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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2002-52; Exemption Application No. D-10986, et al.]

Grant of Individual Exemptions; Bank of America (BoFA)

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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is 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 exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Bank of America (BoFA), Located in Bethesda, MD

[Prohibited Transaction Exemption 2002-52; Exemption Application No. D-10986].

Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to (1) the granting to BoFA by the Westbrook Realbrook Real Estate Fund III, L.P. (LP), Delaware Limited Partnership, of a first, exclusive, and prior security interest in the capital commitments, reserve amounts, and capital contributions (Capital Contributions), whether now owned or after-acquired, of certain employee benefit plans (Plans) investing in the LP; (2) the collateral assignment and pledge by the LP to BoFA of its security interest in each Plan's limited partnership interest, whether now owned or after-acquired; (3) the granting by the LP of a first, exclusive, and prior security interest in a borrower collateral account to which all Capital Contributions will be deposited when paid; (4) the granting to BoFA by Westbrook Real Estate Partners Management III, L.L.C., a Delaware limited liability company and the general partner of the LP (the General Partner), of its right to make calls for cash contributions (Drawdowns) under the Amended and Restated Agreement of Limited Partnership of Westbrook Real Estate Fund III, L.P., dated as of June 10, 1998, where BoFA is the representative of certain lender (the Lenders) that will fund a so-called "credit facility" providing credit to the LP, and the Lenders are parties in interest with respect to the Plans; and (5) the execution of a partner agreement and estoppel (Estoppel) under the Plans agree to honor the Drawdowns; provided that (i) the grants, assignments, and Estoppels are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (ii) the decisions on behalf of each Plan to invest in the LP and to

execute such Estoppels in favor of BoFA, for the benefit of each Lender, are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BoFA; (iii) with respect to Plans that may invest in the LP in the future, such Plans will have assets of not less than \$100 million¹ and not more than 5% of the assets of such Plan will be invested in the LP; and (iv) the General Partner is unrelated to any Plan and any Lender.

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 September 23, 2002, at 67 FR 59558.

Effective Date: This exemption is effective July 30, 1998.

For Further Information Contact: Gary H. Lefkowitz of the Department, telephone (202) 693-8546. (This is not a toll-free number.)

A. Raimondo Inc. Pension Plan (the Plan), Located in Greensburg, PA

[Prohibited Transaction Exemption 2002-53; Exemption Application No. D-11085]

Exemption

The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code,² by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective May 1, 2002, to (1) the past and continued leasing (the Lease) of certain improved real property (the Property) by the Plan to A. Raimondo Inc. (the Employer), a party in interest with respect to the Plan; and (2) the exercise, by the Employer, of options to renew the Lease, for two additional terms.

This exemption is subject to the following conditions:

(a) The terms and conditions of the Lease have been, and continue to be, no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Plan has been, and continues to be, represented for all purposes under the Lease, and during each renewal

¹ In the case of multiple plans maintained by a single employer or a single group of employers treated as a single employer under sections 414(b), 414(c), 414(m), and 414(o) of the Code, the assets of which are invested on a commingled basis (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans.

² For purposes of this exemption, references to provisions of title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

term, by a qualified, independent fiduciary.

(c) The Plan's independent fiduciary has negotiated, reviewed, and approved the terms and conditions of the Lease and the options to renew the Lease on behalf of the Plan and has determined that the transactions are appropriate investments for the Plan and are in the best interests of the Plan and its participants and beneficiaries.

(d) The rent paid to the Plan under the Lease, and during each renewal term, is no less than the fair market rental value of the Property, as established by a qualified, independent appraiser.

(e) The rent is adjusted annually to reflect changes in the Consumer Price Index (the CPI) and the Property is re-appraised at least every three years by a qualified, independent appraiser who is selected by the independent fiduciary to determine the appropriate fair market rental value (but in no event is the rental rate less than that established for the preceding rental term).

(f) The Lease is triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by the Employer, as lessee.

(g) The Plan's independent fiduciary has monitored, and continues to monitor, compliance with the terms of the Lease throughout the duration of the Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of the Employer under the terms of the Lease.

(h) The Plan's independent fiduciary expressly approves any renewal of the Lease beyond the initial term.

(i) At all times throughout the duration of the Lease and each renewal term, the fair market value of the Property has not exceeded, and does not exceed, 25 percent of the value of the total assets of the Plan.

Effective Date: This exemption is effective as of May 1, 2002.

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 September 23, 2002, at 67 FR 59562.

Written Comments

The Department received one written comment with respect to the proposed exemption and no requests for a public hearing. The comment was submitted by the Employer and confirmed by Mr. Lawrence Walter, the Plan's independent fiduciary. The comment is intended to clarify two issues raised in the Summary of Facts and

Representations (the Summary) of the proposed exemption. These issues are discussed below.

1. *Impact of Adjacent Real Estate on the Property's Value.* Representation 3 of the Summary states, in part, that the Property is not located in close proximity to other real estate that is owned by the Employer and/or its principals. The Employer explains that although certain of its principals do own a parcel of residential real property that is adjacent to a corner of the Property, it does not believe such ownership impacts on the merits of the transactions involving the Lease. Because the Property is zoned for commercial use and the adjacent property is zoned solely for residential use, the Employer indicates that the two properties cannot be combined or used for the same purpose, and therefore, the ownership of the adjacent residential property by certain of its principals does not affect the value of the Property.

In response to this comment, Mr. Walter has confirmed the representations made by the Employer. Mr. Walter also concurs that no additional value is attributable to the Property by reason of the ownership of contiguous residential property by certain of the Employer's principals.

2. *Excess Rental Value of the Property and Potential Code Violations.*

Representation 6 of the Summary states, in part, that an independent appraisal report dated July 16, 2001 (the 2001 Appraisal), placed the monthly fair market rental value of the Property at \$3,500. Representation 5 of the Summary further states, in part, that the Employer is currently paying the Plan \$4,500 per month in rent. The Employer indicates that these facts suggest that the rent paid to the Plan exceeds the fair rental value of the Property, and that such excess amount might be treated as an additional contribution to the Plan.³ In this regard, the Employer notes that Mr. Walter has been in communication with Mr. H. Kenneth Gehr, the independent appraiser, throughout the exemption application period and that based upon his experience in the real estate industry, Mr. Walter concluded that a slightly higher rental value was justified. Therefore, Mr. Walter set the current monthly rent at \$4,500 rather

than the \$3,800 amount calculated by Mr. Gehr in the 2001 Appraisal.⁴

In addition, the Employer states that Mr. Walter was selected to serve as the Plan's independent fiduciary because he is a Licensed Public Accountant and Certified Financial Planner who does substantial work involving the real estate industry. Moreover, the Employer explains that Mr. Walter's determination of the Property's fair market value is not only entitled to weight, but, in light of his ongoing responsibility as the Plan's independent fiduciary, he is the final arbiter of fair market value to the Plan. Based upon Mr. Walter's determination of the fair market rental value of the Property, the Employer is of the belief that the Plan should not be viewed as receiving excess rental value for the Property that would cause violations of the Code.

In response to this comment, Mr. Walter again confirms the representations made by the Employer. In addition, Mr. Walter concurs that the Plan should not be viewed as receiving an amount that is in excess of the fair market rental value of the Property that would violate the Code.

On the basis of the Employer's comment letter and Mr. Walter's confirmation and agreement with the statements contained therein, the Department notes the foregoing clarifications to the Summary. The Department also notes that the valuation date for the 2001 Appraisal is July 16, 2001, instead of July 31, 2001.

For further information regarding the Employer's comment, Mr. Walter's confirmation statement, and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11085) 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 Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

⁴ In an appraisal report dated August 20, 2002, which was subsequent to the effective date of the Lease, Mr. Gehr updated the 2002 Appraisal. As of August 16, 2002, Mr. Gehr placed the fair market value of the Property at \$258,700 and its fair market rental value at \$4,200 monthly or \$50,400 annually.

Under the terms of the former exemption that was issued to the Employer (Prohibited Transaction Exemption 87-63, 52 FR 24078, June 26, 1987) and the new exemption, the appraisal is only required to be updated once every three years. However, under both exemptions, the annual rent is to be adjusted by the independent fiduciary to reflect changes in the CPI.

³ The Department notes that the Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and, therefore, must be examined under applicable provisions of the Code, including sections 401(a)(4), 404 and 415.

Accordingly, after giving full consideration to the entire record, including the written comment and the confirmation statement, the Department has decided to grant the exemption

For Further Information Contact: Ms. Anna M.N. Mpras of the Department, telephone (202) 693-8565. (This is not a toll-free number.)

J. Penner Corporation Profit, Sharing Plan (the Plan), Located in Doylestown, PA

[Prohibited Transaction Exemption 2002-54; Exemption Application No. D-11099].

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,⁵ shall not apply to (1) the sale (the Sale) of certain improved real property (the Property) by Thomas G. Frazier and Carol G. Frazier (the Fraziers) to their respective participant-directed individual investment accounts in the Plan (together, the Frazier Accounts); and (2) the simultaneous lease (the Lease) of the Property by the Frazier Accounts to J. Penner Corporation (the Corporation), the Plan sponsor and a party in interest with respect to the Plan.

This exemption is subject to the following conditions:

(a) The terms and conditions of the transactions are not less favorable to the Frazier Accounts than those which the Frazier Accounts would receive in an arm's length transaction with an unrelated party.

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

(c) The acquisition price that is paid by the Frazier Accounts for proportionate interests in the Property is not more than the fair market value of the Property as determined by a qualified, independent, appraiser on the date of the Sale.

(d) The value of the proportionate interests in the Property that are acquired by each of the Frazier Accounts does not exceed 25% of each of the Frazier Accounts' assets at the time of the Sale nor throughout the duration of the Lease.

(e) The Frazier Accounts do not pay any real estate fees, commissions or other expenses with respect to the transactions.

(f) The rental amount under the Lease is no less than the fair market rental value of the Property, as determined by a qualified, independent appraiser on the date the Lease is entered into by the parties.

(g) The Lease is a triple net lease under which the Corporation, as lessee, pays, in addition to the base rent, all normal operating expenses of the Property, including taxes, insurance, maintenance, repairs and utilities.

(h) The Frazier indemnify and hold the Plan and the Frazier Accounts harmless from any liability arising from the Sale, including, but not limited to, hazardous material found on the Property, violation of zoning, land use regulations or restrictions, and violations of Federal, State or local environmental regulations or laws.

(i) The Sale is effected and the Lease comments only upon completion of the following transactions, which shall occur no later than sixty days after the granting of the final exemption: (1) The Fraziers and the Bucks County Industrial Development Corporation (BCIDC) fulfill all of their obligations to the Pennsylvania Industrial Development Authority; (2) the Fraziers pay off their debt obligation to BCIDC in accordance with the terms of an installment sale agreement and reacquire legal title to the Property; and (3) the lease agreement between the Fraziers and the Corporation is terminated.

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 October 8, 2002, at 67 FR 62824.

For Further Information Contact: Ms. Anna M.N. Mpras of the Department, telephone (202) 693-8565. (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 of 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 in Washington, DC, this 27th day of November, 2002.

Ivan Strasfeld,

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

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NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95-541)

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received under the Antarctic Conservation Act of 1978, Pub. L. 95-541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by January 3, 2003. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292-7405.

⁵ For purposes of this exemption, references to provisions of title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.