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Signed at Washington, DC this 27th day of October 1995.

Philip J. Gloss,

Chief, Branch of Construction Wage Determinations.

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BILLING CODE 4510–27–M

Pension and Welfare Benefits Administration

[Application No. D–10027, et al.]

Proposed Exemptions; Concord Hospital Capital Region

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 restriction 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

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this Federal Register Notice. Comments and request 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. 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, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

Retirement Plan for Employees of Concord Hospital Capital Region Healthcare Corp. (the Plan) Located in Concord, New Hampshire

[Application No. D–10027]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(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 July 7, July 13, July 18, August 19, and August 22, 1994, transfers (the Transfers) to the Plan of $7,376,039 of publicly-traded securities from non-ERISA accounts (the Accounts) of Concord Hospital, Inc. (the Employer) and its parent corporation, Capital Region Health Care Corporation (Capital; collectively, the Applicant); (2) the transfer of $3,761,319 of publicly-traded securities from the Plan to the Accounts in August of 1994 (the August, 1994 Distributions); and (3) the proposed transfer of approximately $3.6 million from the Plan to the Accounts (the Proposed Corrective Distribution), provided the following conditions are satisfied: (a) the decision for the Plan to enter the subject transactions was made at the recommendation of the Plan's independent investment advisor; (b) the Plan has not paid and will not pay commissions or other fees in connection with the subject transactions; (c) the transactions involve publicly-traded securities, the fair market values of which were based upon published prices on established markets; and (d) the Plan's independent fiduciary has reviewed the transactions and has determined that the transactions were in the best interest of the Plan and protective of the rights of the participants and beneficiaries of the Plan.

EFFECTIVE DATE: If the proposed exemption is granted, the exemption will be effective July 7, 1994.

Summary of Facts and Representations

1. The Plan is a defined benefit pension plan which has approximately

1,400 participants and beneficiaries and assets with an approximate fair market value of $20 million. The Applicant is a community-service hospital which is exempt from federal income tax under section 501(c)(3) of the Code. The Accounts from which the Transfers were made are commingled accounts consisting of assets belonging to the Employer and Capital. The Accounts of Capital are endowment accounts, and the Accounts of the Employer are funded depreciation reserves and operating reserves.

2. Effective June 1, 1993, the Applicant hired an investment consulting firm, Prime Buchholz & Associates, Inc. (PB) to provide advice concerning the investment of the assets of the Plan and of the Accounts. The equity categories that were reviewed included large capitalization U.S. equities, medium capitalization U.S. equities, small capitalization U.S. equities, international equities, and fixed-income U.S. and international securities.

3. After a year of study, PB recommended that the Plan investments be diversified from the then principally large capitalization U.S. equities and intermediate term U.S. fixed- income securities to a broader spectrum of investments in large, medium and small capitalization U.S. equities, international equities and intermediate term U.S. fixed-income and global fixed-income securities. A corresponding decision was made to diversify the investments of the Accounts from principally medium capitalization U.S. equities and intermediate fixed-income securities to include holdings in large, medium and small capitalization U.S. equities and international equities, and intermediate term U.S. fixed-income and global fixed-income securities.

4. In order to eliminate significant transaction costs which would arise from sales of existing securities and the purchase of other securities for the Plan, the decision was made, at PB's recommendation, to enter into an equivalent like-kind exchange of assets between the Plan and the Accounts. The intent of PB and of the Applicant was to produce this exchange at an exactly equivalent value, determined by third party valuation sources. The practical impact was a substantial cost saving to the Plan in sales brokerage commissions, as well as the purchase of certain medium capitalization and small capitalization U.S. equities recommended for the Plan's portfolio.

5. The first set of transactions consisted of the Transfers, an in-kind transfer of $7,376,039 of publicly-traded securities from the Accounts into the Plan, completed on July 7, July 13, July 18, August 19, and August 22, 1994. The second set of transactions was to be a reciprocal in-kind transfer of $7,376,039 of Plan assets into the Accounts, scheduled for completion in early August, 1994. A portion ($3,761,319) of this second transaction was completed on August 18–19, and August 29–31, 1994 prior to the realization by the Applicant that a prohibited transaction may have taken place.[1] The Applicant immediately suspended further transfers between the Plan and the Accounts, and commenced discussions with PB and its counsel as to whether a prohibited transaction may have occurred and whether any corrective action could be taken. The Applicant then engaged outside counsel to review the situation, to make recommendations concerning corrective action and, subsequently, to request a prohibited transaction exemption from the Department.

6. The Plan's independent asset managers, Keystone Institutional Company, Inc. (Keystone) and Boston represent that they were fiduciaries to the Plan at the time of the subject transactions, and that they were responsible for the selection of the securities.[2] Boston represents that because the transfer value was slightly more than one-half of the value of the account it managed for the Plan, it first selected for transfer one-half of the shares of each equity security held by the account. Then, Boston identified certain securities in the account which had been classified as near-term sell candidates through the firm's investment research process. Boston selected the balance of the securities to be transferred from those designated near-term sell candidates. With regard to its security selection for assets to be transferred to the Plan, Keystone represents that it agreed to transfer securities where possible to fund the pension accounts while avoiding unnecessary transaction costs. Keystone also represents that it undertook all security transfers to have the Plan's portfolio be in line with other similar portfolios that it managed.

7. With respect to the Transfers and the August, 1994 Distributions, the Plan's independent custodian, U.S. Trust Company (UST) represents that all the securities transferred were publicly-traded securities. Each security was valued as of the date of its Transfer to or Distribution from the Plan. UST represents that it relied on Interactive Data Corporation and Merrill Lynch Securities to provide independent valuations of the investment assets transferred. The values of the common stocks were established by Interactive Data Corporation, based upon closing prices, if available. If they were not available, then the bid quotation was used. The values of the bonds were established by Merrill Lynch, a market maker, based on closing prices. The money market assets were valued at the $1.00 per share stated value.

8. Keystone and Boston represent that the transactions were not all accomplished on the same date for several reasons. First, the instructions from PB were sent to the two asset managers in two separate fax transmissions, separated by approximately a month. In addition, Boston states that the distributions out of the Plan were delayed because there were multiple accounts, there were questions about the mechanics of the transactions, and because UST had recently become the custodian of the Plan's accounts and it was necessary that UST's records be reconciled.

9. The Applicant has retained an independent investment management firm, R.M. Davis & Company (Davis) of Portland, Maine, as an independent fiduciary to evaluate the initial transactions and to recommend the procedure to be followed in making the Proposed Corrective Distribution from the Plan to protect the interests of the Plan and of its participants and beneficiaries. The Applicant instructed Davis that the Proposed Corrective Distribution must be accomplished in such a manner that the Plan will not suffer any loss due to the transaction, and that an appropriate dollar amount will be retained by the Plan to reflect interest, dividends and capital appreciation, if necessary, to put the Plan in at least as good a position as it would have been in had none of the transfers taken place. In this regard, it should be noted that the Plan held assets with a value of approximately $7,361,664 for slightly less than one month (between the Transfers made in July, 1994 and the August, 1994 Distributions), and that it will also have held $3,614,720 in assets from August 22, 1994 until the completion of the Proposed Corrective Distribution.[3]

[1] The Applicant represents that The Boston Company (Boston), one of the independent investment money managers hired to manage the assets of the Plan, had an internal transaction review process which identified the subject transactions as being prohibited transactions under the Act.

[2] Keystone represents that none of the assets that were transferred from the Plan to the Accounts were subject to its management.

[3] Boston represents that the Plan has earned $314,736.50 in interest on this money as of August 31, 1995.

Keystone represents that the assets transferred into the Plan have appreciated in value to $10,997,547 as of September 13, 1995, an increase of $2,942,305 from August 22, 1994. That appreciation, plus any interest and dividends, will be retained by the Plan so that the maximum Proposed Corrective Distribution will be no greater than $3,614,720, which was the difference in value between the assets transferred into the Plan in July and August, 1994, and distributed out of the Plan in August, 1994. It is intended that the Proposed Corrective Distribution will consist of short-term fixed income securities managed by Boston. The Applicant represents that Boston will select the securities to be transferred out of the Plan, and these securities will be valued by UST as of the date of transfer, with the values being verified by Davis.

10. Davis has reviewed the past and proposed transactions and has determined that PB's general recommendation was prudently arrived at and was in accordance with a policy of diversifying Plan assets. PB's specific recommendation to adjust portfolio balances through a direct exchange between the Plan and the Accounts was also prudently arrived at and was consistent with the best interest of Plan participants and beneficiaries. The methods employed for determining fair market values of the securities were consistent with industry practices, and the transactions have been carried out in a manner protective of the participants and beneficiaries of the Plan.

11. In summary, the Applicant represents that the subject transactions satisfy the criteria contained in section 408(a) of the Act because: (a) The decision to enter into the transactions was made at the recommendation of PB, the Plan's independent investment advisor; (b) the Plan paid no commissions or other fees in connection with the transactions; (c) the transactions, which have all involved publicly-traded securities, have been at fair market value as evidenced by published quotations; (d) Boston and Keystone, independent asset managers of the Plan, selected the securities that were involved in the transactions; (e) the Applicant, upon discovery of the prohibited nature of the transactions, suspended the transactions and promptly applied for an exemption; and (f) Davis, the Plan's independent fiduciary, has reviewed all aspects of the transactions and determined that they were in the best interest of the Plan and of its participants and beneficiaries, and protective of their rights.

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

The Industrial Bank of Japan, Limited, New York Branch (IBJ) Located in New York, New York

[Application Nos. D–10065 and D–10066]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(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 proposed granting to IBJ, as the representative of lenders (the Lenders) participating in a credit facility (the Facility), of security interests in limited partnership interests in the Tiger Real Estate Fund, L.P. (the Partnership) owned by certain employee benefit plans (the Plans) with respect to which some of the Lenders are parties in interest; and (2) the proposed agreements by the Plans to honor capital calls made by IBJ in lieu of the Partnership's general partner; provided that (a) the proposed grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's length transactions with unrelated parties; and (b) the decisions on behalf of each Plan to invest in the Partnership and to execute such grants and agreements in favor of IBJ are made by a fiduciary which is not included among, and is independent of, the Lenders and IBJ.

Summary of Facts and Representations

1. The Partnership is a Delaware limited partnership which is organized under an agreement (the Agreement) dated January 31, 1995 for a term expiring on February 1, 2005. The general partner of the Partnership is Tiger Real Estate Partners Management, L.L.C., (the General Partner), a Delaware limited liability company, the managing member of which is Tiger Real Estate Partners, L.L.C., also a Delaware limited liability company. The Partnership has been organized to make investments in a broad range of real estate related assets, portfolios, and companies. Proceeds from the sale or refinancing of properties generally will not be reinvested, but will be distributed to the limited partners, so that the Partnership will be self-liquidating.

2. After execution of the Agreement, the General Partner sought capital commitments through private placement and has obtained, as a result, irrevocable, unconditional capital commitments of at least $500,000,000 from 48 purchasers of limited partnership units (the Limited Partners). The Agreement requires Limited Partners to make capital contributions upon receipt of notice from the General Partner. Under the Agreement, the General Partner may make a call for cash contributions, also known as a "drawdown," up to the total amount of the Limited Partner's capital commitment upon 15 days' notice, subject to certain limitations. The Partners' capital commitments are structured as irrevocable, unconditional, and binding commitments to contribute equity when capital calls are made by the General Partner. The obligation of each Limited Partner to contribute the full amount of its capital commitment is secured by a grant to the Partnership of a security interest in the Limited Partner's partnership interest.

3. In the ordinary course of its business operations, it is contemplated that the Partnership will incur indebtedness in connection with many of its investments. This on-going need for credit is to be provided by the Facility, a 45-month arrangement for $200 million in revolving credit. The Facility will enable the Partnership to consummate investments quickly without the delay of having to finalize the debt/equity structure for an investment or of having to arrange for interim or permanent financing prior to making an investment. IBJ is the administrative agent for a group of Lenders funding the Facility, as well as a participating Lender. The Facility is, for the Partnership, a non-recourse obligation which matures December 30, 1998. The repayment of this obligation is secured by the Partnership's assignment to the Facility of a security interest in each Limited Partner's partnership interest, capital commitment, and the General Partner's right to make drawdowns. As additional security, the Facility will require each Limited Partner to execute a separate agreement (the Security Agreement) granting to IBJ, for the benefit of the Lenders, a security interest and lien in the Limited Partner's partnership interest, and covenanting with IBJ for the benefit of the Lenders, that such Limited Partner will unconditionally honor any drawdown made by IBJ in lieu of the General Partner in accordance with the Agreement to the

full extent of the Limited Partner's unfunded capital commitment.

4. The trusts which hold assets of the Plans (the Trusts) are Limited Partners in the Partnership and therefore own limited partnership interests. Some of the Lenders are parties in interest with respect to some of the Plans in the Trusts by virtue of such Lenders' (or their affiliates') provision of fiduciary services to such Plans. These fiduciary services are provided with respect to Trust assets other than the Partnership interests.

IBJ is requesting an exemption to permit the Trusts to enter into the Security Agreements under the terms and conditions described herein. The Trusts with the largest interests in the Partnership and the extent of their respective capital commitments to the Partnership are described as follows:

(a) *The AT&T Master Pension Trust (the AT&T Trust), Located in New York, New York; State Street Bank and Trust Company, Trustee.* This Trust holds the assets of two defined benefit pension plans sponsored by AT&T—the AT&T Pension Plan and the AT&T Management Pension Plan. The AT&T Trust also holds the assets of some smaller plans sponsored by AT&T affiliates. As of December 31, 1995, the AT&T Trust had a total of 442,240 participants and aggregate assets of $38.25 billion. The AT&T Trust has undertaken a total capital commitment of $100,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the AT&T Trust is David Feldman, Corporate Vice President, of AT&T's Investment Management Organization.

(b) *The Honeywell Master Pension Trust (the Honeywell Trust), Located in Medford, Massachusetts; Boston Safe Deposit and Trust Company, Trustee.* This Trust holds the assets of four defined benefit pension plans. These Plans are the Durham Pension Plan, the Honeywell Retirement Benefit Plan, the Honeywell Protection Services Pension Plan, and the Honeywell Pension Plan for Certain Hourly Employees. As of February 28, 1995, the Honeywell Trust had a total of 82,850 participants and aggregate assets of $2.33 billion. The Honeywell Trust has undertaken a total capital commitment of $20,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the Honeywell Trust is the Honeywell Pension and Retirement Committee.

(c) *The BP America Inc. Retirement Trust (the BP Trust), Located in Cleveland, Ohio; Bankers Trust Company, Trustee.* This Trust holds the assets of two defined benefit pension plans sponsored by BP. These Plans are the BP America Master Hourly Plan for Represented Employees and the BP America Retirement Accumulation Plan. As of December 31, 1993, these Plans had a total of 39,619 participants. The BP Trust also holds the assets of some smaller plans sponsored by BP affiliates. As of December 31, 1993, the BP Trust had aggregate assets of $1.4 billion. The BP Trust has undertaken a total capital commitment of $10,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the BP Trust is Howard H. Harpster, Director, of Pension Investments.

(d) *The IBM Retirement Plan (the IBM Plan), Located in New York, New York.* This Plan is a defined benefit pension plan having 285,951 participants and total assets of $26.7 billion as of February 28, 1995. Assets of the IBM Plan are held in the IBM Retirement Plan Trust (the IBM Trust), of which the Chase Manhattan Bank is the directed trustee. The IBM Trust has undertaken a total capital commitment of $50,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the IBM Trust is the IBM Investment Committee.

(e) *The United States Steel Corporation Plan for Employee Pension Benefits (the USS Plan), Located in New York, New York.* This Plan is a defined benefit pension plan having 148,985 participants and total assets of $8.3 billion as of December 31, 1993. Assets of the USS Plan are held in the USS Special Investments Group Trust (the USS Trust), of which the United States Steel and Carnegie Pension Fund is trustee. The USS Trust has undertaken a total capital commitment of $20,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the USS Trust is the United States Steel and Carnegie Pension Fund.

(f) *The Retirement Plan of Marathon Oil Company (the Marathon Plan), Located in New York.* This is a defined benefit pension plan having 11,969 participants and total assets of $863,677,625 as of December 31, 1993. Assets of the Marathon Plan are held in the MRO USS Special Investments Group Trust (the MRO Trust), of which the United States Steel and Carnegie Pension Fund is trustee. The MRO Trust has undertaken a total capital commitment of $5,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the MRO Trust is the United States Steel and Carnegie Pension Fund.

(g) *The Walt Disney Company Retirement Plan Master Trust (the Disney Trust), Located in Burbank, California; Bankers Trust Company, Trustee.* This trust holds the assets of five defined benefit pension plans. These Plans are the Walt Disney Productions and Associated Companies' Retirement Plan, the Disneyland and Associated Companies' Retirement Plan, the Disney Associated Companies' Retirement Plan, the Walt Disney World Co. and Associated Companies' Retirement Plan, and the Disney Salaried Retirement Plan. As of February 28, 1995, the Disney Trust had a total of 40,000 participants and aggregate assets of $637,000,000. The Disney Trust has undertaken a total capital commitment of $10,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the Disney Trust is the Investment and Administrative Committee of the Walt Disney Company Sponsored Qualified Benefit Plans and Key Employees Deferred Compensation and Retirement Plan.

(h) *The General Mills, Inc. Master Trust (the General Mills Trust), Located in Minneapolis, Minnesota; State Street Bank and Trust Company, Trustee.* This Trust holds assets of eleven defined benefit and deferred compensation pension plans. The Plans in the General Mills Trust are the Retirement Income Plan, the Grain Millers Plan, the Multiple Group Plan, The Restaurant Hourly Plan, the Restaurant Salaried Plan, the Vroman's Bargaining Plan, the Yoplait Hourly Plan, the Yoplait #386 Plan, the Voluntary Investment Plan, the Profit Sharing and Savings Plan, and the Retirement Savings Plan. As of December 31, 1994, the General Mills Trust had a total of 130,000 participants and aggregate assets of $1.42 billion. The General Mills Trust has undertaken a total capital commitment of $5,000,000 to the Partnership. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the General Mills Trust is the Benefit Finance Committee of General Mills, Inc.

(i) *The Central States, Southeast and Southwest Areas Pension Fund (the Fund), Located in Rosemont, Illinois.* This Plan is a defined benefit plan having 483,794 participants and total assets of $12.16 billion as of December 31, 1994. The Fund has undertaken a total capital commitment of $75,000,000. The fiduciary responsible for reviewing and authorizing the investment in the Partnership by the Fund is LaSalle Advisors.

(j) In addition, it is possible that one or more other Plans may become Limited Partners at some future time. Therefore, this proposed exemption is intended to cover any such Plan so long as the Plan meets the terms and conditions described herein.

(k) Limited Partners which are not Plans include:

(1) Allstate Insurance Company, which has undertaken a total capital commitment of $25,000,000.

(2) Allstate Life Insurance Company, which has undertaken a total capital commitment of $10,000,000.

(3) Columbia University, which has undertaken a total capital commitment of $10,000,000.

(4) Cornell University, which has undertaken a total capital commitment of $10,000,000.

(5) The Ministers and Missionaries Benefit Board of the American Baptist Churches, which has undertaken a total capital commitment of $20,000,000.

(6) The New York State Common Retirement Fund, which has undertaken a total capital commitment of $75,000,000.

(7) The Commonwealth of Pennsylvania Public School Employes' Retirement System, which has undertaken a total capital commitment of $50,000,000.

(8) Puma, which has undertaken a total capital commitment of $13,500,000.

(9) NC/TREIT, which has undertaken a total capital commitment of $20,000,000.

(10) Endowment Realty Investors II, Inc., which has undertaken a total capital commitment of $25,000,000.

(11) The Oregon Public Employees' Retirement Fund, which has undertaken a total capital commitment of $75,000,000.

(12) Tiger, which has undertaken a total capital commitment of $38,250,000.

5. IBJ represents that the Partnership has obtained an opinion of counsel that the Partnership will constitute an "operating company" under the Department's plan asset regulations [29 CFR 2510.3–101(c)] if the Partnership is operated in accordance with the Agreement and the offering memorandum (the Offering) distributed in connection with the private placement of the limited partnership interests.[4]

[4] The Department expresses no opinion herein as to whether the Partnership will constitute an operating company under the regulations at 29 CFR 2510.3–101.

6. IBJ represents that the Security Agreement constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships, wherein the financing institutions do not obtain security interests in the real property assets of the partnership. IBJ also represents that the obligatory execution of the Security Agreement by the Limited Partners for the benefit of the Lenders was fully disclosed in the Offering as a requisite condition of investment in the Partnership during the private placement of the limited partnership interests. IBJ represents that the only direct relationship between any of the Limited Partners and any of the Lenders will be in the execution of the Security Agreements. All other aspects of the transaction, including the negotiation of all terms of the Facility, are exclusively between the Lenders and the Partnership. IBJ represents that the proposed executions of the Security Agreements will not affect the abilities of the Trusts to withdraw from investment and participation in the Partnership. The only Plan assets to be affected by the proposed transaction are each Plan's limited partnership interests in the Partnership and the related Plan obligations as Limited Partners to respond to drawdowns up to the total amount of each Plan's capital commitment to the Partnership.

7. IBJ represents that neither it nor any Lender will act in any fiduciary capacity with respect to any Trust's investment in the Partnership and that IBJ is independent of and unrelated to those fiduciaries (the Trust Fiduciaries) responsible for authorizing and overseeing the Trusts' investments in the Partnership. Each Trust Fiduciary represents independently that its authorization of Trust investment in the Partnership was free of any influence, authority or control by the Lenders. The Trust Fiduciaries represent that the Trust's investments in and capital commitments to the Partnership were made with the knowledge that each Limited Partner would be required subsequently to grant a security interest in the Partnership to the Lenders and to honor drawdowns made on behalf of the Lenders without recourse to any defenses against the General Partner. Each Trust Fiduciary individually represents that it is independent of and unrelated to IBJ and the Lenders and that the investment by the Trust for which that Trust Fiduciary is responsible continues to constitute a favorable investment for the Plans participating in that Trust and that the execution of the Security Agreement is in the best interests and protective of the participants and beneficiaries of such Plans.

8. In summary, the applicants represent that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The Plans' investments in the Partnership were authorized and are overseen by the Trust Fiduciaries, which are independent of the Lenders; (b) none of the Lenders have any influence, authority or control with respect to the Plans' investments in the Partnership or the Plans' executions of the Security Agreements; and (c) the Trust Fiduciaries invested in the Partnership on behalf of the Plans with the knowledge that the Security Agreements are required of all Limited Partners investing in the Partnership.

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

Larson Distributing Co. Profit Sharing Plan (the Plan) Located in Denver, Colorado

[Application No. D–10083]

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 F.R. 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 extension of credit to the Plan (the Loan) by Larson Distributing Co., Inc. (the Employer), the sponsor of the Plan, with respect to the Plan's investments in annuity accounts maintained with USG Annuity and Life Co. and All American Life Insurance Company (the Annuities), and (2) the Plan's potential repayment of the Loan (the Repayments); provided the following conditions are satisfied:

(A) The Plan does not pay any interest or incur any expenses with respect to the Loan;

(B) The Repayments are restricted solely to the amounts recovered by the Employer on behalf of the Plan (the Recovery Amounts) in litigation concerning the Annuities; and

(C) To the extent the Loan exceeds the total Recovery Amounts, the Repayments shall be waived.

Summary of Facts and Representations

1. The Plan is a defined contribution plan with 47 participants and total assets of $446,784 as of October 31, 1994. The Employer is a Colorado closely-held corporation engaged in the wholesale distribution of floor coverings and building materials, with its principal place of business in Denver, Colorado. The trustees of the Plan are John L. Larson, Sr. and Allen W. Kliewer (the Trustees), each of whom is an officer and director of the Employer.

2. The Plan provides for individual participant accounts and participant-directed investment of the accounts among investment options (the Funds) selected by the Trustees. Commencing October 1987, the Trustees engaged the services of Moore Resources Group, Inc. (MRGI) as a third party administrator of the Plan. MRGI's duties included responsibility for receiving all Plan contributions for distribution and deposit among the Funds in accordance with participant directions. Among the Funds under MRGI's responsibility was the Money Market Annuity Fund, the assets of which included annuity accounts with USG Annuity and Life Co. (USG) and All American Life Insurance Company (All American; together, the Insurers).

3. The Employer represents that from October 1991 through December 1993, MRGI fraudulently deposited into its own account at Norwest Bank in Denver, Colorado, a total of $150,595.24 generated by forging checks and fraudulently surrendering annuities with respect to the Plan's accounts with the Insurers. The Employer details the allegations of fraud and forgery as follows: Twenty one checks, totalling $78,472.71, in Plan contributions payable to USG were deposited into MRGI's account at Norwest Bank and were never paid to USG. Nineteen checks totalling $51,203.52 issued by USG as surrendered annuities, pursuant to forged surrender applications submitted by MRGI, were endorsed by forgery and deposited by MRGI into its account at Norwest Bank. Twelve checks totalling $20,919.01 issued by All American as surrendered annuities, pursuant to forged surrender applications submitted by MRGI, were endorsed by forgery and deposited by MRGI into its account at Norwest Bank. Previously, on May 14, 1991, according to the Employer, MRGI's chief executive officer had forged the signature of one of the Trustees on a letter to USG requesting that all correspondence regarding the Plan be forwarded to MRGI. Furthermore, the Employer states that the Form 5500's for the Plan which were prepared by MRGI and sent to the Employer for review and signature contained false entries with respect to the amount of contributions to the Insurers and the balances of the participant accounts invested with the Insurers. In addition, the Employer represents that the year-end statements sent to Plan participants by MRGI reflected not the actual balances of the individual accounts but an approximation of the amounts which would have been in the participant accounts without the forgeries.

4. The Employer is initiating litigation on behalf of the Plan against MRGI, USG, All American, and Norwest Bank to recover the amounts fraudulently diverted from the Plan as described above (the Litigation). The Employer is paying all court costs and attorneys fees in initiating and pursuing the Litigation. Meanwhile, the Employer wishes to restore to the Plan the amounts of the forged checks and fraudulently surrendered annuities, plus interest, in the form of a loan to the Plan (the Loan). The Employer represents that by making a special contribution to the Plan in the form of the Loan the Plan will be able to recover immediately the amounts sought in the Litigation, and to prevent further lost earnings on the amounts which have been diverted by MRGI. Accordingly, the Employer is requesting an exemption for the Loan, including its potential repayment by the Plan (the Repayments), as described herein.

5. The Employer proposes to execute a written agreement (the Agreement) under which the Employer undertakes the obligation to make a special cash contribution to the Plan (the Special Contribution), which will constitute the Loan principal. The Agreement provides that the Special Contribution is to be made to the Plan only after the grant of the exemption proposed herein, if granted. The amount of the Special Contribution is defined in the Agreement as the amount of the forged checks for contributions and fraudulently surrendered annuity contracts plus an amount to reflect earnings that would have accumulated under the contracts with the Insurers absent the fraud, as determined on the basis of rate information provided by the Insurers. The Agreement requires that the Special Contribution be allocated to the Plan participants in the proportion that their accounts were affected by the fraud and forgery.

With respect to repayment of the Loan (the Repayment), the Agreement provides that the Special Contribution is to be repaid to the Employer only if the Litigation is successful in recovering monetary amounts on behalf of the Plan either through a final judgment or settlement of the Litigation. If the Litigation does not result in any monetary recovery, the Plan shall not reimburse the Employer for any of the Special Contribution. Upon the entry of a final judgment or upon settlement of the Litigation, the Plan shall repay the Special Contribution to the Company in the amount of the lesser of (a) the amount of the Special Contribution plus Litigation costs and attorneys' fees, or (b) the amount actually recovered in the Litigation. If the amount of such recovery is greater than the amount of the Special Contribution plus costs of the Litigation and attorneys fees, the excess recovery shall enure to the benefit of the Plan. If the amount of such recovery is less than the amount of the Special Contribution plus costs of the Litigation and attorneys fees, repayment of the difference will be waived and the Employer will have no further right of reimbursement with respect to the Special Contribution.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) The Loan will enable the Plan to recover immediately the amounts allegedly diverted, including interest on such amounts as determined by the Insurers, and to prevent further loss of earnings on such amounts; (b) The Plan will not pay any interest or incur any expenses with respect to the Loan; (c) Repayment of the Loan will be restricted to the proceeds, if any, recovered in the Litigation; and (d) To the extent the Loan exceeds the amount recovered in the Litigation, the Repayments will be waived.

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

Retirement Savings Plan and Trust for Employees of the J.H. Heafner Company, Inc. (the Plan), Located in Lincolnton, North Carolina

[Application No. D–10125]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by to the Plan of certain limited partnership units (the Units) in two limited partnerships to the J.H. Heafner Company, Inc. (Heafner), provided the following conditions are satisfied: a) the sale is a one-time transaction for cash; b) the Plan pays no commissions or other expenses in connection with the transaction; and c) the Plan receives no less than the greater of: (1) its cost for the Units; or (2) the fair market value of the Units on the date of the sale.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan established by Heafner under the provisions of section 401(k) of the Code. The Plan currently has 392 participants, and had assets of $5,728,370 as of June 30, 1995. Heafner is a North Carolina corporation which has 30 distribution centers throughout the Southeast involved in the wholesale distribution of tires and automotive equipment and wheels.

2. Among the assets in the Plan are the Units, which are interests in two limited partnerships, which are unrelated to Heafner. Heafner has no interests in either of the partnerships. One partnership is Realty Parking Properties L.P. (RPP), and the second is Atlantic Income Properties (Atlantic). The Plan purchased 1,600 Units in RPP on June 2, 1989 for a purchase price of $40,000. The Plan purchased 5,000 Units in Atlantic on April 5, 1989 for a purchase price of $100,000. The Plan's investment broker, Interstate Johnson Lane, purchased the Units in both partnerships on behalf of the Plan on the open market. There are a total of 1,909,087 units of RPP as of June 30, 1995, so the Plan's Units represent approximately .08% of the total units. There are a total of 508,844 units of Atlantic outstanding, so the Plan's Units represent approximately .98% of the total units. The applicant represents that the Units are non-liquid in nature with no ready market for their sale.

3. The Plan now proposes to sell the Units to Heafner. The applicant represents that the Units are the only non-liquid assets contained in the Plan, except for those invested in the NCNB Real Estate Fund, which the North Carolina National Bank is moving to liquidate itself. Currently, the Plan's trustees have frozen these fixed asset accounts to preserve the principal base for all participants who have money invested in these assets. Due to the non-liquid nature of the assets, there are no allowable distributions currently until the liquidity improves. The applicant represents that the presence of these assets has made Plan administration difficult and that the current freeze is unfair to participants. The applicant represents that before considering a sale to Heafner, the Plan's trustees investigated the possibility of selling the Units on the open market and found that there was no market.

4. The sale price will be the higher of the Plan's cost for the Units or their fair market value as of the date of the sale. Any costs that will be incurred in the proposed transaction will be borne by Heafner. Ms. Denise Liekfet of RPP has represented that as of December 31, 1994, the Units of RPP had an appraised fair market value of $22.50 per Unit, or a total value of $36,000. Since the Plan's cost for these Units was $40,000, Heafner proposes to pay $40,000 to the Plan. Ms. Tammy L. Stempler of ISC Realty Corporation, General Partner of Atlantic has represented that as of March 30, 1995 the Units in Atlantic had an appraised fair market value of $13 per Unit, or a total value of $65,000. Since the Plan's cost for these units was $100,000, Heafner proposes to pay $100,000 to the Plan.[5]

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: a) the sale is a one-time transaction for cash; b) the Plan will pay no commissions or other expenses in connection with the transaction; and c) the sale price will be the higher of the Plan's cost of the Units or the current fair market value of the Units as determined by independent appraisal.

Tax Consequences of the Transaction

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

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

General Information

The attention of interested persons is directed to the following:

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

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 31st day of October, 1995.

U.S. Department of Labor.

Ivan Strasfeld,

Director of Exemption Determinations Pension and Welfare Benefits Administration.

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[5] Heafner represents that should the Plan receive greater than the fair market value of the Units, the excess, if treated as a contribution to the Plan, would not cause the Plan to violate sections 401(a)(4), 404 or 415 of the Code.