies in all respects with the requirements of PTE 85-68.<sup>18</sup> The applicant represents that the AMG Notes Fund invests almost exclusively in customer notes purchased from AMG in accordance with PTE 85-68. In this regard, the applicant states that to the extent the amount directed into the AMG Notes Fund by the participants exceeds the amount of available customer notes, the Plan will invest the money in short-term interest bearing investments.

5. The applicant represents that the Independent Fiduciary for the Plan, Roy Miller (Mr. Miller), monitors the total amount invested in the AMG Notes Fund by each participant to ensure compliance with PTE 85-68. Mr. Miller is an experienced trust officer, having served for a number of years in pension and profit sharing trust management and administration with institutional trust departments of major banks, prior to being retained as a full-time trustee and independent fiduciary for the Plan pursuant to a federal court order and settlement involving transactions unrelated to the Plan's acquisition and holding of customer notes. Mr. Miller has served as the Plan's trustee and Independent Fiduciary, for purposes of acquiring and monitoring customer notes pursuant to PTE 85-68, since 1992.<sup>19</sup> The applicant states that Mr. Miller, as the Independent Fiduciary, continually monitors the customer notes held in the AMG Notes Fund to ensure that the notes are being repaid in accordance with PTE 85-68. The Independent Fiduciary performs a semi-annual review of all the customer notes including verification of the security for each note and compliance with the provisions of PTE 85-68. Additionally, the Independent Fiduciary must take appropriate action in order to safeguard Plan participants and beneficiaries in the event of a default of a customer note in the AMG Notes Fund. The applicant states that since the inception of the

<sup>18</sup> PTE 85-68 permits a plan to acquire customer notes accepted by an employer of employees covered by the plan in the ordinary course of the employer's primary business activity. Among the conditions contained therein is a requirement that a plan may not invest more than 50% of its assets in customer notes and not over 10% of its assets in the notes of a single customer. In addition, there are maximum terms ranging up to five years that are imposed on the notes, depending on the type of property being financed.

<sup>19</sup> With respect to Mr. Miller's current role as the Plan's Independent Fiduciary, the applicant represents that if it becomes necessary in the future to appoint a successor Independent Fiduciary to replace Mr. Miller (the Successor), the applicant will notify the Department at least sixty (60) days in advance of the appointment of the Successor. The applicant states that the Successor will have the responsibilities, experience and independence similar to that of Mr. Miller.

AMG Notes Fund in January 1993, there have been approximately 170 customer notes held by the Plan. None of these notes has incurred a default. However, the applicant states that two of the notes had become sufficiently delinquent so that AMG had to repurchase the notes from the Plan. With respect to these notes, AMG never had to make any payments on its guarantee to the Plan.

6. AMG and the Independent Fiduciary state that the AMG Notes Fund is a popular investment choice with AMG's employees that are participants in the Plan. As of December 31, 2001, approximately 29% of the Plan's total assets, or approximately \$1,800,000, was invested in the AMG Notes Fund. The applicant states that Plan participant demand for customer notes is significantly higher than AMG's current supply of good quality notes. If the proposed exemption is granted, AMG, as Plan sponsor, will establish a new consolidated customer notes fund (the Consolidated Notes Fund) that would be available to all adopting employers of the Plan and their corporate affiliates. The applicant represents that the Consolidated Notes Fund would be preferable to additional individual customer notes funds for the Plan. In this regard, the Consolidated Notes Fund would be less complicated to administer, would reduce the Plan's overall administrative expenses, and would allow better geographic diversification for the notes *vis a vis* the underlying investments (*i.e.*, notes of various customers in different local economic regions).<sup>20</sup> Thus, the Consolidated Notes Fund would enhance the security of the Plan participants' overall investments in customer notes.

7. The applicant represents that each transaction will be on terms that are at least as favorable to the Plan as an arm's-length transaction with an unrelated party.

Prior to the consummation of any transaction described herein, the transaction will be approved on behalf of the Plan by an Independent Fiduciary. Such fiduciary will be independent of any of the sponsoring or

<sup>20</sup> With respect to the appropriate Plan fiduciary's determination to offer a customer notes fund (*i.e.*, the Consolidated Notes Fund) as an investment choice for Plan participants, the Department notes that such decision would be subject to the fiduciary responsibility provisions of Part 4 of Title I of the Act including, among other things, section 404(a)(1). In addition, once a customer notes fund is selected as an investment option for the Plan's participants, the responsible fiduciary's duties would include prudently selecting the customer notes to be included in the Consolidated Notes Fund as well as taking appropriate actions to protect the Plan's interest in connection with delinquent customer notes.



adopting employers, upon a determination made by the fiduciary that the other conditions of this exemption, if granted, will be satisfied. The Independent Fiduciary will acknowledge, in writing, his or her plan fiduciary status under the Act for each transaction. A person will be independent of an employer, even though he or she was selected by an adopting employer (or by a person with an interest in such employer), if he or she has no other interest in the transaction for which an exemption is sought that might affect his or her best judgment as a fiduciary under the Act.

8. The Plan's continuing rights under the terms and conditions of the acquired customer notes, and under this proposed exemption, will be monitored and enforced on behalf of the Plan by the same or another Independent Fiduciary who is independent of any of the sponsoring or adopting employers and who has acknowledged his or her fiduciary status and liability as described herein. The Independent Fiduciary will be responsible for taking all appropriate actions necessary to protect the Plan's rights with regard to the safety and collection of the notes purchased by the Plan. These actions will include: (i) Ascertaining that payments are received timely; (ii) diligently pursuing the receipt of delinquent payments; and (iii) enforcing the employer's or affiliates' guarantees to repurchase delinquent notes, with accrued interest.

9. The acquisition of a customer note from a Plan sponsor, an adopting employer, or an affiliate, will not cause the Plan to hold, immediately following the acquisition, more than: (i) twenty-five percent (25%), in the aggregate, of the current value of the Plan's assets in customer notes of such Plan sponsor, adopting employers or affiliates, or (ii) five percent (5%) of the current value of the Plan's assets in the notes of any one customer who is the obligor under such notes.

The employer or affiliate from which the Plan acquires a customer note, as well as AMG (when the customer note was accepted and held by an employer other than AMG), will guarantee in writing the immediate repayment of the outstanding balance of the notes and accrued interest in the event that the note is more than 60 days in arrears or if other events occur that, in the opinion of the Independent Fiduciary, will impair the safety of the note as a Plan investment. The Independent Fiduciary may, at his or her discretion, grant an additional 30-day extension before repurchase of the note by an employer or affiliate is necessary upon a petition

by the employer or affiliate, if the fiduciary determines, after consultation with the employer or affiliate, that such an extension is in the best interests of the participants and beneficiaries of the Plan. Other events of impairment will include:

(a) The obligor on the note fails to comply with any terms or conditions of the note;

(b) The obligor becomes insolvent, commits an act of bankruptcy, makes an assignment for the benefit of creditors or a liquidating agent, offers a composition or extension to creditors or makes a bulk sale;

(c) Any proceeding, suit or action at law, in equity, or under any of the provisions of the Bankruptcy Code, or amendments thereto, for reorganization, composition, extension, arrangements, receivership, liquidation or dissolution is begun by or against the obligor;

(d) A receiver of any property of the obligor is appointed under any jurisdiction at law or in equity; or

(e) The obligor fails to take proper care of or abandons the property being financed by the note.

The Plan will receive adequate security for each note. In this regard, the term "adequate security" will mean that each note will be secured by a perfected security interest in the property purchased by the obligor on the note so that if the security is foreclosed upon, or otherwise disposed of, in default of repayment of the loan, the value and liquidity of the security will be such that it may reasonably be anticipated that loss of principal or interest will not result. However, in no event will the term "adequate security" mean an interest in intangible personal property, such as accounts, contract rights, documents, instruments, chattel paper, and general intangibles.

Insurance against loss or damage to the collateral from fire or other hazards will be procured and maintained by the obligor until the note is repaid or repurchased by the employer or affiliate which originally sold the note to the Plan, and the proceeds from such insurance will be assigned to the Plan.

Repayment will be provided for in the following manner:

(a) Where the note is secured by heavy equipment, the term of the note will not exceed 60 months. For purposes of this proposed exemption, heavy equipment will include machinery sold by equipment distributors such as earth moving, material handling, pipe laying, power generation, and construction machinery manufactured according to standard specifications. However, heavy equipment will not include any

equipment which has been specifically designed and manufactured to a user's specifications and which cannot reasonably be resold in the ordinary course of the equipment distributor's business;

(b) Where the note is secured by passenger automobiles and light-duty highway motor vehicles, the term of the note will not exceed 48 months. For purposes of this proposed exemption, passenger automobiles and light-duty highway motor vehicles are defined as vehicles which have a gross weight of 10,000 pounds or less, are propelled by means of their own motor and are a type used for highway transportation; and

(c) Where the note is secured by tangible personal property, other than heavy equipment or motor vehicles as described herein, the term of the note will not exceed 36 months.

10. In summary, the applicant represents that the proposed exemption will satisfy the statutory criteria under section 408(a) of the Act for the following reasons:

(a) Each transaction will be on terms that are at least as favorable to the Plan as an arm's-length transaction with an unrelated party;

(b) Prior to the consummation of any transaction described herein, the transaction will be approved on behalf of the Plan by an Independent Fiduciary, upon a determination made by such Independent Fiduciary that all of the conditions of this proposed exemption will be satisfied. The Independent Fiduciary will acknowledge, in writing, his or her fiduciary status for the Plan under the Act with respect to each transaction;

(c) The Plan's continuing rights under the terms and conditions of the acquired customer notes, and under this proposed exemption, will be monitored and enforced on behalf of the Plan by an Independent Fiduciary, as described herein;

(d) The acquisition of a customer note from either AMG, an adopting employer, or an affiliate, will not cause the Plan to hold, immediately following the acquisition, more than: (i) twenty-five percent (25%), in the aggregate, of the current value of the Plan's assets in customer notes of AMG, adopting employers or affiliates, or (ii) five percent (5%) of the current value of the Plan's assets in the notes of any one customer who is the obligor under such notes;

(e) The employer or affiliate from which the Plan acquires a customer note, as well as AMG, will guarantee in writing the immediate repayment of the outstanding balance of the notes, and accrued interest thereon, in the event

that the note is more than 60 days in arrears or if other events occur that, in the opinion of the Independent Fiduciary, will impair the safety of the note as a Plan investment; and

(f) The Plan will receive adequate security for each note. Additionally, insurance against loss or damage from fire or other hazards to the collateral underlying each note will be procured and maintained by the obligor until the note is repaid or repurchased by the employer or affiliate which originally sold the note to the Plan, and the proceeds from such insurance will be assigned to the Plan.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brian J. Buyniski of the Department, telephone (202) 693-8545. (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 30th day of April, 2003.

**Ivan Strasfeld,**

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

[FR Doc. 03-11012 Filed 5-2-03; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Public Meeting of the Advisory Committee on Apprenticeship (ACA)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to section 10 of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. APP. 1), notice is hereby given of a meeting of the Advisory Committee on Apprenticeship (ACA).

**Time and Date:** The meeting will begin at 8:30 a.m. on Wednesday, May 21, 2003, and continue until approximately 3 p.m. The meeting will reconvene at 9 a.m. on Thursday, May 22, 2003, and continue until approximately 5 p.m.

**Place:** Loews L'Enfant Plaza Hotel, Meeting Room Monet 3 & 4, 480 L'Enfant Plaza, SW., Washington, DC 20024.

The agenda is subject to change due to time constraints and priority items which may come before the Committee between the time of this publication and the scheduled date of the ACA meeting.

**FOR FURTHER INFORMATION CONTACT:** Mr. Anthony Swoope, Administrator, Office of Apprenticeship Training, Employer and Labor Services, Employment and Training Administration, U.S. Department of Labor, Room N-4671, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693-2796, (this is not a toll-free number).

**Matters to Be Considered:** The agenda will focus on the following topics:

- (1) Reestablishment of the Advisory Committee on Apprenticeship;
- (2) Advisory Committee Procedures/Ethics;
- (3) Preparation of the American Workforce for sustained employment and training programs; and

(4) Implementation Plan for Advancing Apprenticeship.

**Status:** Members of the public are invited to attend the proceedings. Individuals with disabilities should contact Marion Winters at (202) 693-3786 no later than May 13, 2003, if special accommodations are needed.

Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending them to Mr. Anthony Swoope, Administrator, Office of Apprenticeship Training, Employer and Labor Services, Employment and Training Administration, U.S. Department of Labor, Room N-4671, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions should be sent by May 8, 2003, to be included in the record for the meeting.

Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. Anthony Swoope, by May 8, 2003. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Signed at Washington, DC, this 29th day of April, 2003.

**Emily Stover DeRocco,**

*Assistant Secretary for Employment and Training Administration.*

[FR Doc. 03-10968 Filed 5-2-03; 8:45 am]

**BILLING CODE 4510-30-P**

## THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Proposed Collection, Comment Request, Study of User Needs; Assessment in Digitization

**AGENCY:** Institute of Museum and Library Service, National Foundation for the Arts and the Humanities

**ACTION:** Notice.

**SUMMARY:** The Institute of Museum and Library Services as part of its continuing effort to reduce paperwork and respondent burdens, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3508(2)(A)] This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection