

(60 FR 12980, 3/9/95). This notice lists nine (9) programs and procedures (collectively, programs), eight of which (called supplemental programs) an NRTL may use to rely on other parties to perform product testing and evaluation activities. An NRTL's initial recognition will always include the first or basic program, which requires that all of these activities be performed in-house by the NRTL that will certify the product. OSHA previously granted FMRC recognition to use these programs, which currently are listed in OSHA's informational web page on the FMRC recognition.

*Program 2:* Acceptance of testing data from independent organizations, other than NRTLs.

*Program 3:* Acceptance of product evaluations from independent organizations, other than NRTLs.

*Program 4:* Acceptance of witnessed testing data.

*Program 5:* Acceptance of testing data from non-independent organizations.

*Program 6:* Acceptance of evaluation data from non-independent organizations (requiring NRTL review prior to marketing).

*Program 7:* Acceptance of continued certification following minor modifications by the client.

*Program 8:* Acceptance of product evaluations from organizations that function as part of the International Electrotechnical Commission Certification Body (IEC-CB) Scheme.

*Program 9:* Acceptance of services other than testing or evaluation performed by subcontractors or agents.

OSHA developed the program descriptions to limit how an NRTL may perform certain aspects of its work and to accept the activities covered under a program only when the NRTL meets certain criteria. In this sense, they are special conditions that the Agency places on an NRTL's recognition. OSHA does not consider these programs in determining whether an NRTL meets the requirements for recognition under 29 CFR 1910.7. However, OSHA does treat these programs as one of the three elements that defines an NRTL's scope of recognition.

#### **Preliminary Finding on the Application**

FMRC has submitted an acceptable request for renewal of its recognition as an NRTL. While processing this request, OSHA performed an on-site review of FMRC's NRTL testing facilities. FMRC has addressed any discrepancies noted by the assessor following the on-site evaluation, and the assessor has recommended renewal of FMRC's recognition (see Exhibit 12).

Following a review of the application file, the assessor's recommendation, and other pertinent documents, the NRTL Program staff has concluded that OSHA can grant to FMRC the renewal of its recognition as an NRTL to use the facilities, test standards, and programs listed above. The staff, therefore, recommended to the Assistant Secretary that the application be preliminarily approved.

Based upon the recommendation of the staff, the Agency has made a preliminary finding that the Factory Mutual Research Corporation can meet the requirements, as prescribed by 29 CFR 1910.7, for the renewal of its recognition. This preliminary finding does not constitute an interim or temporary approval of the application.

OSHA welcomes public comments, in sufficient detail, as to whether FMRC has met the requirements of 29 CFR 1910.7 for renewal of its recognition as a Nationally Recognized Testing Laboratory. Your comment should consist of pertinent written documents and exhibits. To consider it, OSHA must receive the comment at the address provided above (see **ADDRESS**) no later than the last date for comments (see **DATES** above). Should you need more time to comment, OSHA must receive your written request for extension at the address provided above (also see **ADDRESS**) no later than the last date for comments (also see **DATES** above). You must include your reason(s) for any request for extension. OSHA will limit an extension to 15 days unless the requester justifies a longer period. We may deny a request for extension if it is frivolous or otherwise unwarranted. You may obtain or review copies of FMRC's requests, the memo on the recommendation, and all submitted comments, as received, by contacting the Docket Office, Room N2625, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. You should refer to Docket No. NRTL3-93, the permanent record of public information on FMRC's recognition.

The NRTL Program staff will review all timely comments and, after resolution of issues raised by these comments, will recommend whether to grant FMRC's application for renewal of recognition. The Agency will make the final decision on granting the renewal and, in making this decision, may undertake other proceedings that are prescribed in Appendix A to 29 CFR Section 1910.7. OSHA will publish a public notice of this final decision in the **Federal Register**.

Signed at Washington, DC this 26th day of April 2001.

**R. Davis Layne,**

*Acting Assistant Secretary.*

[FR Doc. 01-11245 Filed 5-3-01; 8:45 am]

BILLING CODE 4510-26-P

## **DEPARTMENT OF LABOR**

### **Pension and Welfare Benefits Administration**

**[Prohibited Transaction Exemption 2001-16; Exemption Application No. D-10584, et al.]**

**Grant of Individual Exemptions; New York Life Insurance Company (NYLIC) et al.**

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

**ACTION:** Grant of individual exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

## Statutory Findings

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

(a) The exemptions are administratively feasible;

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

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

## New York Life Insurance Company (NYLIC) Located In New York, NY

[Prohibited Transaction Exemption 2001-16  
Exemption Application No.: D-10584]

## Exemption

### I. Transactions

The restrictions of section 406(a)(1)(A) through (D) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code shall not apply to the following transactions, if the conditions set forth in Section II and Section III, below, are satisfied:

(a) The receipt, directly or indirectly, by a sales agent (Sales Agent or Sales Agents), as defined in Section IV(l) below, of a sales commission from NYLIC in connection with the purchase, with plan assets, of an insurance contract (the Insurance Contract or Insurance Contracts), as defined in Section IV(h) below;

(b) The receipt of a sales commission by NYLIC, as principal underwriter for a mutual fund registered under the Investment Company Act of 1940, in connection with the purchase, with plan assets, of securities issued by such mutual fund (the NYLife Fund or NYLife Funds), as defined in Section IV(c) below;

(c) The effecting by NYLIC, as principal underwriter, of a transaction for the purchase, with plan assets, of securities issued by a NYLife Fund, and the effecting by a Sales Agent of a transaction for the purchase, with plan assets, of an Insurance Contract; and

(d) The purchase, with plan assets, of an Insurance Contract from NYLIC.

### II. General Conditions

(a) The transactions are effected by NYLIC in the ordinary course of NYLIC's business as an insurance company, or as a principal underwriter to an NYLife Fund, or in the case of a Sales Agent, in the ordinary course of

the Sales Agent's business as a Sales Agent.

(b) The transactions are on terms at least as favorable to the plan as an arm's length transaction with an unrelated party would be.

(c) The combined total of all fees, sales commissions, and other consideration received by NYLIC or a Sales Agent: (1) For the provision of services to the plan, and (2) in connection with a purchase of an Insurance Contract or securities issued by a NYLife Fund, is not in excess of "reasonable compensation" within the contemplation of section 408(b)(2) and (c)(2) of the Act and section 4975(d)(2) and (d)(10) of the Code. If such total is in excess of "reasonable compensation" the "amount involved" for purposes of the civil penalties of section 502(i) of the Act and excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of "reasonable compensation."

### III. Specific Conditions

(a) NYLIC or the Sales Agent is not—

(1) A trustee of the plan (other than a non-discretionary trustee who does not render investment advice with respect to any assets of the plan or a trustee to a pooled trust (the Pooled Trust), as defined in Section IV(g) below, which will not purchase Insurance Contracts or securities issued by a NYLife Fund pursuant to this exemption);

(2) A plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g) of the Code;

(3) A fiduciary who is expressly authorized in writing to manage, acquire, or dispose of, on a discretionary basis, those assets of the plan that are or could be invested in Insurance Contracts, securities issued by a NYLife Fund, or units of a Pooled Trust; or

(4) An employer any of whose employees are covered by the plan.

(b) (1) Prior to the execution of a transaction involving the receipt of sales commissions by a Sales Agent in connection with the plan's purchase of an Insurance Contract, NYLIC or the Sales Agent provides to an independent plan fiduciary (the Independent Plan Fiduciary), as defined in Section IV(f) below, disclosures of the following information concerning the Insurance Contract in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) An explanation of: (i) the nature of the affiliation or relationship between NYLIC and the Sales Agent recommending the Insurance Contract; and, (ii) the nature of any limitations

that such affiliation or relationship, or any agreement between the Sales Agent and NYLIC places on the Sales Agent's ability to recommend Insurance Contracts;

(B) The sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by NYLIC to the Sales Agent in connection with the purchase of the recommended Insurance Contract, together with a description of any factors that may affect the commission; and

(C) A full and detailed description of any charges, fees, discounts, penalties, or adjustments which may be paid by the plan under the recommended Insurance Contract in connection with the plan's purchase, holding, exchange, termination, or sale of the Insurance Contract, including a description of any factors that may affect the level of charges, fees, discounts, or penalties paid by the plan.

(2) Following receipt of the information required to be provided to the Independent Plan Fiduciary, as described in Section III(b)(1) above, and before execution of the transaction, the Independent Plan Fiduciary acknowledges in writing receipt of such information, and approves the transaction on behalf of the plan. The Independent Plan Fiduciary may be an employer of employees covered by the plan but may not be a Sales Agent involved in the transaction. The Independent Plan Fiduciary may not receive, directly or indirectly (e.g. through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(3) With respect to additional purchases of Insurance Contracts, the written disclosure required under Section III(b)(1) need not be repeated, unless—

(A) More than three years have passed since such disclosure was made with respect to the same kind of Insurance Contract, or

(B) The Insurance Contract being recommended for purchase or the commission with respect thereto is materially different from that for which the approval described under Section III(b)(2) was obtained.

(c)(1) With respect to purchases with plan assets of securities issued by a NYLife Fund, or receipt of sales commissions by NYLIC in connection with such purchases, NYLIC provides to an Independent Plan Fiduciary, prior to the execution of the transaction, the following information concerning the

recommended NYLife Fund in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) A description of: (i) the investment objectives and policies of the NYLife Fund, (ii) the principal investment strategies that the NYLife Fund may use to obtain its investment objectives, (iii) the principal risk factors associated with investing in the NYLife Fund, (iv) historical investment return information for the NYLife Fund, (v) fees and expenses of the NYLife Fund, including annual operating expenses (e.g., management fees, distribution fees, service fees, and other expenses) and fees paid by shareholders (e.g., sales charges and redemption fees), (vi) the identity of the NYLife Fund adviser, and (vii) the procedures for purchases of securities issued by the NYLife Fund (including any applicable minimum investment requirements and sales charges);

(B) A description of: (i) the expenses of the recommended NYLife Fund, including investment management, investment advisory, or similar services, any fees for secondary services (e.g., for services other than investment management, investment advisory, or similar services, including but not limited to custodial, administrative, or other services), and (ii) any charges, fees, discounts, penalties, or adjustments that may be paid by the plan in connection with the purchase, holding, exchange, termination, or sale of shares of the recommended NYLife Fund securities, together with a description of any factors that may affect the level of charges, fees, discounts, or penalties paid by the plan or the NYLife Fund;

(C) An explanation of (i) the nature of the affiliation or relationship between NYLIC, the NYLife Fund, and (ii) the limitation, if any, that such affiliation, relationship, or any agreement between NYLIC and the NYLife Fund places on NYLIC's ability to recommend securities issued by other investment companies;

(D) The sales commission, if any, that NYLIC will receive in connection with the purchase of securities of the recommended NYLife Fund, expressed either as: (i) a percentage of the dollar amount of the plan's gross payments and the amount actually invested, (ii) an annual percentage of average daily net asset value of securities issued by the NYLife Fund, or (iii) both if applicable, with a description of any factors that may affect the commission; and

(E) A description of the procedure or procedures for redeeming the NYLife Fund securities.

The disclosures required under Section III(c)(1) above shall be deemed to be completed only if, with respect to fees and expenses of NYLife Fund, the type of each fee or expense (e.g., management fees, administrative fees, fund operating expenses, and other fees, including but not limited to fees payable for marketing and distribution services pursuant to Rule 12b-1 under the Investment Company Act of 1940 (the 12b-1 Fees)) and the rate or amount charged for a specified period (e.g., annually) is provided in a written document separate from the prospectus of such NYLife Fund.

(2) Following receipt of the information required to be provided to the Independent Plan Fiduciary, as described in Section III(c)(1) above, and before execution of the transaction, the Independent Plan Fiduciary approves the specific transaction on behalf of the plan. Unless facts and circumstances would indicate the contrary, such approval may be presumed if the Independent Plan Fiduciary directs the transaction to proceed after NYLIC has delivered the written disclosures to the Independent Plan Fiduciary. The Independent Plan Fiduciary may be an employer of employees covered by the plan but may not be NYLIC. The Independent Plan Fiduciary may not receive, directly or indirectly (e.g., through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(3) With respect to additional purchases of NYLife Fund securities, NYLIC:

(A) Provides reasonable advance notice of any material change with respect to the NYLife Fund securities being purchased or the commission with respect thereto, and

(B) Repeats the written disclosure required under Section III(c)(1)(A), (C), (D), and (E) once every three years.

(d)(1) NYLIC shall retain or cause to be retained for a period of six (6) years from the date of any transaction covered by this exemption the following:

(A) The information disclosed with respect to such transaction pursuant to Section III(b), and (c) above; and

(B) Any additional information or documents provided to the Independent Plan Fiduciary with respect to the transaction; and

(C) The written acknowledgments described in Section III(b)(2) above.

(2) A prohibited transaction shall not be deemed to have occurred if, due to circumstances beyond the control of NYLIC, such records are lost or

destroyed before the end of such six-year period.

(3) Notwithstanding anything to the contrary in sections 504(a)(2) and (b) of the Act, such records shall be unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization any of whose members are covered by the plan.

(e) Neither NYLIC nor a Sales Agent renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to the assets involved in the transaction in connection with a formal advice program under which specific/individualized asset allocation recommendations are made available to participants based on their responses to questionnaires.

#### IV. Definitions

For purposes of this exemption—

(a) "NYLTC" means the New York Life Trust Company, or any other financial institution supervised under state or federal laws and affiliated with NYLIC;

(b) "NYLIC" means the New York Life Insurance Company and any of its affiliates, including but not limited to NYLTC, as defined in Section IV(a) above;

(c) "NYLife Fund or NYLife Funds" mean any investment company registered under the Investment Company Act of 1940 for which NYLIC serves as investment advisor and as principal underwriter (as that term is defined in section 2(a)(29) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(29));

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

(1) any person directly or indirectly controlling, controlled by, or under common control with such person, (2) any officer, director, employee, or relative of any such person, or any partner in such person, and (3) any corporation or partnership of which such person is an officer, director, or employee, or in which such person is a partner. For purposes of this definition, an "employee" includes: (A) any registered representative of NYLIC, where NYLIC or an affiliate is principal underwriter, and (B) any insurance agent or broker or pension consultant acting under a written agreement as NYLIC's agent in connection with the sale of an Insurance Contract, whether or not such registered representative or insurance agent or broker or pension

consultant is a common law employee of NYLIC;

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

(f) "Independent Plan Fiduciary" means a fiduciary with respect to a plan, which fiduciary has no relationship to or interest in NYLIC that might affect the exercise of such fiduciary's best judgment as a fiduciary;

(g) "Pooled Trust" means any collective investment fund or group trust maintained by NYLTC, provided that, NYLTC its successor or affiliate does not have discretionary authority or responsibility with respect to the management and administration of or provide investment advice with respect to, any assets of the plan that are or could be invested in Insurance Contracts, securities issued by a NYLife Fund, or units of a Pooled Trust;

(h) "Insurance Contract or Insurance Contracts" mean an insurance or annuity contract issued by NYLIC;<sup>1</sup>

(i) A "nondiscretionary trustee" of a plan is a trustee whose powers and duties with respect to any assets of the plan are limited to: (1) The provision of nondiscretionary trust services, as defined in Section IV(j) below, to such plan, and (2) the duties imposed on the trustee by any provision or provisions of the Act or the Code;

(j) "Nondiscretionary trust services" mean custodial services and services ancillary to custodial services, none of which services are discretionary;

(k) A "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in Code section 4975(e)(6), or a brother, a sister, or a spouse of a brother or a sister;

(l) "Sales Agent or Sales Agents" mean any insurance agent, broker, or pension consultant or any affiliate thereof that is affiliated with NYLIC; and

(m) "Principal underwriter" is defined in the same manner as that term is defined in section 2(a)(29) of the

Investment Company Act of 1940 (15 U.S.C. 8a-2(a)(29)).

#### Effective Date

This exemption is effective, as of February 12, 1998, the date of the filing of the application for exemption.

#### Written Comments

In the Notice of Proposed Exemption (the Notice), the Department of Labor (the Department) invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within thirty (30) days of the date of the publication of the Notice in the **Federal Register** on February 15, 2001. All comments and requests for a hearing were due by April 6, 2001.

During the comment period, the Department received no requests for a hearing. However, the Department did receive a comment letter from the applicant. In this regard, in a letter dated April 6, 2001, the applicant requested certain amendments to the language of the Summary of Facts and Representations (the SFR), as published in the Notice. The applicant believes that none of the changes described below involve material changes in any facts or representation made by NYLIC in its application to the Department.

A discussion of each of the applicant's comments and the Department's responses, thereto, are set forth in the numbered paragraphs below. In the language below, words that have been stricken from the text of the SFR appear in the closed brackets, and additions to the SFR appear in bold italics.

1. *Representation 2.* The applicant has informed the Department that NYLIC recently organized a new wholly-owned investment management subsidiary, New York Life Investment Management LLC (NYLIM), and has made other changes to the names or organization of one or more of its subsidiaries. The applicant requests that the Department substitute the language, as set forth in the paragraph below, for the text of Representation 2, as it appeared in the SFR.

The Department concurs. Accordingly, the language, as set forth in the Notice at 66 FR at 10517, column 1, lines 49 to 57 and column 2, lines 1-2 should have read as follows:

The application was filed on behalf of NYLIC and its direct or indirect wholly-owned subsidiaries, New York Life Trust Company (NYLTC), New York Life Benefit Services LLC (NYLBS), NYLIFE Distributors Inc. (NYLIFE Distributors), *New York Life Investment Management LLC (NYLIM)*, MacKay-Shields LLC ~~(Financial Corporation)~~

(MacKay-Shields), ~~(Monitor Capital Advisors, Inc. (Monitor Capital))~~, and NYLIFE Securities Inc. (NYLIFE Securities).

2. *Representation 3.* The applicant wishes to update the total consolidated assets information, as published in the SFR. In this regard, the applicant represents that the revised numbers, as set forth below, are based on NYLIC's annual report, as of December 31, 2000. It is further represented that this report includes condensed, consolidated financial information for NYLIC and its domestic, wholly-owned life insurance subsidiaries, New York Life Insurance and Annuity Corporation and NYLIC Insurance Company of Arizona.

The Department concurs. Accordingly, the language, as set forth in the Notice at 66 FR at 10517, column 2, lines 5-9 should have read, as follows:

As of December 31, ~~(1996)~~ 2000, NYLIC had *approximately \$97.1 billion* in total consolidated assets ~~(of approximately \$78.8 billion and net)~~ (including policy reserves) and *\$88.4 billion* in total liabilities ~~(of \$74.8 billion)~~.

In addition, the applicant wishes to clarify the following statement that appeared in Representation 3 in the Notice at 66 FR at 10517, column 2, lines 16-23:

It is represented that all insurance products offered by NYLIC are reviewed and approved by the New York Insurance Department under New York insurance laws and under the applicable insurance laws of any other state where such products are marketed and sold.

The applicant notes that insurance products offered by NYLIC are reviewed and approved by the New York State Insurance Department under New York laws or under the applicable insurance laws of another state where such products are marketed and sold. In this regard, NYLIC may not obtain New York State Insurance Department approval for insurance products marketed and sold in states other than New York, although such products are filed with the New York State Insurance Department. In addition, insurance products offered by certain subsidiaries of NYLIC that are organized and supervised by another state are not approved by the New York State Insurance Department but are filed with the New York State Insurance Department if marketed in New York.

The Department acknowledges the clarification as submitted by the applicant.

3. *Representation 6.* The applicant has informed the Department of certain changes with respect to the NYLife Funds, including the renaming of the MainStay Institutional Funds Inc. on

<sup>1</sup> The Department expresses no opinion as to whether any so-called "synthetic guaranteed insurance contracts" offered by NYLIC constitute an Insurance Contract within the meaning of this exemption. The Department further notes that this exemption provides relief from the self-dealing and conflict of interest provisions of the Act in connection with the sale of Insurance Contracts to plans by fiduciaries. It does not provide relief from any acts of self-dealing that do not arise directly in connection with the purchase of specific insurance products. Thus, for example, no relief is provided under this exemption for any act of self-dealing that may arise in connection with the ongoing operation or administration of an Insurance Contract.

December 29, 2000. Therefore, the applicant requests that the Department substitute the language, as set forth in the paragraph below, for the text of Representation 6, as it appeared in the SFR.

The Department concurs. Accordingly, the language, as set forth in the Notice at 66 FR at 10517, column 3, lines 29 to 60 and at 10518, column 1, lines 1–7 should have read as follows:

The NYLife Funds are open-end investment companies registered with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940. The NYLife Funds are offered to plans directly and through variable life and annuity contracts issued by NYLIC. Currently, the NYLife Funds include ~~the~~ The MainStay Funds, which are available to retail and institutional investors (including defined contribution plans) and the ~~MainStay Institutional~~ Eclipse Funds Inc., and Eclipse Funds, which are ~~only~~ available to institutional investors, ~~and to~~ group individual retirement account customers, and retail investors. The MainStay Funds, organized as a Massachusetts business trust, currently include ~~fourteen (14)~~ twenty-five (25) separate funds, each of which has its own investment objectives and policies. Eclipse Funds Inc., a Maryland corporation, currently offers thirteen (13) separate funds, and the Eclipse Funds, a Massachusetts business trust, currently offers four (4) separate funds. Both the Eclipse Funds Inc. and the Eclipse Funds are marketed under a combined prospectus. ~~MainStay Institutional Funds Inc. currently include eleven (11) separate funds~~.

Affiliates of NYLIC provide ~~provides~~ a broad range of services to NYLife Funds. Specifically, the NYLife Funds are managed by NYLIM. MacKay-Shields is a sub-advisor to one or more of the NYLife Funds. ~~or Monitor Capital, both of which~~ Both are registered investment advisers and indirect wholly-owned subsidiaries of NYLIC. NYLIM ~~NYLIC~~ is the administrator to each of the NYLife Funds and provides various services, including administration, accounting, and other similar services and shareholder administration and sub-accounting for which NYLIM ~~NYLIC~~ and/or its affiliates may receive management fees, administrative fees, and/or shareholder services fees.

4. **Representation 9.** The applicant wishes to clarify the following statement that appeared in Representation 9 in the Notice at 66 FR at 10518, column 2, line 1:

In this regard, it is represented that NYLIC will advise NYLTC in connection with the management of the Collective Trust, although NYLTC will have final decision making authority.

The applicant has informed the Department that NYLIC has engaged NYLIM to advise it in providing investment management services to all of its clients, including services provided by NYLIC to NYLTC for the

Collective Trust. However, it is represented that NYLIC remains fully responsible for providing advice and other services under the terms and conditions of the documents governing the Collective Trust, described in Representation 9, as published in the SFR.

The Department acknowledges the clarification as submitted by the applicant.

After giving full consideration to the entire record, including the written comment from the applicant, the Department has decided to grant the exemption, as described, amended, clarified, and concurred in above. In this regard, the comment letter submitted by the applicant to the Department has been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on February 15, 2001, at 66 FR 10514.

#### For Further Information Contact

Angelena C. Le Blanc of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

#### **Indianapolis Life Insurance Company (Indianapolis Life) and AmerUs Group Co. (AmerUs Group) Located in Indianapolis, IN**

[Prohibited Transaction Exemption 2001-17; Exemption Application No. D-10930]

#### **Exemption**

##### *Section I. Covered Transactions*

The restrictions of section 406(a) of the Act (or ERISA) 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 to (1) the receipt of common stock (Common Stock) issued by AmerUs Group, which will become the parent of Indianapolis Life, or (2) the receipt of cash (Cash) or policy credits (Policy Credits), by or on behalf of a policyowner of Indianapolis Life who is an eligible member, as defined in Section III (the Eligible Member), which is an employee benefit Plan, including an employee benefit plan that is sponsored by Indianapolis Life and its affiliates for their own employees (the Indianapolis Life Plans; collectively, the

Plans), in exchange for such Eligible Member's membership interest in Indianapolis Life, in accordance with the terms of a plan of conversion (the Plan of Conversion), implemented under Indiana law.<sup>2</sup>

In addition, the restrictions of section 406(a)(1)(E) and (a)(2) and section 407(a)(2) of the Act shall not apply to the receipt or holding, by the Indianapolis Life Insurance Company Group Term Life Insurance Plan for Employees, Plan No. 505 (the IL Group Term Life Insurance Plan), of employer securities in the form of excess AmerUs Group Common Stock, in accordance with the terms of the Plan of Conversion.

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

#### *Section II. General Conditions*

(a) The Plan of Conversion is subject to approval, review and supervision by the Commissioner of Insurance of the Indiana Department of Insurance (the Commissioner) and is implemented in accordance with procedural and substantive safeguards imposed under Indiana law.

(b) The Commissioner reviews the terms and options that are provided to Eligible Members as part of such Commissioner's review of the Plan of Conversion, and the Commissioner approves the Plan of Conversion following a determination that such Plan is fair, reasonable and equitable to Eligible Members.

(c) Each Eligible Member has an opportunity to vote to approve the Plan of Conversion after full written disclosure is given to the Eligible Member by Indianapolis Life.

(d) Any determination to receive Common Stock, Cash or Policy Credits by an Eligible Member which is a Plan, pursuant to the terms of the Plan of Conversion, is made by one or more Plan fiduciaries which are independent of Indianapolis Life and its affiliates and neither Indianapolis Life nor any of its affiliates exercises any discretion or provides "investment advice" within the meaning of 29 CFR 2510.3-21(c), with respect to such decisions.

(e) After each Eligible Member entitled to receive shares of AmerUs Group Common Stock is allocated at least 12 shares, additional consideration is allocated to Eligible Members who own participating policies based on actuarial formulas that take into account

<sup>2</sup> Unless otherwise noted, all references to Indianapolis Life and its affiliates are deemed to include references to AmerUs Group and its affiliates.

the actuarial contribution, if any, that each Eligible Member's policy has made (and is expected to make) to Indianapolis Life's statutory surplus, which formulas are subject to review and approval by the Commissioner.

(f) In the case of the Indianapolis Life Plans, the independent fiduciary—

(1) Votes on whether to approve or not to approve the proposed restructuring process (the Restructuring);

(2) Elects between consideration in the form of AmerUs Group Common Stock or Cash;

(3) Determines how to apply the Cash or AmerUs Group Common Stock received for the benefit of the participants and beneficiaries of the Indianapolis Life Plans;

(4) Votes shares of AmerUs Group Common Stock held by all Indianapolis Life Plans, including the IL Group Term Life Insurance Plan, and disposes of such stock held by the IL Group Term Life Insurance Plan exceeding the limitation of section 407(a)(2) of the Act as soon as reasonably practicable, but in no event later than six months after the effective date of the Plan of Conversion.

(5) Provides the Department with a complete and detailed final report as it relates to the Indianapolis Life Plans prior to the effective date of the Restructuring; and

(6) Takes all actions that are necessary and appropriate to safeguard the interests of the Indianapolis Life Plans and their participants and beneficiaries.

(g) All Eligible Members that are Plans participate in the transactions on the same basis as all Eligible Members that are not Plans.

(h) No Eligible Member pays any brokerage commissions or fees in connection with their receipt of AmerUs Group Common Stock or Policy Credits or in connection with the implementation of the commission-free purchase and sale program.

(i) All of Indianapolis Life's policyholder obligations remain in force and are not affected by the Plan of Conversion.

### Section III. Definitions

For purposes of this exemption,

(a) The term "Indianapolis Life" means Indianapolis Life Insurance Company and AmerUs Group Co., unless otherwise noted.

(b) An "affiliate" of Indianapolis Life includes —

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Indianapolis Life. (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 or partner in such person, and

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

(c) A "policy" is defined as (1) any contract of insurance, annuity contract, or supplemental contract in each case, that has been issued by Indianapolis Life; (2) each certificate issued under any of Indianapolis Life's group annuity contracts as part of a custodial 403(b) or IRA arrangement, or as part of a non-ERISA 403(b) arrangement (the custodian or employer-sponsor holding such group annuity contracts shall not be considered the Eligible Member or owner); and (3) each certificate issued under the group plan established as a convenience by Indianapolis Life to provide life insurance to self-employed agents. The following policies and contracts are deemed not to be policies for purposes of the Plan of Conversion: (1) a certificate issued to an individual pursuant to a group life insurance policy (except as set forth in the preceding sentence); (2) a certificate issued under a group annuity contract (except as set forth in the preceding sentence); and (3) any reinsurance assumed on an indemnity basis (but certificates of assumption constitute policies).

(d) The term "Eligible Member" means a policyholder whose name appears on Indianapolis Life's records as the owner of one or more policies issued by Indianapolis Life on both the date the Board of Directors adopts the Plan of Conversion and the effective date of the Plan of Conversion.

(e) A "supplemental contract" is a policy or contract that has been issued pursuant to a Plan, qualified under section 401(a) of the Code, directly to a Plan participant.

(f) "Policy Credits" will consist of an increase in the dividend accumulation on an Indianapolis Life policy or contract (to which no sales, surrender, or similar charges will be applied), an increase in the accumulation account value of the Indianapolis Life policy or contract (to which no sales, surrender, or similar charge will be applied), an increase in the premium deposit fund under the Indianapolis Life policy or contract, an increase in the amount of the payments distributed under an Indianapolis Life policy or contract that is a supplemental contract, or an extension of the expiry date on an Indianapolis Life policy or contract that is in force as extended term life

insurance pursuant to a non-forfeiture provision of a life insurance policy.

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 25, 2001 at 66 FR 7802.

### Written Comments

The Department received four written comments with respect to the proposed exemption. Two comments were submitted by Plan policyholders of Indianapolis Life. Of these comments, one policyholder said he was in favor of the Department's granting the proposed exemption while the other policyholder said he was opposed to the demutualization and preferred that Indianapolis Life's surplus earnings remain with the insurer in order to enhance the policyholder's existing insurance policies with Indianapolis Life. The third and fourth comments, which were submitted under separate cover by AmerUs Group and Indianapolis Life, expressed specific concerns about the proposed exemption in a number of areas.

The dissenting policyholder's comment, as well as the comments submitted by AmerUs Group and Indianapolis Life, are discussed below. Also discussed below are Indianapolis Life's response to the policyholder comment and the Department's responses to the areas of concern raised by both AmerUs Group and Indianapolis Life.

### Policyholder Comment

As stated briefly above, one commenter states that he is opposed to Indianapolis Life's contemplated demutualization and maintains that Indianapolis Life should retain its current status as a mutual insurance company. The commenter indicates that he does not believe the exemption is in his best interest as grounds for his opposition. The commenter explains that he would prefer that Indianapolis Life's surplus remain with the insurer in order to make the policyholder's insurance contracts stronger.

In response, Indianapolis Life disagrees with the commenter's position. As explained in the exemption application, Indianapolis Life emphasizes that the demutualization will not in any way reduce the benefits, values, guarantees, or dividend eligibility of existing policies or contracts that it has issued. Instead, the Restructuring will result in significant benefits to Indianapolis Life policyholders. In this regard, Indianapolis Life states that the

Restructuring is designed to enhance its financial strength in access to capital through an affiliation with AmerUs Group that will result in a larger combined organization. Moreover, Indianapolis Life explains that access to capital markets will enable it to invest in new technology, improve customer service, develop new products and channels of distribution, and obtain more financial flexibility with which to maintain its ratings and financial stability. Finally, Indianapolis Life explains that the combination with AmerUs Group will create an opportunity to leverage its corporate capacity and strength and reduce expenses through economies of scale.

In addition, Indianapolis Life notes that, at the special policyholders meeting held earlier this week, over 96 percent of the policyholders who voted on the Restructuring voted to approve it. Because of the overwhelming policyholder vote and the reasons cited for the Restructuring, Indianapolis Life maintains that the view expressed by the commenter should not preclude the Department from granting the final exemption.

#### AmerUs Group's Comment

In its comment, AmerUs Group notes that the proposed Restructuring will involve both the combination of Indianapolis Life and AmerUs Group and the sponsored demutualization of Indianapolis Life. At the time the demutualization consideration is provided to Indianapolis Life policyholders, AmerUs Group explains that Indianapolis Life will become a second tier subsidiary of AmerUs Group. For this reason, AmerUs Group states that it is important that the exemption cover AmerUs Group and its affiliates as well as Indianapolis Life and its affiliates. However, AmerUs Group notes that the proposed exemption has been issued only under the name of Indianapolis Life. Therefore, AmerUs Group requests that the final exemption be issued in the names of both entities and that the final exemption contain a statement to the effect that the exemption covers the affiliates of both entities.

In response, the Department has modified the title of the exemption to include a reference to AmerUs Group to show that the exemption has been issued to AmerUs Group and Indianapolis Life, jointly. In addition, the Department has inserted a new footnote in the operative language which states that "[f]or purposes of this exemption, all references to Indianapolis Life and its affiliates are deemed to include references to

AmerUs Group and its affiliates." Further, the Department has revised Section III(a) of the final exemption by including a reference to AmerUs Group, the future parent of Indianapolis Life. Section III(a) of the final exemption now reads as follows:

The term "Indianapolis Life" means Indianapolis Life Insurance Company and AmerUs Group Co., unless otherwise noted.

#### Indianapolis Life's Comments

Indianapolis Life had three major comments to the proposed exemption and a couple of minor comments that were in the nature of technical clarifications designed to enhance the accuracy of the description of the subject transactions and update factual information.

##### 1. *Definition of Indianapolis Life.*

Section III(a) of the proposed exemption defines "Indianapolis Life" to include "any affiliate of Indianapolis Life, as defined in paragraph (b) of this Section III." Indianapolis Life requests that the reference to any affiliate be deleted from the definition and that the term "affiliate" as defined in paragraph (b) of Section III be added where needed throughout the exemption. Indianapolis Life notes that it is important to exclude affiliates from the definition of Indianapolis Life because the phrase "Indianapolis Life and its affiliates" is referred to separately in the exemption application, and many of the provisions from the application have been incorporated into the exemption. By lumping Indianapolis Life and its affiliates together in one defined term changes the meanings of many of those provisions, according to Indianapolis Life and may lead to an incongruous result.<sup>3</sup>

In addition, Indianapolis Life notes that there are several other places in the proposed exemption where a distinction between Indianapolis Life and its affiliates is important. Rather than identify all of those places, Indianapolis Life would prefer to remove "affiliates" from the definition of Indianapolis Life and refer separately to affiliates where needed in the proposed exemption. Indianapolis Life also explains that it conducted a word search through the proposed exemption and found only one instance where the term "affiliates" had been inappropriately used. The

<sup>3</sup>For example, Indianapolis Life refers to the definition of "Eligible Member" in paragraph (d) of Section III. Without distinguishing between it and its affiliates, Indianapolis Life explains that this definition would incorrectly include persons with policies issued by the affiliates as members of Indianapolis Life. Policyholders of Indianapolis Life's affiliates are not members of Indianapolis Life, according to Indianapolis Life.

sentence in question appears in the last sentence in the third paragraph of Representation 23 of the proposed exemption in the Summary of Facts and Representations (the Summary). There, it is stated that "U.S. Trust \* \* \* derives less than one percent of its annual income from Indianapolis Life." Indianapolis Life believes that the sentence should be revised to state that "U.S. Trust derives less than one percent of its annual income from Indianapolis Life and its affiliates."

In response to Indianapolis Life's comment, the Department has already revised Section III(a) of the final exemption (as shown above) by deleting the term "affiliates" and by including a reference to AmerUs Group. The Department also notes Indianapolis Life's revision to Representation 23 of the Summary.

2. *Standard of Commissioner's Review.* Section II(b) of the proposed exemption recites the standard under which the Commissioner will review the Plan of Conversion under Indiana law. Indianapolis Life states that Indiana law requires the Commissioner to determine that the Plan of Conversion is not only fair and equitable but is "reasonable" to Eligible Members before approving the Plan of Conversion. Accordingly, Indianapolis Life requests that "reasonable" be added to the standard described in this subsection.

In response to this comment, the Department has revised Section II(b) of the final exemption to read as follows:

The Commissioner reviews the terms and options that are provided to Eligible Members as part of such Commissioner's review of the Plan of Conversion, and the Commissioner approves the Plan of Conversion following a determination that such Plan is fair, reasonable and equitable to Eligible Members.

3. *Time Frame for Distributing Notice to Interested Persons.* In the section of the proposed exemption titled "Notice to Interested Persons," Indianapolis Life suggests updating the paragraph contained therein to reflect that Indianapolis Life had provided interested persons with notice of the proposed exemption as well as to show the revised time frame for the comment period. Indianapolis Life states that it requested an 8 day extension of time to provide interested persons with notice of the proposed exemption in order to allow time for mailing its member information statement prior to the dissemination of the proposal. Indianapolis Life also notes that, at the Department's request, the extension of time was granted, provided an additional 3 days were factored into the comment period to allow for mailing



time and to ensure that interested persons would have at least 30 days in which to comment. With the increased time, Indianapolis Life explains that comments to the proposed exemption were then due to the Department by March 21, 2001.

**4. Technical Corrections to Sections I-III of the Proposed Exemption.**

**a. Section I.** In the operative language of the proposed exemption, Section I states that AmerUs Group Co. is the parent of Indianapolis Life. However, Indianapolis Life explains that this entity will not become Indianapolis Life's parent until the effective date of Indianapolis Life's Restructuring. Also, in that same paragraph of the operative language, Indianapolis Life states that the reference to the term "Eligible Member" should refer to the definition of that term, as defined in Section III, because not all of Indianapolis Life's policyholders are Eligible Members of the insurer.

In response to this comment, the Department has revised part of the operative language of the final exemption to read as follows:

The restrictions of section 406(a) of the Act (or ERISA) 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 to (1) the receipt of common stock (Common Stock) issued by AmerUs Group, which will become the parent of Indianapolis Life, or (2) the receipt of cash (Cash) or policy credits (Policy Credits), by or on behalf of a policyowner of Indianapolis Life who is an eligible member, as defined in Section III (the Eligible Member), which is an employee benefit Plan, including an employee benefit plan that is sponsored by Indianapolis Life and its affiliates for their own employees (the Indianapolis Life Plans; collectively, the Plans), in exchange for such Eligible Member's membership interest in Indianapolis Life, in accordance with the terms of a plan of conversion (the Plan of Conversion), implemented under Indiana law.

**b. Section II(e).** Section II(e) of the proposed exemption states that after each Eligible Member entitled to receive shares of AmerUs Group Common Stock is allocated at least 12 shares, additional consideration will be allocated to Eligible Members owning participating policies based on actuarial formulas that take into account each participating policy's contribution to surplus and asset valuation reserve of Indianapolis Life, which formulas have been approved by the Commissioner.

Indianapolis Life requests that Section II(e) be revised to reflect the language in the Plan of Conversion and to correspond more closely with language used later in the proposed exemption to

describe the process for determining the amount of additional consideration, if any, an Eligible Member will receive after being allocated the fixed component of consideration.

In response to this comment, the Department has revised Section II(e) of the final exemption to read as follows:

After each Eligible Member entitled to receive shares of AmerUs Group Common Stock is allocated at least 12 shares, additional consideration is allocated to Eligible Members who own participating policies based on actuarial formulas that take into account the actuarial contribution, if any, that each Eligible Member's policy has made (and is expected to make) to Indianapolis Life's statutory surplus, which formulas are subject to review and approval by the Commissioner.

**c. Section III(f).** Subparagraph 4 of Section II(f) of the proposed exemption states that U.S. Trust, will vote shares of AmerUs Group Common Stock that are held by the IL Group Term Life Insurance Plan and dispose of any stock held by this plan which exceeds the limitation of section 407(a)(2) of the Act as reasonably as practicable, but in no event later than six months after the effective date of the plan of Conversion. The last paragraph of Representation 23 of the Summary contains a similar provision.

Indianapolis Life wishes to point out that U.S. Trust will vote all shares of AmerUs Group Common Stock that are held by any of the Indianapolis Life Plans and not just those held by the IL Group Term Life Insurance Plan. Therefore, the Department has revised subparagraph (4) of Section II(f) of the final exemption to read as follows:

Votes shares of AmerUs Group Common Stock held by all Indianapolis Life Plans, including the IL Group Term Life Insurance Plan, and disposes of such stock held by the IL Group Term Life Insurance Plan exceeding the limitation of section 407(a)(2) of the Act as soon as reasonably practicable, but in no event later than six months after the effective date of the Plan of Conversion.

In addition, the Department notes a corresponding revision to the last paragraph of Representation 23 of the Summary.

**d. Section III(c).** Section III(c) of the proposed exemption defines the term "policy," to include, in part, a certificate issued under a group plan established as a convenience by Indianapolis Life to provide life insurance to self-employed agents and under which all premiums have been paid by such agents. At the Commissioner's request, Indianapolis Life states that the Plan of Conversion has been revised to delete the phrase "and under which all premiums were

paid by such agents" from the description of the certificates. Therefore, in response to this comment, the Department has revised part of Section III(c) of the final exemption to read as follows:

\* \* \* each certificate issued under the group plan established as a convenience by Indianapolis Life to provide life insurance to self-employed agents.

**e. Section III(e).** Section III(e) of the proposed exemption defines the term "supplemental contract" as a policy or contract that has been issued pursuant to a Plan participant. Indianapolis Life states that the definition of "supplemental contract" should only include contracts issued to Plan participants by Plans that are qualified under section 401(a) of the Code and do not include contracts issued by a Plan that is not qualified under Code section 401(a). Therefore, the Department has revised Section III(e) of the final exemption to read as follows:

A "supplemental contract" is a policy or contract that has been issued pursuant to a Plan, qualified under section section 401(a) of the Code, directly to a Plan participant.

**5. Technical Corrections to the Summary.** The Department notes the following clarifications made to the Summary by Indianapolis Life:

**a. Representation 1.** Representation 1 states that Indianapolis Life's rating by Fitch is "AA" whereas its correct rating is "AA -."

**b. Representation 3.** In the first paragraph, Representation 3 states that Indianapolis Life's principal products include individual retirement accounts. However, Indianapolis Life wishes to point out that such products include "annuities" rather than "accounts" covered under section 408 of the Code.

**c. Representation 4(a).** Representation 4(a) sets forth the total assets of the Indianapolis Life Insurance Company Salary Reduction Plan, Plan No. 007. Indianapolis Life wishes to clarify that the asset and participants totals for this Plan were reported as of June 30, 2000 rather than June 20, 2000.

For further information regarding the comments and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10930) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200



Constitution Avenue, N.W.,  
Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

#### For Further Information Contact

Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### UAM Fund Services, Inc., Located in Boston, MA

[Prohibited Transaction Exemption 2001-18; Application No. D-10938]

### Exemption

#### Section I. Transactions

The restrictions of section 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply effective April 30, 2001 to (i) the acquisition of shares of one or more of the UAM Funds (Shares) by a Plan for which a Fund Adviser serves as investment manager, through the in-kind exchange of the Plan's assets held in one or more separate accounts (each, an Account) maintained by a Fund Adviser, and (ii) the redemption of Shares by a Plan for which a Fund Adviser serves as investment manager, through the in-kind exchange of assets from one or more UAM Funds to one or more Account(s), provided that the conditions set forth in Section II below are met.

#### Section II. Conditions

(a) The Fund Adviser is not an employer of employees covered by the Plan.

(b) The Plan does not pay sales commissions, redemption fees, or other fees in connection with such acquisition or redemption.

(c) The assets transferred pursuant to such acquisition or redemption consist entirely of cash and Transferable Securities.

(d) In the case of an acquisition, the Plan receives Shares of the Funds that have a total Net Asset Value equal to the value of the Plan's assets exchanged for such Shares on the date of the transfer, as determined (with respect to Transferable Securities) in a single valuation performed in the same manner, at the close of the same business day, in accordance with the procedures set forth in Rule 17a-7 under the Investment Company Act of 1940 (the 1940 Act), as amended from time to time, or any successor rule,

regulation, or similar pronouncement (Rule 17a-7) (using sources independent of the UAM Funds and the Fund Adviser) and the procedures established by the UAM Funds pursuant to Rule 17a-7.

(e) In the case of a redemption, with respect to Transferable Securities, the Plan receives a pro rata portion of the securities of the UAM Fund that is equal in value to the number of Shares redeemed for such securities, as determined in a single valuation performed in the same manner, at the close of the same business day, in accordance with the procedures set forth in Rule 17a-7 (using sources independent of the UAM Funds and the Fund Adviser). With respect to all other assets, the Plan receives cash equal to its pro rata share of the fair market value of such assets, determined in accordance with Rule 17a-7 of the 1940 Act and the valuation policies and procedures of the UAM Fund.

(f) The price that is paid or received by the Plan for Shares is the Net Asset Value per Share at the time of the transaction and is the same price for the Shares that would have been paid or received by any other investor for Shares of the same class at such time.

(g) Prior to the in-kind acquisition or redemption, an Independent Fiduciary with respect to the Plan receives full and detailed written disclosure of information regarding the in-kind acquisition or redemption, including, without limitation, the following:

(i) A current prospectus for each UAM Fund to or from which Plan assets may be transferred (updated as necessary to reflect the investment mix of the UAM Fund at the time of the in-kind acquisition or redemption);

(ii) A statement describing the rate of fees for investment advisory and other services to be charged to and paid by the Plan (and by the UAM Funds in which the Plan invests) to the Fund Adviser, including the nature and extent of any differential between the rates of the fees paid by the UAM Funds and the rates of the fees otherwise payable by the Plan to the Fund Adviser;

(iii) A statement of the reasons why the Fund Adviser may consider the in-kind acquisition or redemption to be appropriate for the Plan;

(iv) A statement as to whether there are any limitations on the Fund Adviser with respect to which Plan assets may be invested in Shares of the UAM Funds and, if so, the nature of such limitations;

(v) The identity of all securities that are deemed suitable by the Fund Adviser for transfer to the UAM Funds (in the case of an acquisition) or from

the UAM Funds (in the case of a redemption);

(vi) The identity of all such securities that will be valued in accordance with the procedures set forth in Rule 17a-7(b)(4) under the 1940 Act; and

(vii) Copies of the proposed and final exemptions pertaining to the exemptive relief provided herein for in-kind acquisitions and redemptions.

(h) On the basis of such disclosures, the Independent Fiduciary, consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Subtitle B of Title I of the Act, (i) makes a determination as to whether the terms of the in-kind acquisition or redemption are fair to the participants of the Plan and are comparable to and no less favorable than terms that would be reached at arms' length between unaffiliated parties, and that the in-kind acquisition or redemption (as opposed to an acquisition or redemption for cash) is in the best interest of the Plan and its participants and beneficiaries, and (ii) gives prior written approval for the in-kind acquisition or redemption, including agreement as to the date on which the in-kind acquisition or redemption will take place.

(i) The authorization by the Independent Fiduciary is terminable at will without penalty to the Plan at any time prior to the date of acquisition or redemption, and any such termination will be effected by the close of the business day following the date of receipt by the Fund Adviser, either by mail, hand delivery, facsimile, or other available means of written or electronic communication at the option of the Independent Fiduciary, of any written notice of termination.

(j) In the case of an acquisition, all of the Plan's assets held in an Account (other than Shares already held in the Account) are transferred in-kind to one or more UAM Funds in exchange for Shares, except that any Plan assets in the Account which are not suitable for acquisition by the UAM Fund shall be liquidated as soon as reasonably practicable, and the cash proceeds shall be invested directly in Shares.

(k) The Fund Adviser sends to the Independent Fiduciary, by regular mail or personal delivery, the following information:

(i) No later than 30 days after the completion of the in-kind transfer, a written confirmation which contains:

(A) The identity of each Transferable Security that was valued for purposes of the in-kind transfer in accordance with Rule 17a-7;

(B) The current market price, as of the date of the in-kind transfer, of each such Transferable Security; and

(C) The identity of each pricing service or market-maker consulted in determining the current market price of such Transferable Securities.

(ii) No later than 105 days after each in-kind transfer, a written confirmation which contains:

(A) In the case of an in-kind acquisition, the number of Shares in the UAM Funds that are held by the Plan immediately following the acquisition, the related per-Share Net Asset Value, and the total dollar value of such Shares.

(B) In the case of an in-kind redemption, the number of Shares in the UAM Funds that were held by the Plan immediately prior to the redemption, the related per-Share Net Asset Value, and the total dollar value of such Shares.

(I) With respect to each of the UAM Funds in which a Plan continues to hold Shares acquired in connection with an in-kind acquisition, the Fund Adviser provides the Independent Fiduciary with:

(i) A copy of an updated prospectus of such UAM Fund, at least annually; and

(ii) Upon request of the Independent Fiduciary, a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other statement) containing a description of all fees paid by the UAM Fund to the Fund Adviser.

(m) The combined total of all fees received by the Fund Adviser for the provision of services to the Plan, and in connection with the provision of services to the UAM Funds in which the Plan holds shares purchased in connection with an in-kind exchange, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(n) The Fund Adviser does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the acquisition or redemption.

(o) All other dealings between the Plan and the UAM Funds are on a basis no less favorable to the Plan than dealings between the UAM Funds and other shareholders holding the same Shares of the same class as the Plan.

(p) The Fund Adviser maintains for a period of six years the records necessary to enable the persons described in paragraph (q) below to determine whether the conditions of this exemption have been met, except that (i) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Fund Adviser, the records are lost or destroyed prior to the end of the six-

year period, and (ii) no party in interest other than the Fund Adviser shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (q) below.

(q) (1) Notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (p) above are unconditionally available at their customary locations for examination during normal business hours by (i) any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service; (ii) any fiduciary of the Plan who has authority to acquire or dispose of Shares of the UAM Funds owned by the Plan, or any duly authorized employee or representative of such fiduciary; and (iii) any participant or beneficiary of the Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (q)(1)(ii) and (iii) above shall be authorized to examine trade secrets of the UAM Funds or the Fund Adviser, or commercial or financial information which is privileged or confidential.

### *Section III. Availability of Prohibited Transaction Exemption 77-4 (PTE 77-4)*

Any in-kind acquisition of Shares of the UAM Funds that complies with the conditions of Section II of this exemption shall be treated as a "purchase or sale" of shares of a registered, open-end investment company for purposes of PTE 77-4, 42 FR 18732 (April 8, 1977), and shall be deemed to have satisfied paragraphs (a), (d) and (e) of section II of that exemption.

### *Section IV. Definitions*

For purposes of this exemption:

(a) The term "UAM" means United Asset Management Corporation, a Delaware corporation with headquarters in Boston, Massachusetts, and any affiliate thereof;

(b) The term "UAM Funds" means UAM Funds Inc., UAM Funds, Inc. II, and UAM Funds Trust, each of which is an open-end investment company registered under the 1940 Act, or any portfolio or group of portfolios thereof, for which UAM or a Fund Advisor serves as investment advisor and may provide other services.

(c) The term "Fund Adviser" means (i) any affiliate of UAM which serves as an investment adviser to a UAM Fund, and (ii) any former affiliate of UAM

which was divested within 12 months of the acquisition of UAM by Old Mutual, and which serves as an investment adviser to a UAM Fund pursuant to a contractual relationship with UAM, and (iii) any affiliate of an investment adviser identified in subsections (i) or (ii).

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

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

(ii) Any officer, director, employee, relative, or partner in any such person;

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

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

(f) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, sister, or spouse of a brother or a sister.

(g) The term "Plan" includes any pension, profit sharing or stock bonus plan qualified under section 401(a) of the Code, individual retirement account, simplified employee pension plan, custodial account plans as described in section 403(b) of the Code, or savings incentive match plans for employees.

(h) The term "Independent Fiduciary" means the Plan sponsor or other fiduciary of a Plan who is independent of and unrelated to UAM or the Fund Adviser. For purposes of this exemption, the Independent Fiduciary will not be deemed to be independent of and unrelated to UAM or the Fund Adviser if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with UAM or the Fund Adviser;

(ii) Such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary is an officer, director, partner, or employee of UAM or the Fund Adviser (or is a relative of such persons); or

(iii) Such fiduciary directly or indirectly receives compensation or other consideration for his or her own personal account in connection with any transaction described in this exemption.

(i) The term "Transferable Securities" shall mean securities (1) for which market quotations are readily available; and (2) which are not in any of the following categories: (i) securities which may not be publicly offered or sold

without registration under the Securities Act of 1933 (the 1933 Act); (ii) securities issued by entities in foreign countries which (A) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the UAM Funds, or (B) permit transfers of ownership or securities to be effected only by transactions conducted on a local stock exchange; (iii) certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although they may be liquid and marketable, involve the assumption of contractual obligations, require special trading facilities, or can only be traded with the counterparty to the transaction to effect a change in beneficial ownership; (iv) cash equivalents (such as certificates of deposit, commercial paper, and repurchase agreements); and (v) other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable).

(j) The term "Net Asset Value" means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in the UAM Fund's prospectus and statement of additional information, and other assets belonging to the UAM Fund less the liabilities charged to such UAM Fund, by the number of outstanding Shares.

#### Effective Date

This exemption is effective for transactions occurring on or after April 30, 2001.

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 February 15, 2001 at 66 FR 10529.

#### Modification

The exemption as proposed contained no specific effective date. In this regard, the proposed exemption would have been effective as of the date the final exemption was granted and published in the **Federal Register**. However, after the exemption was proposed, the applicant requested that the final exemption be made effective as of April 30, 2001, to cover certain transactions occurring on or after that date. Therefore, the final exemption has been modified accordingly.

**FOR FURTHER INFORMATION CONTACT**  
Karen Lloyd of the Department,

telephone (202) 219-8194. (This is not a toll-free number).

#### General Information

The attention of interested persons is directed to the following:

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

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

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

Signed at Washington, D.C., this 1st day of May, 2001.

**Ivan Strasfeld,**

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

[FR Doc. 01-11305 Filed 5-3-01; 8:45 am]

**BILLING CODE 4510-29-P**

#### NATIONAL SCIENCE FOUNDATION

##### Special Emphasis Panel in Bioengineering and Environmental Systems; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

*Name:* Special Emphasis Panel in Bioengineering and Environmental Systems (1189).

*Date/Time:* May 30-31, 2001; 8:00 am-5:00 pm.

*Place:* National Science Foundation, 4201 Wilson Boulevard, Arlington, VA.

*Type of Meeting:* Closed.

*Contact Person:* Fred G. Heineken, Program Director, Division of Bioengineering and Environmental Systems, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 292-7944.

*Purpose of Meeting:* To provide advice and recommendations concerning proposals submitted to NSF for financial support.

*Agenda:* To review and evaluate proposals as part of the selection process for awards.

*Reason for Closing:* The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: May 1, 2001.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 01-11288 Filed 5-3-01; 8:45 am]

**BILLING CODE 7555-01-M**

#### NATIONAL SCIENCE FOUNDATION

##### Advisory Committee for Biological Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

*Name:* Advisory Committee for Biological Sciences (#1110).

*Date/Time:* May 9, 10, 11, 2001; 8:30 a.m.-5 p.m.

*Place:* Room 630, National Science Foundation, 4201 Wilson Blvd., Arlington, VA.

*Type of Meeting:* Part Closed.

*Contact Person:* Dr. Jane Silverthorne and Dr. Chris Cullis, Program Directors for Plant Genome Research Program, Room 615, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230; Telephone: 703-292-8470.

*Purpose of Meeting:* To carry out committee of visitors review, including program evaluation and GPRA assessments.

*Agenda:* Open Sessions—Introduction, program officers discussions, Fastlane discussion.

Closed Sessions—Proposals review, recommendations formulation, COV report drafting.

*Reason for Closing:* During the closed session, committee will review proposal