Technical Support, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue, N.W., Washington, DC 20210, telephone: (202) 693–2110. A copy of the Agency's Information-Collection Request (ICR) supporting the need for the information-collection requirements specified by OSHA for becoming a nationally-recognized testing laboratory (29 CFR 1910.7) is available for inspection and copying in the Docket Office, or you may request a mailed copy by telephoning Bernard Pasquet at (202) 693–2110. For electronic copies of the ICR, contact OSHA on the Internet at *http://www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing information-collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments clearly understood, and OSHA's estimate of the information burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necesssary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

A number of standards issued by the Occupational Safety and Health Administration (OSHA) contain requirements for equipment, products, or materials. These standards often specify that employers use only equipment, products, or material ''tested'' or ''approved'' by a ''nationally recognized testing laboratory'' (NRTL); this requirement ensures that employers use safe and efficacious equipment, products, or materials in complying with the standards. Accordingly, OSHA promulgated the regulation titled ''Definitions and Requirements for a Nationally Recognized Testing Laboratory'' (the ''Regulation''). The Regulation specifies procedures that organizations must follow to apply for, and to maintain, OSHA's recognition to test and certify equipment, products, or material for this purpose.

As part of the recognition process, the Regulation requires that organizations seeking recognition submit an initial-recognition application to OSHA. The Agency reviews the information provided in the initial-recognition application to determine if an organization meets the qualification criteria specified in the Regulation. These criteria address an organization's capability to test and examine equipment, products, or material for safety (for example, fire or electrical safety). In this regard, the Agency evaluates an organization's facilities, equipment, staff training, written testing procedures, and calibration and quality-control programs necessary to test and examine equipment, products, and material for safety. If OSHA approves the initial-recognition application, it will recognize the organization as an NRTL for five years.

Once recognized, an NRTL may apply to expand its current recognition to cover additional categories of NRTL testing. To do so, an NRTL must submit an expansion-of-recognition application that provides the Agency with information demonstrating that it meets the testing criteria specified by the Regulation for these additional categories. An NRTL may also revise its testing procedures, such as testing methods or pass-fail criteria, provided the revisions are at least as effective as the prior testing procedures; OSHA reviews these revisions during the annual site visit to the NRTL.

To renew recognition for another five-year period, an NRTL must submit a renewal-of-recognition application to the Agency several months before the current recognition expires. OSHA may in some cases dispense with this renewal requirement provided the organization certifies its continuing compliance with the Regulation.

To ensure that NRTLs are meeting the requirements of the Regulation, the Agency attempts to conduct site visits (i.e., audits) at each NRTL annually. During these site visits, an NRTL provides OSHA with written information to evaluate its compliance with the requirements for recognition. These reviews also permit the Agency to determine if revisions to testing procedures made by NRTLs are at least as effective as the prior testing procedures. These site visits help to ensure that equipment, products, or material used by employers to comply with OSHA's standards are providing employees with the highest level of protection available.

II. Proposed Actions

OSHA proposes to extend OMB's approval of the collection-of-information (paperwork) requirements contained in the requirements for becoming a nationally-recognized testing laboratory. OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of these information-collection requirements.

Type of Review: Extension of currently approved information-collection requirements.

Title: Definition and Requirements for a Nationally Recognized Testing Laboratory (29 CFR 1910.7).

OMB Number: 1218–0147.

Affected Public: Business or other for-profit organizations; Not-for-Profit institutions; State, Local or Tribal governments.

Number of Respondents: 58.

Frequency: On occasion.

Total Responses: 58.

Average Time per Response: 53 hours.

Estimated Total Burden Hours: 1,345 hours.

Estimated Cost (Operation and Maintenance): $0.

III. Authority and Signature

Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No. 3–2000 (65 FR 50017).

Signed at Washington, DC on September 12, 2000.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 00–23900 Filed 9–21–00; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10800, et al.]

Proposed Exemptions; The Masters, Mates and Pilots Pension Plan (the Pension Plan) and Individual Retirement Account Plan (the IRAP; Together, the Plans)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

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

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

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ______, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

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

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

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

The Masters, Mates and Pilots Pension Plan (the Pension Plan) and Individual Retirement Account Plan (the IRAP; together, the Plans), Located in Linthicum Heights, Maryland

[Application Nos. D–10800 and D–10801]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(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 (E) of the Code, shall not apply to: (1) The transfer and sale by the Plans of their shares of stock (the AHL Stock or the Stock) in American Heavy Lift Shipping Company (AHL) to AHL Holdings, Inc. (AHL Holdings), in exchange for a note (the Note) from AHL Holdings to the Plans; (2) the holding of the Note by the Plans; (3) the guarantee (the Guarantee) of the Note to the Plans by AHL; (4) the continued holding of the AHL Stock by the Plans for the period from January 1, 1999 until the date of the sale of the Stock by the Plans to AHL Holdings; and (5) the holding by the Plans for a period of two years of any collateral, including the Stock, received by the Plans as a result of the exercise of their rights in the event of a default under the Note or under the Guarantee, provided that: (a) The Plans' independent fiduciary, Independent Fiduciary Services, Inc. (IFS), has determined that the transactions are appropriate for the Plans and in the best interests of the Plans' participants and beneficiaries; (b) the Plans' independent investment manager with respect to the Stock, Hellmold Associates, Inc. (HAI), negotiated the terms of the subject transactions with AHL Holdings and has made the decision for the Plans' to enter the subject transactions with AHL Holdings; (c) HAI continues to monitor the Plans' holding of the Note, determines at all times that such transaction remains in the best interests of the Plans and takes whatever actions are necessary to enforce the Plans' rights under the Note; (d) HAI has determined that the current fair market value of the Note is not less than the current fair market value of the Stock; and (e) HAI has determined that the proposed transactions have terms and conditions which are at least as favorable to the Plans as terms and conditions which would exist in similar transactions with unrelated parties.

EFFECTIVE DATE: With respect to the Plans' holding of the AHL Stock, this proposed exemption, if granted, will be effective from January 1, 1999 until the date of the sale of the Stock by the Plans to AHL Holdings; with respect to the sale of the AHL Stock by the Plans to AHL Holdings, this proposed exemption, if granted, will be effective the date of publication of the grant in the **Federal Register**.

Summary of Facts and Representations

1. The Pension Plan is a defined benefit plan that currently has approximately 5,026 participants. As of December 31, 1998, the Pension Plan had approximately $797,144,611 in assets. The IRAP is a defined contribution plan that currently has approximately 3,959 participants. As of December 31, 1998, the IRAP had approximately $163,618,557 in assets. The Plans principally cover members of the International Organization of Masters, Mates and Pilots (the Union).

2. IFS is a registered investment advisor which serves as the Named Fiduciary for the Special Assets Portfolio of the Plans. The Special Assets Portfolio consists of various venture capital and other non-liquid investments which were made by a former investment manager of the Plans, Tower Asset Management, Inc. (Tower), and which were the subject of protracted litigation (the Litigation) between the Department, Tower, the Plans and certain of their trustees, and certain plan participants.[1] The Litigation ultimately was settled pursuant to Court Order entered by the United States District Court for the Southern District of New York (the Court).

[1] *In re Masters, Mates and Pilots Pension Plan and IRAP Litigation, Lead File No. 85 Civ. 9545 (VLB) (S.D.N.Y.)*

3. In the course of the Litigation, IFS[2] was appointed Named Fiduciary for the Plans' Special Assets Portfolio by Court Order dated September 18, 1990 (the Court Order). IFS assumed its responsibilities on November 8, 1990. The Court Order provided that the Named Fiduciary, rather than the Plans' trustees, has the ''* * * sole, exclusive, full and complete authority and discretion concerning the control, management and disposition of the Special Assets Portfolio.''

4. Since February, 1987, the Plans have each owned 45 shares of the Stock, which Stock represents all of the outstanding shares of AHL. AHL is a Delaware corporation, headquartered in New Orleans, Louisiana, that is engaged in the shipping industry. Its principal assets consist of four double-hulled tankers, built in the 1950's as single-hulled ships and converted to double-hulled beginning in 1995 to comply with Federal law, that are used primarily for the transportation of petroleum products in the Jones Act trade (*i.e.,* American-flagged tankers in the domestic intra-coastal trade). The Plans' Stock can be traced back to certain prior investments made by Tower and is held in the Plans' Special Assets Portfolio, along with the Plans' other remaining Tower-initiated investments.

5. In connection with the double-hulling of the ships, AHL assumed significant long-term debt. AHL issued $125 million U.S. Government Ship Financing Bonds on May 12, 1995. AHL sold an additional $23.7 million U.S. Government Ship Financing Bonds on December 18, 1996. Proceeds from the sales of bonds were deposited with the U.S. Treasury and may be used for ship construction pursuant to Title XI of the Merchant Marine Act. AHL was required to pay the following minimum amounts through sinking fund deposits:

1998—$3,326,000
1999—$3,568,000
2000—$3,827,000
2001—$4,104,000
Thereafter—$132,302,000

In addition to this $148.7 million of debt (the MARAD Loans), AHL also borrowed $3.35 million from Avondale Industries, Inc. (the Avondale Loan), one of the nation's leading shipbuilding companies. This amount, together with interest at approximately 7.5%, is due to be repaid in 20 years or earlier under certain circumstances if cash flow, as defined, exceeds certain minimum amounts. The payment of principal and interest is secured by a second mortgage on AHL's ships. No payments are anticipated to be due in the next five years.

6. Since AHL is an employer of employees covered under the Plans, the AHL Stock constitutes employer securities under section 407(d)(1) of the Act. The applicants represent that the Stock constituted qualifying employer securities within the meaning of section 407(d)(5) of the Act at the time of its acquisition, but as of January 1, 1993, the AHL Stock may have ceased to be a qualifying employer security because the Stock is wholly-owned by the Plans and thus may not meet the requirements of section 407(f) of the Act. However, the applicants state that the Plans' continued holding of the Stock was exempt from the prohibited transaction restrictions of the Act pursuant to Prohibited Transaction Class Exemption No. 79–15 (44 FR 26979, May 8, 1979) as a result of a court order, dated November 2, 1992, entered in the Litigation (the PTE 79–15 Order). Under the terms of the PTE 79–15 Order, this exemption was effective until the later of: (a) December 31, 1993; or (b) December 31, 1994, provided the Plans made application to the Department for an exemption to permit the continued holding of the Stock. The Plans did file a request for an exemption in timely fashion, and thus the exemption provided under the PTE 79–15 Order was automatically extended to December 31, 1994. On December 19, 1994, the Department granted Prohibited Transaction Exemption 94–85 (PTE 94–85; 59 FR 65403), which continued the exemption for the holding of the Stock by the Plans until the later of: (a) December 31, 1995, or (b) December 31, 1996, provided another application for exemption was filed with the Department prior to December 31, 1995. Another exemption application was filed prior to December 31, 1995, so that PTE 94–85 remained effective until December 31, 1996. On October 2, 1996, the Department granted Prohibited Transaction Exemption 96–73 (61 FR 51463), which continued the exemption for the holding of the Stock by the Plans until the later of: (a) December 31, 1997, or (b) December 31, 1998, provided another application for exemption was filed with the Department prior to December 31, 1997. Another exemption application was filed on October 15, 1997, so that PTE 96–73 remained in effect until December 31, 1998. That application was later withdrawn, and a revised application was filed on August 13, 1999. The applicant has requested that the exemption proposed herein be made retroactive to January 1, 1999 with respect to the holding of the Stock by the Plans.

7. While IFS, in its capacity as Named Fiduciary, has ultimate investment management responsibility for the Special Assets Portfolio, it does not exercise investment management discretion over the portfolio's assets on a day-to-day basis. Rather, as contemplated by the Court Order, responsibility for the day-to-day management and supervision of the portfolio's assets has been delegated at all times to independent investment managers selected by IFS. With respect to the Plans' investment in the Stock, such responsibility was first delegated to Sunwestern Advisors, L.P. (Sunwestern), which served as the investment manager for this investment until July 14, 1992. Effective that date, Sunwestern's responsibilities were assumed by a new investment manager, Potomac Asset Management, Inc. (Potomac). On October 15, 1996, IFS appointed HAI as the investment manager for certain investments of the Plans, including the AHL Stock. HAI continues to serve in that capacity.

8. HAI is a private investment banking firm offering financial advisory services and investment management services. HAI has specialized in working with troubled companies or their creditors to raise capital, divest businesses and restructure liabilities, whether in or outside bankruptcy. HAI is also the general partner of a hedge fund that invests primarily in the securities of distressed companies. HAI is registered with the Securities and Exchange Commission as an investment advisor and broker/dealer. HAI is located in New York, New York. Since its retention, HAI has devoted substantial time and effort to developing a thorough understanding of AHL's business and financial condition. As required by the terms of its engagement, HAI has provided IFS with quarterly reviews of AHL's financial results and operations, including the status of ships under construction, charter status, and the status of collective bargaining negotiations, including negotiations involving the transaction which is the subject of this proposed exemption.

9. The applicants have requested an exemption that would permit the Plans to sell their AHL Stock to AHL Holdings. Subsequently, all of the shares of AHL Holdings (Holdings Stock) will be acquired by a newly created ESOP to be established by AHL. The ESOP is represented by the ESOP Committee. The ESOP Committee is a five-person ad hoc committee of AHL employees represented by the Union.

[2] IFS was then known as ''Bear Stearns Fiduciary Services, Inc.''

The ESOP Committee has functioned as an advisory group to the Union and its advisors in connection with the collective bargaining negotiations that resulted in the proposed transaction.[3]

10. In connection with the transaction involving the transfer of the AHL Stock, the Union and AHL have adopted a new conditional eight-year collective bargaining agreement (CBA), which took effect in part on September 1, 1997, and will take effect in full upon the closing of the proposed transaction. The new CBA provides for a 7.5% reduction in base wages and vacation pay by Union members, certain benefit concessions and a reduction in crew size. On August 31, 2002, the wage rate reductions and other benefit modifications (the CBA Concessions) to the CBA adopted pursuant to agreement between the Union and AHL will be terminated and certain wages and benefit provisions will be restored to their 1996 levels. In addition, AHL will continue to benefit from certain productivity improvements in the new agreement.

According to AHL and the Union, the modifications to the CBA would reduce AHL's actual cash compensation costs by more than $1,500 per day, per ship—or more than seventeen percent of AHL's actual cash compensation costs under the prior collective bargaining agreement—for a period through August 31, 2002. The net present value of these proposed contractual reductions in wages, staffing and pension contributions and benefits over five years, as estimated by AHL and the Union, exceeds $7.7 million.

11. AHL Holdings will issue the Note to the Plans in exchange for the Stock.[4] The Note will have a six-year term and a stated principal value of $6.9 million. The Note will have an interest rate of nine percent for the initial three years and ten percent for the remaining three years. The interest will be payable semi-annually (with a total of twelve interest payments), but the first six semi-annual interest payments will be ''payable in kind'', *i.e.*, accrued and added to the principal amount of the Note. A single $2.5 million payment will be due on the fifth anniversary of the date of issuance of the Note, and the remaining principal balance will be due at the conclusion of the six-year term.

Principal may be pre-paid at any time, without penalty. In order to provide an incentive for the repayment of principal, in the event that at least $250,000 of principal is prepaid in cash at one time, the final principal payment will be reduced by an amount calculated in accordance with the following formula:

(1+R/2) to the Y power times the Prepayment Amount

Where

Y=Number of semi-annual periods until maturity.

R=Semi-Annually Compounded Discount Rate.

If the Prepayment Amount is between $250,000—$499,999, the Annual Discount Rate is 8.00% and the Semi-Annually Compounded Discount Rate is 7.85%.

If the Prepayment Amount is between $500,000—$749,999, then the Annual Discount Rate is 12.00% and the Semi-Annually Compounded Discount Rate is 11.66%.

If the Prepayment Amount is between $750,000—$999,999, the Annual Discount Rate is 15.00% and the Semi-Annually Compounded Discount Rate is 14.48%.

If the Prepayment Amount is $1,000,000 or more, the Annual Discount Rate is 17.50% and the Semi-Annually Compounded Discount Rate is 16.79%.

If more than one prepayment is made, subsequent prepayments are entitled to be calculated at the larger discount rate applicable to the cumulative amount of prepayments made.

The applicant represents that the prepayment formula results in a lesser discount the closer the prepayment is to the Note's maturity. Additionally, aside from the prepayment dollar amounts, different discount rates have been assigned to different size prepayments, so that the greater the prepayment, the greater the reduction in principal. Therefore, a prepayment received sooner rather than later will result in a greater discount from principal, and a larger prepayment will also obtain a greater discount than a smaller one. As an example, a $500,000 prepayment made as soon as the Note is issued will result in a reduction of $986,910 from the final principal payment six years later. In contrast, a $500,000 prepayment made in the third year of the six-year Note will only result in a reduction of $702,460 from the final principal payment.

The Note given by AHL Holdings will be secured by: (1) A pledge of all of the AHL Stock, none of which will be released until the Note is paid in full; (2) the Guarantee of AHL, subordinated to AHL's obligations under the MARAD and Avondale Loans; (3) a pledge of the cash in an escrow account to be established for all wage increases under the collective bargaining agreement beginning March 1, 2003, none of which will be released until the Note is paid in full; and (4) if practicable, a third mortgage on AHL's assets, subordinated to the MARAD and Avondale Loans. AHL will periodically provide the Plans with certain confidential financial information. Effective as of the date of the closing of the transaction, AHL's Board of Directors (the AHL Board) will consist of seven members, one of whom will be designated by HAI (acting as investment manager for the Plans), two of whom will be selected by the ESOP Committee and the Union (the Employee Directors), and one of whom will be designated by AHL (the Management Director). There will be three independent directors who will be jointly selected by the Employee Directors and the Management Director. On the date the Plans receive their first cash payment under the terms of the Note (*i.e.,* $893,000), HAI's power to designate a member of the AHL Board will end. HAI will have the power to designate (on behalf of the Plans) one director of AHL Holdings until the Note is fully repaid. The ESOP, as 100% shareholder of AHL Holdings, will elect the rest of AHL Holdings' Board. The applicant represents that by requiring at least one director to be elected by the Plans, and further precluding (1) the

[3] In this regard, the applicant states that the acquisition of the Holdings Stock by the ESOP will be covered by the statutory exemption available under section 408(e) of the Act, because the Holdings Stock is considered ''qualifying employer securities'' pursuant to section 407(d)(5) of the Act. The Department is providing no opinion in this proposed exemption as to whether the acquisition and holding by the ESOP of Holdings Stock would be covered by section 408(e) of the Act and the regulations thereunder. In addition, the Department is not providing any relief herein for any transactions by the ESOP involving the Holdings Stock.

[4] The Department wishes to note that ERISA's general standards of fiduciary conduct would apply to the proposed acquisition and holding of the Note by the Plans and the proposed acquisition and holding of the Stock by the ESOP, and that satisfaction of the conditions of this proposal should not be viewed as an endorsement of the investments by the Department. Section 404(a) of the Act requires, among other things, that a plan fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, the plan fiduciary must act prudently with respect to the decision to enter into an investment transaction. The Department further emphasizes that it expects the plan fiduciary to fully understand the benefits and risks associated with engaging in a specific type of investment, following disclosure to such fiduciary of all relevant information. In addition, such plan fiduciary must be capable, either directly or indirectly through the use of hired professional experts, of monitoring the investment, including any changes in the value of the investment. Thus, in considering an investment, a fiduciary should take into account its ability to provide adequate oversight of the particular investment.

The Department also wishes to note that it reserves the right to investigate and take any other action with respect to the transaction which is the subject of the proposed exemption.

incurrence of any debt, (2) any bankruptcy filing, or (3) any amendment to its Articles without the unanimous consent of the AHL Holdings Board (and therefore of the Plans' director), the ESOP cannot abrogate AHL Holdings' requirement to repay the Note to the Plans in full, or return ownership of 100% of AHL to the Plans upon any default under the Note.

Certain extraordinary actions cannot be taken by AHL without the affirmative vote of at least 6 of the 7 directors of AHL, including: A merger, consolidation or combination of AHL with another person or entity; any aggregate investment of $1 million in another person or entity in the maritime shipping business; a sale or issuance of stock or other equity securities which would give another person or entity more than 35% of AHL's common stock on a fully diluted basis, except for issuances necessary to permit AHL to avoid bankruptcy or repossession of AHL vessels; a sale, lease, transfer or disposition of more than 32% of AHL's assets, subject to certain exceptions; the appointment of a new CEO; or certain other changes relating to the composition, removal, replacement, committee structure, or consensus provisions of the AHL Board.

The AHL Holdings Articles of Incorporation will provide that AHL Holdings may not: (1) Incur any new debt; (2) declare voluntary bankruptcy; or (3) amend its Articles, without the unanimous consent of the AHL Holdings Board.

12. The applicants represent that AHL Holdings and AHL will be motivated to make payments on the Note in a full and timely fashion. The Note will default if AHL Holdings fails to make a required cash interest payment for any single payment period. In the event of default, AHL Holdings will have 45 days to cure the default. If AHL Holdings does not cure the default within 45 days, the holders of the Note will enjoy standard public debt provisions with respect to events of default. In addition, the Notes will contain cross-default provisions with respect to the covenants of AHL contained in the Guarantee.[5] These public debt provisions include approximately 25 affirmative and negative covenants made by AHL which, if violated, would trigger a default on the Note. The affirmative covenants include covenants to: Make timely payments of principal and interest on the Note; to maintain a principal office in New Orleans; to keep proper books and records in accordance with GAAP (*i.e.*, generally accepted accounting principles); to properly pay all taxes; to keep AHL's properties and assets in good condition, repair and working order; to comply with all applicable laws and government rules and regulations; to maintain sufficient insurance; to render periodic financial statements; and to notify the Plans of any material adverse changes in the business, affairs or financial condition of AHL. The negative covenants include prohibitions on: The acquisition of significant assets in the ordinary course of business; the redemption of outstanding stock; the incurrence of indebtedness except for tax liabilities; the incurrence of any liens except permitted liens and obligations included in the ordinary course of business; the declaration of dividends in cash or in stock; the guaranty of any third party obligations; the dissolution, sale, consolidation or merger of AHL; transactions with affiliated persons on terms less favorable than comparable transactions with non-affiliates; investments or loans to any other company; and the sale and leaseback of assets in excess of $250,000.

In the event of default, the Plans will be in a position to foreclose on the pledged AHL Stock[6] and to demand payment from AHL under its Guarantee. Events of default include the falsity of any representation or warranty in any material respect given; a payment default; failure to observe or perform any affirmative or negative covenant which continues unremedied for more than 30 days after written notice thereof; a default under the MARAD Loan (see rep. 5, above) documents (*i.e.*, cross-default with MARAD) unless such default is waived by MARAD; the suspension or discontinuance of business by AHL or the commencement of any bankruptcy or similar proceeding by or against AHL; the entry of an order, judgment or decree of dissolution of AHL; the entry of a money judgment against AHL in excess of $500,000 that has not been stayed pending appeal; if any of the operative documents should be declared unenforceable; and finally, if the Internal Revenue Service determines that the ESOP does not qualify under section 4975(e)(7) of the Code. If AHL was forced into bankruptcy for nonperformance, the Plans' unsecured claim (as a creditor) against the estate would be superior to the claims of all other equity holders. AHL will provide the Plans with the Guarantee, which will contain covenants and events of default identical in form to the covenants and events of default contained in subordinated public debt, because the Note will be subordinated to all of AHL's funded indebtedness.

13. HAI has reviewed the proposed transactions and made a determination that they are appropriate for the Plans and in the best interests of their participants and beneficiaries. HAI represents that, under the CBA in effect prior to September 1, 1997, the labor costs of AHL were too high for AHL to be profitable or even survive. As a part of the collective bargaining process, the Union recognized that cost concessions were necessary and agreed to put them into effect in return for the proposed ESOP transaction. In connection with the CBA signed on September 1, 1997 (see rep. 10, above), certain of the new labor contract cost savings were implemented as of that date, resulting in escrowed cash savings of $2,148,400 as of October 31, 1999. If the subject proposed transaction were not to take effect, AHL would be required to return these amounts, which it would not be financially capable of doing. Therefore, failure to approve the proposed ESOP transaction could render AHL insolvent.

HAI further represents that because of its belief that AHL could not be profitable and service its debt when due without these CBA Concessions, and because the Union refused to make such cost concessions to any third party, it was not possible to attempt to sell AHL as a going concern to anyone other than the ESOP.

14. HAI completed a financial evaluation of AHL as of December 31, 1997, and represents that, as of December 31, 1999, there has been no material change in the financial condition of AHL. HAI represents that AHL could be liquidated, but given the extremely large debt load incurred to convert AHL's four ships to double-hull (*i.e.*, the MARAD Loan and the Avondale Loan; see Rep. 5, above), and because of the provision in the CBA that obligates AHL to make a payment to the Union of $2.5 million if it sells its four ships and Union members are not employed thereon, it is extremely unlikely that, if AHL were liquidated, there would be any net value remaining to the AHL Stock owned by the Plans. HAI has calculated that a one-year

[5] If AHL Holdings defaults on its obligations on the Note, AHL must meet its obligations under the Guarantee. AHL Holdings may not incur any additional debt (see rep. 11, above). If AHL defaults on any of its obligations, then AHL Holding's Note will also be in default (by virtue of the cross-default provision).

[6] If the Plans were to foreclose on the pledged Stock, the Plans' subsequent holding of that Stock could create the same prohibited transactions for which PTEs 94–85 and 96–73 were granted. Thus, the applicants have requested that should this scenario arise, the exemption proposed herein would permit the Plans to hold such Stock for a period of two years after the foreclosure.

bankruptcy and liquidation process, including shut-down, marketing and legal expenses estimated at $3 million, would likely produce a negative $3.1 million equity value for the Plans if the MARAD Loan were to be paid off at face, with no accrued interest. If the MARAD Loan had to be repurchased at the 106% premium called for in its indenture, the equity value for the Plans would be a negative $12 million. HAI's analysis assumed that a third party would pay as much for the AHL ships, with their old engine rooms, as for a completely new ship. HAI represents that the likelihood is that the actual recoveries would be substantially lower than those described above, and would certainly leave no value for the AHL Stock. Thus, HAI believes there would be no value remaining to the Plans' ownership of the Stock in the event of a liquidation of AHL. HAI has concluded, accordingly, that if the subject transaction does not take place, the likely value of the AHL Stock is zero. If the transaction were to take place, HAI has concluded that the net present value of the AHL Stock is equal to the net present value of the Note to be received. Using 10% to 15% as the appropriate discount rates, HAI has estimated the present value of the Note to be in the range of $5.2 to $6.1 million.

15. IFS represents that, based upon its own analysis of the situation and continuing close evaluation of HAI's activities as investment manager, it believes that the Plans' equity investment in AHL is in dire circumstances. Although IFS recognizes that the proposed sale of the Stock is not ideal (largely because of the seller financing), IFS strongly believes that it is preferable to the only other alternative, which is bankruptcy. IFS represents that absent completion of the proposed transaction, the Plans' equity interest is likely to be worth little or nothing. By contrast, with the transaction, (a) AHL's cost structure (and thus, its only chance for survival) will improve dramatically, and (b) the Plans will exchange an equity security for a fixed income instrument, thus gaining a priority position in the event of AHL's bankruptcy. In short, IFS represents that without the transaction, the Plans' equity investment in AHL is in severe jeopardy, but with the improved protections including the Guarantee and the escrow, the Plans will be in a superior position as a debtholder in a more viable company.

16. Arthur Anderson LLP (AA), an independent accounting firm, has reviewed the balance sheets and income statements of AHL as of June 30, 1999. AA, in a report dated September 2, 1999, has opined that ''if the cost savings and the resulting funds [from the ESOP transaction] are not realized in the full amount and on the schedule contemplated, [AHL] may not be able to meet its obligations timely'', and that ''[t]he uncertainties related to these matters raise substantial doubt about [AHL]'s ability to continue as a going concern.''

17. The ESOP Committee also represents that it believes the subject transactions are necessary to prevent the insolvency of AHL. The ESOP Committee reached this conclusion after extremely extensive negotiations with the Plans, in which it exerted every effort to achieve the best deal it could. In acquiring AHL Holdings, the ESOP is in essence acquiring the possibility that AHL will become profitable again. There is risk in this transaction, particularly given AHL's recent financial performance. However, there is also the possibility that the investment in AHL Stock by AHL Holdings will be profitable, which in turn will make the value of Holdings Stock pay off for the ESOP participants.

18. In summary, the applicant represents that the proposed transactions satisfy the criteria contained in section 408(a) of the Act because: (a) The Plans' independent investment manager, HAI, has determined that the transactions are appropriate for the Plans and in the best interests of the Plans' participants and beneficiaries; (b) HAI has made this determination based upon its finding that if AHL were to be liquidated, it is unlikely that there would be any value remaining to the Plans' ownership of the Stock; (c) AA, the independent accountant for AHL, concurs in the opinion that if the proposed transactions are not consummated, there is substantial doubt about AHL's ability to meet its obligations and to continue as a going concern; (d) IFS, the Plans' independent fiduciary, has also determined that the transactions are appropriate for the Plans and in the best interests of the Plans' participants and beneficiaries; (e) HAI, the Plans' independent investment manager, will continue to monitor the Plans' holding of the Note, determine at all times that such transaction remains in the best interests of the Plans and take whatever actions are necessary to enforce the Plans' rights under the Note; and (f) the ESOP Committee has determined that the transaction is in the best interests of the AHL employees who will become ESOP participants.

Notice To Interested Persons

The applicant represents that the notice to interested persons required by 29 CFR 2570.43 will be effected by publication of a copy of this notice of proposed exemption and the required supplemental statement in *The Master, Mate and Pilot.* This publication is a newspaper published by the Union and is received by participants and beneficiaries of the Plans, including retirees. The notice will be published within 30 days of the publication of this notice of proposed exemption in the **Federal Register**. Comments and requests for a public hearing are due within 60 days of the publication of this notice of proposed exemption in the **Federal Register**.

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

John L. Rust Co. Profit Sharing Plan (the Plan), Located in Albuquerque, New Mexico

[Application No. D–10877]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to (1) the proposed purchases by the Plan of certain leases of equipment (the Leases) from John L. Rust Co. (Rust), the Plan sponsor and a party in interest with respect to the Plan, and (2) the agreement by Rust to indemnify the Plan against any loss relating to the Leases and also to repurchase any Leases that are in default in accordance with paragraph (E) below, provided that the following conditions are met:

A. Any sale of Leases to the Plan is on terms at least as favorable to the Plan as an arm's length transaction with an unrelated third party.

B. Subsequent to the date of publication of the proposed exemption, the acquisition of a Lease from Rust shall not cause the Plan to hold immediately following the acquisition (1) more than 25% of the current value (as that term is defined in section 3(26) of the Act)[7] of Plan assets in customer notes (Notes) and Leases sold by Rust or (2) more than 10% of Plan assets in the aggregate of Leases with and Notes of any one entity.

C. Prior to the purchase of each Lease, an independent, qualified fiduciary determines that the purchase is appropriate and suitable for the Plan and that any Lease purchase is a fair market value transaction.

D. The independent fiduciary, on behalf of the Plan, monitors the terms of the Leases and the exemption and take whatever action is necessary to enforce the rights of the Plan.

E. Upon default by the lessee on any payment due under a Lease, Rust repurchases the Lease from the Plan at the payout value[8] as of the date of the default, without discount, and indemnifies the Plan for any loss suffered. The occurrence of any of the following events shall be considered events of default for purposes of this section: (1) The lessee's failure to pay any amounts due hereunder within five days after receipt of written notice from the Plan's independent fiduciary, or the lessee's failure to pay any amounts due hereunder within 30 days after payment becomes past due, if earlier; (2) the lessee's failure to perform any other obligation under this agreement within ten days of receipt of written notice from the Plan's independent fiduciary; (3) abandonment of the equipment by the lessee; (4) the lessee's cessation of business; (5) the commencement of any proceeding in bankruptcy, receivership or insolvency or assignment for the benefit of creditors by the lessee; (6) false representation by the lessee as to its credit or financial standing; (7) attachment or execution levied on lessee's property; or (8) use of the equipment by third parties without lessor's prior written consent.

F. The Plan receives adequate security for the Lease. For purposes of this exemption, the term adequate security means that the Lease is secured by a perfected security interest in the leased property which will name the Plan as the secured party.

G. Insurance against loss or damage to the leased property from fire or other hazards is procured and maintained by the lessee and the proceeds from such insurance is assigned to the Plan.

H. The Plan maintains for the duration of any Lease which is sold to the Plan pursuant to this exemption, records necessary to determine whether the conditions of this exemption have been met. The Plan continues to maintain the records for a period of six years following the expiration of the Lease or the disposition by the Plan of the Lease. The records referred to above must be unconditionally available at their customary location for examination, for purposes reasonably related to protecting rights under the Plan, during normal business hours by the Internal Revenue Service, the Department, Plan participants, any employee organization any of whose members are covered by the Plan, or any duly authorized employee or representative of the above described persons.

Temporary Nature of Exemption

Effective Dates: The proposed exemption, if granted, will be temporary and will be effective from September 21, 2000 through September 21, 2005 with respect to the Plan's future purchases of Leases. The Plan may hold the Leases acquired pursuant to the terms of the exemption subsequent to the end of the five year period.

Summary of Facts And Representations

1. The Plan is a profit sharing plan which currently has 502 participants and assets with an approximate aggregate fair market value of $34,303,504. Rust, which does business as "Rust Tractor Co." in Albuquerque, New Mexico, is in the business of selling heavy construction equipment. The Plan's trustee is Wells Fargo Bank New Mexico, N.A. (the Bank).

2. On April 3, 1985, the Department published Prohibited Transaction Class Exemption 85–68 (PTE 85–68, 50 FR 13293) which permits, under certain conditions, a plan to purchase and hold customer notes from an employer of employees covered by the plan. The applicant represents that the Plan has acquired and held many such customer notes (*i.e.,* the Notes) from Rust since 1985 in compliance with the terms and conditions of PTE 85–68.[9]

3. In addition to the Notes, the Plan also acquired from Rust, from December 30, 1985 through September 21, 1995, approximately 76 Leases. These Leases are secured leases which were accepted by Rust in the normal course of its primary business activity as the seller of heavy construction equipment. The Leases involve equipment which is leased to third parties. The applicant represents that the Plan acquired the Leases from Rust in the belief that such transactions were also covered by PTE 85–68. When the applicant realized that the Leases might not be exempt under PTE 85–68, it requested retroactive relief from the Department with respect to the Plan's past acquisition of such Leases, and also requested an exemption to permit the Plan to purchase additional Leases from Rust over a five year period. The Department granted the requested relief in PTE 95–87 (60 FR 49010, September 21, 1995).

4. The applicant represents that, since the issuance of PTE 95–87, the Plan has acquired from Rust approximately 50 Leases. The applicant now requests prospective relief for an additional five (5) years, upon the expiration of PTE 95–87 on September 21, 2000.

5. The applicant represents that each of the transactions involving the Plan's acquisition of the Leases would have satisfied the conditions of PTE 85–68 (*i.e.,* the class exemption for customer notes), but for the fact that these were Leases and not Notes. The applicant further represents that the conditions of PTE 95–87 (*i.e.,* the current individual exemption for Leases) have been satisfied and will continue to be satisfied with respect to future purchases by the Plan of Leases. The applicant specifies that the conditions of PTE 95–87 have been satisfied in the following manner:

(a) Prior to the purchase of any Lease, the transaction has been reviewed by Mr. Charles R. Seward, C.P.A., an independent certified public accountant who is the Plan's independent fiduciary with respect to this series of transactions. Mr. Seward performs no other services for either Rust or the Plan. On-going review of the performance of the customer-obligor is performed by the Bank, the Plan's independent trustee. In the event that a default in payment occurs, Rust is notified by the Bank and an immediate repurchase is effected for cash;

(b) The transactions have been on terms at least as favorable to the Plan as an arm's-length transaction with an unrelated party. The Plan's independent fiduciary, Mr. Seward, has represented that each transaction that he has approved for the Plan involving a Note or Lease has been in the best interests of the Plan and its participants. Mr. Seward further represents that each such transaction has been for a price and on terms and conditions no less favorable to the Plan, and in many

[7] According to section 3(26) of the Act, the term "current Value" means fair market value where available and otherwise the fair market value as determined in good faith by a trustee or a named fiduciary pursuant to the terms of the plan and in accordance with regulations of the Secretary [of Labor], assuming an orderly liquidation at the time of such determination.

[8] "Payout value" of a Lease is defined as the price that the lessee would pay at any point in time to obtain title to the leased property.

[9] In this proposed exemption, the Department expresses no opinion with respect to the applicability of PTE 85–68 to the Plan's acquisition and holding of such Notes.

respects more favorable, than such transactions have in the past been engaged in between Rust and third party financial institutions. Mr. Seward represents that due to the high rate of return on these Notes/Leases, they are excellent investments which bear no risk of loss since Rust has guaranteed the repurchase of any Note/Lease which might default;

(c) At no time has the value of the Notes/Leases held by the Plan approached 50% of the Plan's assets. In accordance with PTE 95–87, less than 25% of the Plan assets has been and will be involved in these transactions. As of December 31, 1999, the Notes/Leases comprised only 4.1% of the Plan's assets. At no time have the Notes/Leases of any one customer exceeded 10% of the Plan's assets. With respect to Notes and Leases acquired by the Plan subsequent to the publication of this proposed exemption, the applicant represents that the value of such Notes and Leases in the aggregate will constitute no more than 25% of the total value of Plan assets. At no time will the Notes/Leases of any one customer exceed 10% of the Plan's assets.

(d) Rust will continue to guarantee immediate repayment of any defaulted obligation. The applicant represents that there have been zero defaults of the Leases since the issuance of PTE 95–87;

(e) The Plan will continue to receive a perfected security interest in the tangible personal property purchased from Rust in return for the Note/Lease;

(f) The obligor is required to insure the collateral against fire and other hazards; and

(g) None of the terms of the Notes/Leases will extend beyond the 60 month period applicable to Notes secured by heavy equipment.

6. The applicant represents that the Leases create essentially the same risk and obligations on the parties as a sale transaction, and thus pose no greater risk of loss to the Plan than in the case of the acquisition of a Note which is subject to PTE 85–68. To date, the Plan has suffered no loss on any of the subject Lease transactions. Before entering into either a Note or Lease, Rust performs the same type of due diligence and requests the same type of financial information from the prospective purchaser/lessee. The agreements governing the transactions are very similar in that:

(a) Both transactions provide for monthly installments to pay for the use and possession of the equipment;

(b) Financing statements are filed by Rust in connection with both transactions;

(c) Upon default, Rust may accelerate the lessee/purchaser's obligations and immediately regain possession of the subject equipment;

(d) In the event of default under either transaction, Rust is entitled to its enforcement costs, including reasonable attorneys' fees;

(e) Both types of transactions contain warranty disclaimers and sell/lease the subject equipment ''AS IS WHERE IS'' with no express or implied warranties except the pass-through of the manufacturer's warranties;

(f) When either a Note or a Lease is sold to the Plan, an identical form of guarantee is executed by Rust in favor of the Plan as required by PTE 85–68. In the few transactions involving Notes sold to the Plan which have gone into default (prior to the issuance by the Department of PTE 95–87), Rust has performed under its guarantees and the Plan has suffered no loss;

(g) Under New Mexico law, there is no practical difference in the rights and obligations of Rust between the subject Lease transactions and sales transactions involving Notes. The essential terms and conditions of the two types of transactions are identical.

7. In summary, the applicant represents that the proposed sales of the Leases by the Employer to the Plan will meet the requirements of section 408(a) of the Act, because: (a) The sales will be limited to a five year period and will be limited to 25% of Plan assets, with the additional condition that no more than 10% of Plan assets can be invested in the Leases or Notes of any one customer; (b) the decision to purchase a Lease will be made by Mr. Seward acting as independent fiduciary for the Plan, and the customer/obligor's performance under the Lease will be monitored by Mr. Seward and the Bank on behalf of the Plan; (c) perfected security interests will be filed on the equipment related to each Lease; and (d) Rust will agree to indemnify the Plan against any loss related to the Leases and to repurchase any Leases that are in default.

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

Richard E. Lobenherz Profit Sharing Plan (the Plan), Located in Charlevoix, Michigan

[Application No. D–10895]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale of certain unimproved real property (the Land) by the Plan to Richard E. Lobenherz (Mr. Lobenherz), a disqualified person with respect to the Plan,[10] provided that the following conditions are satisfied:

(a) The proposed sale will be a one-time transaction for cash;

(b) The Plan will receive the current fair market value for the Land established at the time of the sale by a qualified, independent appraiser;

(c) The Plan will pay no real estate expenses or commissions associated with the sale; and

(d) The sale will provide the Plan with greater liquidity and further diversification of the Plan's assets.

Summary of Facts and Representations

1. The Plan, which was originally known as the ''Richard E. Lobenherz Keogh Plan'' (the Keogh Plan), was established on April 5, 1986 by Mr. Lobenherz, who was the sole sponsor, trustee and participant. In 1991, the Keogh Plan was converted and restated as the current Plan. At the time of conversion, Mr. Lobenherz flied an application with the Internal Revenue Service (the Service) and subsequently obtained a Favorable Determination Letter from the Service with respect to the qualifications of the current Plan.

2. As of December 31, 1999, the Plan had $786,209 in net assets available for benefits. Mr. Lobenherz is the sponsor, trustee, and the only participant in the Plan. He is also a sole proprietor, who is an independent contractor and real estate broker licensed in the State of Michigan. Recently, Mr. Lobenherz retained an independent party, Citizens Bank and Trust (CBT) of Saginaw, Michigan, to serve as the Plan's custodian, trustee and investment manager.

3. In May of 1998, the Plan purchased the Land from the Bruce K. Shanahan Trust, an unrelated third party, for $60,000 in cash. The Land was acquired by the Plan for capital appreciation purposes and it was considered by Mr. Lobenherz to be a good long-term investment. The Land consists of approximately 80 acres of vacant

[10] Because Mr. Lobenherz is the sole owner of the Plan sponsor and the only participant in the Plan, there is no jurisdiction under Title I of the Employee Retirement Income Security Act of 1974 (the Act) pursuant to 29 CFR 2510.3–3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

agricultural land that is located in Hayes Township, Charlevoix County, Michigan. The Land is legally described as:

''That portion of the west ½ of the northwest ¼ of Section 17, Town 34 North, Range 7 West, lying North of U.S.-31, and also; that part of the Northwest ¼ of the Southwest ¼ of Section 17, Town 34 North, Range 7 West, lying north of Highway U.S.-31.''

The Land is adjacent to Big Rock Nuclear Power Plant, which is presently in the second year of a five year decommissions program, and the Charlevoix Country Club (the Club), of which Mr. Lobenherz is a 15% shareholder.[11] At the time of purchase, the Land represented approximately 15% of the Plan's total assets. As of December 31, 1999, the Land represented approximately 8.9% of the total value of the Plan's assets.

4. The applicant represents that the Land has not produced any income since it was acquired by the Plan. In addition, the applicant states that the Land has not been used by or leased to anyone, including disqualified persons. Furthermore, the Plan has paid aggregate real estate taxes for the Land in the total amount of $3,112.45. The Plan also paid $300 for one appraisal, which was dated February 8, 2000 (the Appraisal), as discussed below. Therefore, the Plan's total acquisition and holding costs in connection with its ownership of the Land is $63,412.45.

5. The Land was appraised as of February 8, 2000 (*i.e.*, the Appraisal), by A. Kenneth Smith (Mr. Smith), GRI, who is an independent state certified real estate appraiser in the State of Michigan. Mr. Smith is employed with Mid-Michigan Engineering & Survey Co., a real estate appraisal and consultation business located in Big Rapids, Michigan.

In determining the fair market value of the Land, Mr. Smith relied primarily on the Sales Comparison Approach. On the basis of the Appraisal, Mr. Smith placed the fair market value of the Land at $70,000, as of February 8, 2000. The applicant represents that Mr. Smith maintains that the Land's adjacency to the Club does not merit a premium above fair market value. In this regard, Mr. Smith considered, among other things, that the Club passed on the opportunity to acquire the Land at an earlier time, and also the Club is not in the financial position to expand. Thus, even though Mr. Lobenherz is a 15% shareholder of the Club, no premium above the fair market value of the Land is merited for purposes of a sale of the Land to Mr. Lobenherz.

By letter dated June 28, 2000, Mr. Smith stated that he was aware that the Appraisal was being submitted by the applicant to the Department as part of the exemption request described herein. In that letter, Mr. Smith also indicated that the value of the Land had not changed since his original valuation.

6. CBT, as the Plan's newly appointed custodian, trustee and investment manager, has requested that the Plan divest itself of the Land because it is non-income producing. Therefore, the applicant requests an administrative exemption from the Department which will allow Mr. Lobenherz to purchase the Land from the Plan in a one-time cash transaction. The applicant represents that the proposed transaction will be in the best interest and protective of the Plan because the Plan will pay no real estate commissions or expenses (including transfer taxes) associated with the sale. In addition, Mr. Lobenherz will pay the Plan the current fair market value of the Land, as determined by Mr. Smith in an updated appraisal at the time of the sale. Further, the sale of the Land will increase the liquidity of the Plan's portfolio, provide the Plan with the opportunity to reinvest the proceeds of the sale in investments that will yield greater returns, and permit greater diversification of the Plan's assets.

7. In summary, the applicant represents that the proposed transaction will satisfy the statutory criteria for an administrative exemption under section 4975(c)(2) of the Code because:

(a) The proposed sale will be a one-time transaction for cash;

(b) The Plan will receive the current fair market value for the Land established at the time of the sale by a qualified, independent appraiser;

(c) The Plan will pay no real estate expenses or commissions associated with the sale; and

(d) The sale will provide the Plan with greater liquidity, an opportunity to achieve greater investment returns, and will permit further diversification of the Plan's assets.

Notice to Interested Persons

Because Mr. Lobenherz is the sole participant in the Plan, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Comments and requests for a hearing are due thirty (30) days from the date of publication of the notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department at (202) 219–8883. (This is not a toll-free number.)

I.B.E.W. LU 567 Electrical Joint Apprenticeship and Training Trust Fund (the Training Plan) and Money Purchase Retirement Plan of Local 567, I.B.E.W (the M/P Plan) (collectively, the Plans), Located in Falmouth, MA

[Application Nos. L–10906 and D–10907, respectively.]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective August 31, 2000, to the leases (the Leases) of certain office space and supplemental facilities (the Leased Space) to the Plans by Local 567 I.B.E.W. Building Corporation (the Building Corporation), an entity which is wholly owned by Local 567 of the International Brotherhood of Electrical Workers (the Union), a party in interest with respect to the Plans, provided that the following conditions are satisfied:

(1) The terms of the Leases are at least as favorable to the Plans as those obtainable in an arm's length transaction with an unrelated party;

(2) A qualified, independent appraiser determines annually the fair market rental value of the Leased Space;

(3) The Lease payments are adjusted annually by an independent fiduciary to assure that such Lease payments are not greater than the fair market rental of the Leased Space. The Lease payments are reduced, if the fair market rental value, as determined by the independent fiduciary, decreases;

(4) An independent fiduciary determines that the transactions are appropriate for the Plans and in the best interest of the Plans' participants and beneficiaries;

(5) The independent fiduciary monitors the terms of the transactions and conditions of this exemption, if granted, at all times, and takes whatever actions are necessary and proper to enforce the Plans' rights under the Leases and protect the participants and beneficiaries of the Plans. (Such independent fiduciary duties also include, but are not limited to, negotiating any required amendments to

[11] It is represented that the Club has nine other shareholders aside from Mr. Lobenherz. These shareholders are not related to Mr. Lobenherz or the Plan.

the Leases on behalf of the Plans to make certain the terms of the Leases are commercially reasonable.); and

(6) The annual fair market rental amount for the Leased Space will not exceed 5% of each of the Plan's total assets.

EFFECTIVE DATE: If granted, this proposed exemption will be effective as of August 31, 2000.

Summary of Facts and Representations

1. The Training Plan, which operates under a formal Trust Agreement dated January 1, 1994, is a collectively-bargained multi-employer joint apprenticeship training plan. The Training Plan is sponsored by the members of the Electrical Contractors Association of Greater Boston Inc.—Portland, Maine Division of the Boston Chapter, N.E.C.A. (the Employers), which have negotiated the collective employment contract with the Union. The Training Plan provides training and educational benefits to electrical apprentices and journeymen. Such benefits are funded by contributions made by the Employers to the Training Plan, pursuant to certain collective bargaining agreements between the Union and the Employers. As of August 31, 1999, the Training Plan had 87 participants and $178,149 in net assets available for benefits.

2. The M/P Plan, which was established on June 1, 1981, is a defined contribution, participant-directed plan that is sponsored by the Employers. The M/P Plan provides retirement benefits that are funded by contributions made by the Employers pursuant to certain collective bargaining agreements between the Union and the Employers. As of August 31, 1999, the M/P Plan had 564 participants, all of whom are members of the Union. As of March 31, 1999, the M/P Plan had $14,570,601 in net assets available for benefits.

3. The Training Plan is administered by six trustees (the Trustees), three of whom are appointed by the Union (Union Trustees) and three of whom are appointed by the Employers (the Employer Trustees). The Union Trustees with respect to the Training Plan are Milton McBreairty (Mr. McBreairty), John Stevens and Kevin Murphy. The Employer Trustees for the Training Plan are Thomas Driscoll (Mr. Driscoll), Mario Gowell and Steve Stewart. The Employer Trustees are not affiliated with either the Union or the Building Corporation.

The M/P Plan is also administered by three Union Trustees and three Employer Trustees. The Union Trustees for the M/P Plan are Mr. McBreairty, Donald Berry and Gene Ellis. The Employer Trustees for the M/P Plan are Mr. Driscoll, David Bradbury and John Penney. The Employer Trustees are not affiliated either with the Union or the Building Corporation.

4. The applicants represent that the Training Plan required space for its administrative offices and training facilities. Similarly, the M/P Plan also required office space for its administrative personnel. Therefore, on August 31, 2000, the Building Corporation acquired a 10 year old two-unit warehouse building (Building I) from Atlantis Development Building Corporation (Atlantis), an unrelated party, for $425,000. Building I is located at 238 Goddard Road, Lewiston, Maine. It was purchased by the Building Corporation as a replacement for another building located at 240 Gray Road, Falmouth, Maine (Building II), which the Building Corporation intends to sell to an unrelated party by September 30, 2000.

5. The applicants state that both Plans currently occupy space in Building II, which also houses administrative offices of the Union and serves as the Union meeting hall. The applicants note that the M/P Plan's use of Building II is the subject of a prior administrative exemption granted by the Department which is known as Prohibited Transaction Exemption (PTE) 94–16, (59 FR 8027, February 17, 1994). PTE 94–16 permits, in relevant part, the leasing of 360 square feet of office space in Building II by the Building Corporation to the M/P Plan. The applicants state that although the Lease would constitute the payment by the M/P Plan for office space to a party in interest within the meaning of section 408(b)(2) of the Act and the lease would otherwise meet the requirements of 29 CFR 2550.408b–2, and be statutorily exempt from section 406(a) of the Act, further exemptive relief was required because the Union Trustees of the M/P Plan participated in the decision to have the M/P Plan engage in the Lease in violation of section 406(b)(2) of the Act. The applicants represent that the M/P Plan has complied with all of the terms and conditions of PTE 94–16 since the exemption was granted.

6. In addition, the applicants explain that the Training Plan leased office space in Building II from the Building Corporation and state that the Training Plan used certain other space for training-related purposes. The applicants represent that the Training Plan's leasing of office space in Building II satisfies the requirements for statutory exemptive relief under section 408(b)(2) of the Act and the regulations that have been promulgated thereunder (see 29 CFR 2550.408b–2).

Moreover, the applicants believe that the other space in Building II, which has been used by the Training Plan for training-related purposes, is covered by Prohibited Transaction Class Exemption (PTCE) 78–6 (43 FR 23024, May 30, 1978). PTCE 78–6 permits certain lease transactions involving collectively bargained multiple employer apprenticeship and training plans, provided the conditions therein are met.[12]

7. The applicants state that the Training Plan wished to relocate and consolidate its office space and training facilities in one location. Previously, training and educational classes were held in rented facilities over the entire State of Maine, and such programs were constrained by the time and space limitations of such facilities. Therefore, the applicants believed that Building I, rather than Building II, would provide a central geographic location for the Training Plan's administrative offices and training facilities.

Similarly, the applicants note that the M/P Plan required additional administrative office space. Thus, Building I's central geographic location and proximity to other Union facilities and services used by participants in the M/P Plan were thought by the applicants to make it an ideal location for office space for such Plan.

Therefore, the applicants request an administrative exemption from the Department to permit, effective August 31, 2000, the Leases, by the Building Corporation to the Plans, of certain office space and supplemental facilities space (*i.e.*, the Leased Space) in Building I. The applicants represent that the participation by the Union Trustees for both plans in the decision to have the respective Plans engage in the Leases does not permit that portion of the Leased Space between the Plans and the Building Corporation pertaining to office space from otherwise meeting the requirements of section 408(b)(2) of the Act and the Department's regulations relating thereto. The applicants explain that the Trust documents for the Plans require that a majority of the Plans' Trustees, which includes at least one Union Trustee from each Plan, vote to cause the Plans to enter into any transaction, such as the subject Leases. However, if the Union Trustees for both

[12] The Department expresses no opinion herein on whether the Training Plan's leasing or use of space in Building II has complied with the conditions required under PTCE 78–6 or provisions of section 408(b)(2) of the Act. The Department notes that the appropriate Training Plan fiduciaries must make such determinations.

Plans exercise their fiduciary authority to cause the Plans to enter into the Leases, the applicants state that the transactions may violate section 406(b)(2) of the Act because of the adverse interests of the Plans and the Building Corporation.

Again, the Department expresses no opinion herein on whether each Lease constitutes the payment by a plan for office space to a party in interest under circumstances which would be statutorily exempt from the prohibitions of section 406(a) of the Act by reason of section 408(b)(2) of the Act.

8. The Training Plan is initially leasing 1,949 square feet of space in Building I from the Building Corporation. However, it is anticipated that upon the termination of an unrelated third party's lease in Building I on June 30, 2001, the Training Plan will expand and reconfigure part of Building I so that the Training Plan will have 8,600 square feet for office space and training facilities.

The M/P Plan is initially leasing 400 square feet of space in Building I for its administrative offices. It is also anticipated that this Plan will lease an additional 800 square feet in Building I for its administrative offices once certain unrelated third parties terminate their respective leases in Building I.

9. Both the Training Plan Trustees and the M/P Plan Trustees negotiated with the Building Corporation the respective leasing agreements for their Plans. In this regard, each Lease is a triple-net lease having an initial term of a five years which commenced on August 31, 2000, and two consecutive five year renewal terms. Rent is being paid monthly in advance under the Leases, and will equal the fair market rental value of the Leased Space as determined by a qualified, independent appraiser. Currently, the Leases specify that the Training Plan will pay $730.09 per month ($8,761 per year) in rent and the M/P Plan will pay $150 per month ($1,800 per year) in rent. These monthly rentals reflect the values prior to the reconfiguration. The rental amounts will be increased following the reconfiguration.

The applicants represent that the annual fair market rental amount under the Leases will involve approximately one percent (1%) of the M/P Plan's total assets and less than five percent (5%) of the Training Plan's total assets. However, in no event will the annual fair market rental amount for the Leased Space exceed five percent (5%) of each Plan's total assets.

Other terms of the Leases will be at least as favorable to the Plans as the terms obtainable in an arm's length transaction with an unrelated party. Further, the Leases may be terminated by the Plans without penalty, on sixty days prior written notice to the Building Corporation, should any provision of such Leases become disadvantageous to the Plans.

In addition, the Leases contain specific provisions designed to be beneficial to the Plans, such as the tenant's right to a ten-day written notice of payment default, and the tenant's right to take action on behalf of the defaulting landlord and set off such costs against the rent. The applicants note that these conditions cannot be obtained in the open market without having to pay a higher rental to reflect the increased costs and risks to the landlord.

10. On October 12, 1999, Brian D. Diskin (Mr. Diskin), a Certified General Appraiser, who is employed by Maineland Appraisal Consultants of Portland, Maine (Maineland) as an independent commercial real estate appraiser, completed a competitive rental market study of Building I (the Study). As stated above, Building I was constructed at its present location (*i.e.*, 238 Goddard Road, Lewiston, Maine) in 1990, and it consists of a manufacturing warehouse containing two units.

Mr. Diskin relied on the Market Comparison Approach to determine the fair market rental value of Building I. Mr. Diskin considered rental amounts being charged for other warehouse/industrial properties in the same geographic area as Building I, and he determined that the market rents for such properties there ranged from $4 to $6 per square foot, depending upon such factors as location, size and utility of the particular facility.

In the Study, Mr. Diskin noted that there were two tenants in Building I: RF Technologies (RF) [13] and the Building Corporation, both of which leased space from Atlantis, the former owner, until the August 31, 2000 sale of Building I to the Building Corporation. Mr. Diskin explained that RF's original lease, which commenced on April 4, 1994, was in its fourth renewal period, which is set to expire on June 30, 2001. Mr. Diskin indicated that RF's lease provides for a rental payment of $4.25 per square foot. In addition, he explained that this lease is triple net and requires RF to pay its *pro rata* share of common area expenses.

Mr. Diskin also noted that the Building Corporation had entered into a lease with Atlantis on September 1, 1999 for a five year term. This lease, which was terminated when the Building Corporation purchased Building I from Atlantis on August 31, 2000, required the Building Corporation to pay Atlantis $4.50 per square foot in rent and it contained a 3% escalator provision for increasing the rental amount each year. The Building Corporation was also responsible for paying its *pro rata* share of the common area expenses.

In the Study, Mr. Diskin concluded that as of October 6, 1999, the current fair market rent for space in Building I under a triple net lease would range between $4.25 and $4.50 per square foot.

11. The Trustees of each Plan have also retained Maineland to serve as the independent fiduciary for the Plans in connection with the subject Leases. On October 25, 1999, the Plans' Trustees signed a Fiduciary Engagement Agreement (the Agreement) with Maineland whereby Maineland agreed to: (a) Evaluate the fair market rental value of Building I; (b) review, on behalf of the Plans, the provisions of each Lease (and any proposed amendments thereto), and make a determination and recommendation to the Trustees whether such Leases would be in the best interest and protective of the Plans; and (c) monitor the Lease transactions at least annually (or more frequently, upon written request by a Trustee) to ensure that the rental amounts for the Leased Space remain at fair market rental for Building I, and the Leases continue to be protective and in the best interest of the Plans.

In the Agreement, Maineland states that it has been advised by legal counsel regarding its fiduciary obligations under ERISA, and it understands and accepts its duties as an ERISA fiduciary on behalf of the Plans with respect to the Leases.

12. In a letter dated December 16, 1999, Frank R. Montello, the president of Maineland (Mr. Montello), has made specific representations regarding Maineland's functions as the Plans' independent fiduciary for the Leases. Mr. Montello states that Maineland is completely independent of the Plans, the Union, the Employers and other entities affiliated with the Plans. Mr. Montello also states that the fees received by Maineland will not exceed one percent (1%) of Maineland's annual gross income (including all appraisal fees) for each fiscal year that Maineland acts as the Plans' independent fiduciary for the Leases.

Based on the Study completed by Mr. Diskin (described in paragraph 10

[13] The applicants state that RF, a manufacturing business that currently occupies approximately one-half of Building I, is not a party in interest with respect to either Plan, and is otherwise unrelated to the Plans, the Employers and the Union.

above), Mr. Montello has deemed the Leases to be administratively feasible, protective of the Plans and in the best interest of the Plans. In this regard, under the terms of the Leases, the Plans have the right to terminate the Leases upon sixty (60) days advance written notice to the Building Corporation. Such termination will be without penalty.

Mr. Montello states that the Agreement requires Maineland to reevaluate the terms of the Leases upon a written request from the Plans' Trustees. After reconfiguration of the spaces in Building I, Maineland will evaluate the fairness of the rental amounts and the commercial reasonableness of the Leases to ensure that the Plans' interests continue to be protected under the terms of the Leases. The applicants maintain that the reconfiguration cost for the space is anticipated to be nominal (*i.e.,* no more than a few thousand dollars).

13. The Agreement requires Maineland to reevaluate any proposed amendment to a Lease. In a second letter to the Department dated June 13, 2000, Mr. Montello has confirmed that the Agreement gives Maineland, as the independent fiduciary, authority to take any actions which may be necessary to protect the interest of the Plans and the Plans' participants and beneficiaries with respect to the Lease transactions. This authority includes directing the amendment or termination of either Lease, if Maineland, as the independent fiduciary, determines that the terms of such Leases cease being commercially reasonable for the Plans. Mr. Montello states that these provisions in the Agreement will protect each Plan's interests in the event that the Building Corporation wishes to amend the Lease or adjust the amount of rent charged after the necessary space in Building I is reconfigured.

However, the applicants represent, and Maineland will ensure, that the rents paid by the Plans for the Leased Space will remain at an amount equal to the fair market value of the Leased Space. In addition, the annual fair market rental amount paid by the Plans for the Leased Space will, at no time, exceed 5% of each Plan's total assets, and will not adversely affect either Plan's ability to make necessary payments for benefits or expenses required under the terms of the Plans.

Maineland represents that it will direct the Trustees whether the Plans should either terminate or renew the Leases for each five year extension period. In this regard, the applicants make a request regarding a successor independent fiduciary (the Successor). Specifically, if it becomes necessary in the future to appoint the Successor to replace Maineland, the applicants will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the responsibilities, experience and independence similar to those of Maineland.

14. In summary, the applicants represent that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The terms of the Leases are at least as favorable to the Plans as those obtainable in an arm's-length transaction with an unrelated party;

(b) Maineland, as the Plans' independent fiduciary, has determined and will make subsequent determinations, whenever appropriate, that the terms and conditions of the Leases are in the best interest and protective of the Plans;

(c) The fair market rental amount of Building I and the Leased Space has been determined and will be determined by a qualified, independent appraiser;

(d) The annual fair market rental amount for the Leased Space does not exceed and will not exceed 5% of each of the Plan's total assets; and

(e) Maineland, as the independent fiduciary, has monitored and will continue to monitor the terms and conditions of the Leases, at all times, and will take whatever actions are necessary and proper to enforce the Plans' rights thereunder.

Notice To Interested Persons

The applicants represent that they will distribute, by first class mail, a copy of the notice of pendency of this proposed exemption (the Notice) within seven (7) days of the date such Notice is published in the **Federal Register**. Such Notice will be given to all interested persons, including all participants in the Plans, all employees in the Plans, and all Union members. The distribution to interested persons shall include a copy of the Notice, as published in the **Federal Register,** and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption.

Comments and requests for a public hearing with respect to the proposed exemption are due within thirty-seven (37) days following the publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219–8883. (This is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

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

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

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

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

Signed at Washington, DC, this 18th day of September, 2000.

Ivan Strasfeld,

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

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