

benefit plans. As of December 31, 1999, the Pasadena Plans had 87 participants.

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

*For Further Information Contact:* Karen Lloyd of the Department, telephone (202) 219-8194. (This is not a toll-free number).

#### General Information

The attention of interested persons is directed to the following:

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

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

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

Signed at Washington, DC, this 25th day of June, 2001.

Ivan Strasfeld,

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

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#### DEPARTMENT OF LABOR

##### Pension and Welfare Benefits Administration

[Application No. D-10935, et al.]

##### Proposed Exemptions; The Walston & High, P.A. Profit Sharing Plan (the Plan) et al.

**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 Walston & High, P.A. Profit Sharing Plan (the Plan) Located in Wilson, North Carolina

[Application No. D-10935]

##### 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 Sale (the Sale) by the Plan to A.J. Walston and Arthur T. High, the trustees of the Plan (the Trustees), of three parcels of improved real property (the Parcels). This proposed exemption is conditioned upon adherence to the material facts and representations described herein

and upon the satisfaction of the following requirements:

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

(b) The Plan does not pay any commissions, costs or other expenses in connection with the Sale; and

(c) The Plan will receive an amount equal to the greater of:

(i) \$234,000; or (ii) The current fair market value of the Property, as established by an independent, qualified, appraiser at the time of the Sale.

#### *Summary of Facts and Representations*

1. Walston & High, P.A., the sponsor of the Plan, is a certified public accounting company located in Wilson, North Carolina. The Plan is a defined benefit pension plan which, as of September 27, 2000, has 5 participants. The Plan's assets have an aggregate fair market value of \$727,102.04.

2. The Plan's real property holdings consist of three parcels of real property. The Parcels have an estimated fair market value of \$234,000 and constitutes approximately 32% of the total value of Plan assets.

3. The Trustees represent that the Sale is in the interest of the Plan, and its participants and beneficiaries. The Trustees represent that they are seeking to terminate the Plan and that the Parcels cannot be subdivided to achieve a distribution of assets. The Trustees have attempted to sell the Parcels to unrelated third parties but have been unsuccessful. As a result the Trustees are seeking to purchase the Parcels from the Plan for cash, allowing the Plan to distribute the assets upon termination. There will be no commissions, costs or other expenses incurred by the Plan in connection with the Sale.

4. The Parcels consist of:

A 862 square foot parcel of improved real property located at 1112 Churchill Avenue, Wilson, North Carolina (Churchill). The property was acquired by the Plan for investment purposes on September 12, 1979 for \$27,584.23 from an unrelated third party. The property has generated a net income of \$19,235 from 1990 through 1999;

A 1,670 square foot parcel of improved real property located at 401–403 Maplewood Avenue, Wilson, North Carolina (Maplewood). The property was acquired by the Plan for investment purposes on August 27, 1976 for \$35,600.86 from an unrelated third party. The property has generated a net income of \$37,987 from 1990 through 1999; and

A 3,264 square foot parcel of improved real property located on 2213 Candlewood Drive, Wilson, North

Carolina (Candlewood). The property was acquired by the Plan for investment purposes on January 30, 1981 for \$132,500 from an unrelated third party. The property has generated a net income of \$112,781 from 1990 through 1999.<sup>1</sup>

5. The Property was appraised (the Appraisal) on July 19, 2000, by Fred W. Morgan (Mr. Morgan), a North Carolina state Certified Residential Real Estate Appraiser. Mr. Morgan is independent of the Employer and is an appraiser with the Bissette Appraisal Services located in Wilson, North Carolina.

Mr. Morgan determined the best use and highest value of the Property was associated with valuing the Property with the so-called direct sales comparison method. In this method, sales of similar use land in the market area are compared to the subject to arrive at an indication of value. In arriving at value conclusions, the tracts are compared as to the rights conveyed, financing terms, sale conditions, market conditions, location, and physical characteristics. Therefore, based on the valuation procedure, the fair market value of the Parcels was determined as follows: (i) Churchill = \$39,000; (ii) Maplewood = \$62,500; and (iii) Candlewood = \$132,500. Therefore, the total fair market value of the Parcels is \$234,000 as of July 19, 2000 (\$39,000 + \$62,500 + \$132,500 = \$234,000). The Plan will receive an amount equal to the greater of: (i) \$234,000; or (ii) The current fair market value of the Property, as established by an independent, qualified, appraiser at the time of the Sale.

6. In summary, the Trustees represent that the subject transaction satisfies the statutory criteria contained in section 408(a) of the Act and section 4975(c)(2) of the Code for the following reasons:

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

(b) The Plan does not pay any commissions, costs or other expenses in connection with the Sale; and

(c) The Plan will receive an amount equal to the greater of:

(i) \$234,000; or (ii) The current fair market value of the Property, as established by an independent, qualified, appraiser at the time of the Sale.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date

<sup>1</sup> The applicant has provided consolidated net income statements for the Parcels from 1977 through 1989. These statements indicate that during this time period the Parcels generated net income of \$140,244.

of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Khalif Ford of the Department, telephone (202) 219–8883 (this is not a toll-free number).

**Retirement Plan of Dime Bancorp, Inc. (The Dime Plan); Retirement 401(k) Plan of Dime Bancorp, Inc. (the Dime 401(k) Plan); North American Mortgage Company Retirement and 401(k) Savings Plan (the NAMCO Plan); and Lakeview Savings Bank Employee Stock Ownership Plan (the ESOP; together, the Plans) Located in New York, New York**

[Application Nos. D–10962 through D–10965]

#### *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, as of December 29, 2000, to: (1) The past receipt by the Plans of certain Litigation Tracking Warrants (the Warrants) pursuant to the distribution of Warrants (the Warrant Distribution) by Dime Bancorp, Inc. (Dime) to all of its common stockholders as of December 22, 2000 (the Record Date);<sup>2</sup> (2) the past and proposed future holding of the Warrants by the Plans; and (3) the disposition or exercise of the Warrants by the Plans; provided that the following conditions are satisfied:

(A) The Plans' acquisition and holding of the Warrants resulted from an independent act of Dime as a corporate entity, and all holders of

<sup>2</sup> In addition to all of Dime's common stockholders as of December 22, 2000 receiving Warrants pursuant to the Warrant Distribution, any person or entity (including the Plans) who brought the common stock of Dime (the Stock) during the period from December 20, 2000 through December 29, 2000 received such Stock with certain accompanying "due bills" reflecting the seller's obligation to deliver Warrants to the buyer upon the seller's receipt of such Warrants pursuant to the Warrant Distribution, and therefore also received Warrant's in connection with such purchases of Stock. Accordingly, the exemption proposed herein shall also apply to the acquisition, holding, disposition and exercise of Warrants acquired by the Plans in connection with the purchase of Stock with due bills.

Stock, including the Plans, were treated in a like manner with respect to the Warrant Distribution (with the exception of one holder of Stock, who did not receive Warrants);

(B) With respect to Warrants allocated to the Dime 401(k) Plan and the NAMCO Plan, the Warrants were acquired solely for the accounts of participants who had directed investment of all or a portion of their account balances in Stock pursuant to Plan provisions for individually-directed investment of participant accounts;

(C) With respect to Warrants allocated to the Dime Plan and the ESOP, the authority for all decisions regarding the holding, disposition or exercise of the Warrants by such Plans will be exercised by an independent fiduciary acting on behalf of such Plans; and

(D) With respect to Warrants allocated to the Dime 401(k) Plan and the NAMCO Plan, all decisions regarding the holding, disposition or exercise of the Warrants have been, and will continue to be made, in accordance with Plan provisions for individually-directed investment of participant accounts, by the individual Plan participants whose accounts in the Plan received Warrants in connection with the Warrant Distribution, including all determinations regarding the exercise or sale of the Warrants received through the Warrant Distribution,<sup>3</sup> except for those participants who fail to file timely and valid instructions concerning the exercise of the Warrants, with respect to whom the Warrants allocated to their accounts will, to the extent a public trading market for the Warrants exists, be sold.

*Effective Date:* This exemption, if granted, will be effective as of December 29, 2000.

### Summary of Facts and Representations

1. Dime is a Delaware corporation and a savings and loan holding company with its headquarters located in New

York, New York. Dime is the parent of the Dime Savings Bank of New York, FSB (Dime Savings), a federally chartered bank currently serving consumers and businesses in the greater New York City metropolitan area. Through Dime Savings and its subsidiaries, including North American Mortgage Company (i.e., NAMCO), Dime provides consumer loans, insurance products and mortgage banking services throughout the United States.

2. On December 29, 2000, Dime distributed the Warrants to all of its holders of common stock (i.e., the Stock), par value \$0.01 per share.<sup>4</sup> The Warrants are litigation tracking warrants to purchase shares of Stock at an exercise price of \$.01 per share of Stock that will be issued in connection with a warrant exercise (the Exercise Price) during a period of 60 days after the holders of the Warrants are given notice of the occurrence of the Triggering Event (as defined in representation 6, below). If the Warrants are not exercised by the end of the 60-day period (the Expiration Date), they will lapse and be canceled. The Warrants have been approved for listing as separately tradeable on the NASDAQ National Market under the trading symbol "DIMEZ." The Stock is currently traded on the New York Stock Exchange under the trading symbol "DME."

3. The Warrants are referred to as "Litigation Tracking Warrants" because the number of shares of Stock for which the Warrants will be converted will depend upon Dime's recovery, if any, in connection with a lawsuit that Dime, as the successor to Anchor Savings Bank FSB (Anchor), maintains in the United States Court of Federal Claims (the Claims Court) against the United States (U.S.) government, whereby it alleges a breach of contract and the taking of property without compensation in contravention of the Fifth Amendment to the U.S. Constitution (the Goodwill Litigation). The action arose because of

Anchor's assertion that the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and the regulations adopted by the Office of Thrift Supervision pursuant to FIRREA, deprived Anchor of the ability to include supervisory goodwill and certain other assets when computing its regulatory capital. The Federal Savings and Loan Insurance Corporation had previously agreed to let Anchor use such assets when computing its regulatory capital ratios. The direct effect was to cause Anchor to go from an institution that substantially exceeded its regulatory capital requirements to one that was critically undercapitalized upon the effectiveness of the FIRREA-mandated capital requirements. Dime has asked the Claims Court to enter partial summary judgment against the U.S. government based on the existence of a contract between the U.S. government and Dime and the inconsistency of the government's actions with respect to that contract. If the Claims Court grants Dime's request, Dime will then present the evidence as to damages. It is believed that Dime may receive a potentially large recovery of damages in connection with the Goodwill Litigation.<sup>5</sup>

4. The Warrants will, upon the Triggering Event, entitle the holders thereof to purchase shares of Stock with an aggregate market value equal to the Adjusted Litigation Recovery (as defined in representation 5, below), if any. Each Warrant will be exercisable at a fixed Exercise Price for the number of shares of Stock with a market value equal to the Adjusted Litigation Recovery divided by the number of Warrants issued or reserved for issuance on the Record Date, with cash to be paid for fractional shares resulting from a holder's Warrant exercise.

5. The "Adjusted Litigation Recovery" will equal 85%<sup>6</sup> of the amount obtained from the following equation:

(a) The aggregate amount of any cash payment and the fair market value of any property actually received by Dime pursuant to a final, non-appealable judgment in or final settlement of the Goodwill Litigation (including any post-judgment interest actually received by

<sup>3</sup> On January 1, 2001, the NAMCO Plan was merged with and into the Dime 401(k) Plan. As a result, for a period of time, there was temporary administrative freeze period (the Freeze Period) during which former participants of the NAMCO Plan (the Former NAMCO Participants) could not direct the investment of their accounts under the Dime 401(k) Plan, including any Warrants allocated to such accounts. During such Freeze Period, an independent fiduciary had the authority to hold, sell or exercise (to the extent the Warrants were then exercisable) all of the Warrants transferred from the NAMCO Plan and allocated to the accounts of the Former NAMCO Participants under the Dime 401(k) Plan. Once the Freeze Period ceased, the Former NAMCO Participants immediately regained the ability to direct the investment of their accounts under the Dime 401(k) Plan, including any Warrants allocated to such accounts.

<sup>4</sup> Warburg Pincus Equity Partners, L.P. (Warburg) recently made an aggregate \$238 million investment in Dime for which it received 13,607,664 shares of series B junior voting preferred stock (series B Stock) of Dime, as well as warrants to purchase 8,142,738 shares of Series C junior nonvoting preferred stock (Series C Stock) and warrants to purchase 5,464,926 shares of Series D junior nonvoting preferred stock (Series D Stock). Each share of Series B Stock has the same economic rights equivalent to 1,000 shares of Stock subject to antidilution adjustments. The shares of Series B Stock will convert into restricted shares of Stock upon, among other events, the distribution of the Warrants. Each share of Series C and Series D Stock will also have the economic rights equivalent to 1,000 shares of Stock. However, one of the terms of Warburg's investment was that it would not receive any Warrants with respect to the shares it acquired or will thereby acquire.

<sup>5</sup> By proposing this exemption, the Department is providing no opinion or comment on, or support for, the merits of the allegations made against the U.S. government with respect to the Goodwill Litigation. The purpose of this proposed exemption, if granted, is merely to facilitate the rights and benefits inuring to the Plans through the receipt of the Warrants as holders of the Stock in order to capitalize on whatever economic value the Warrants may have.

<sup>6</sup> Dime will retain the remaining 15%, and will not issue shares in connection with it.

Dime on any cash payment) (the Total Payment), minus

(b) The sum of the following: (i) The aggregate expenses incurred previously and hereafter by Dime in prosecuting the Goodwill Litigation and obtaining the Total Payment, (ii) the aggregate expenses incurred by Dime in connection with the creation, issuance and trading of the Warrants, and (iii) an amount equal to the net Total Payment (Total Payment less the expenses described in the preceding clauses (i) and (ii)) multiplied by the highest, combined statutory rate of federal, state and local income taxes applicable to Dime during the tax year in which the full total payment is received.

6. The "Triggering Event" is defined as the occurrence of all of the following: (i) receipt by Dime of the full Total Payment, (ii) calculation by Dime of the full amount of the Adjusted Litigation Recovery, and (iii) Receipt of all regulatory approvals necessary to issue the shares of Stock to be issued upon the exercise of the Warrants, including the effectiveness of a registration statement relating to the issuance of such Stock under the Securities Act of 1933, as amended.

7. Once the Triggering Event occurs, Dime will publicly announce, by means of a press release and by written notice mailed to each holder of Warrants: (i) That the Triggering Event has occurred, (ii) the aggregate number of shares for which the Warrants are exercisable, (iii) the number of shares of Stock for which each Warrant is exercisable, (iv) the exercise price per Warrant, (v) the manner in which the Warrants are exercisable, and (vi) the Expiration Date.

8. Dime sponsors the Dime Plan and the Dime 401(k) Plan, while Dime Savings sponsors the Lakeview ESOP and NAMCO sponsors the NAMCO Plan. Dime Savings is a wholly-owned subsidiary of Dime, and NAMCO is a wholly-owned subsidiary of Dime Savings. All or a portion of the assets of each of the Plans is invested in the Stock. The Dime Plan currently has approximately 5,234 participants and \$182,039,800 in total assets, and the Stock represents approximately 10.5% of the assets of the Dime Plan. The Dime 401(k) Plan has approximately 3,000 participants and total assets of approximately \$147,955,000, and the Stock represents approximately 15% of its total assets. The NAMCO Plan had approximately 3,160 Former Participants at the time of its merger into the Dime 401(k) Plan. The NAMCO Plan had approximately \$68,080,600 in total assets, and the Stock represented approximately 0.72% of the NAMCO Plan's assets. The ESOP has

approximately 57 participants and approximately \$8,193,745 in total assets. The Stock represents approximately 96% of the fair market value of the assets of the ESOP. As shareholders of Dime, each of the Plans will receive Warrants in the same manner as all other shareholders of Dime.<sup>7</sup>

9. The assets of the Dime 401(k) Plan and the NAMCO Plan are held in accounts for which investments are participant-directed among various investment funds, one of which is a fund invested in Stock. With respect to accounts of participants in these two plans (which were merged on January 1, 2001, as described in representation 10, below), and except as provided below, participants will make all decisions regarding the disposition or exercise of the Warrants allocated to their accounts (with, and as is the case with other investments under the Plans, absence of affirmative instruction deemed to be direction to continue to hold the Warrants). If the participants do not direct the disposition or exercise of the Warrants prior to the Expiration Date, the Warrants will be sold by the trustee for the particular Plan so that they do not lapse without receipt of some value, assuming there is then a market for the Warrants.

10. As noted in footnote 2, on January 1, 2001, the NAMCO Plan was merged with and into the Dime 401(k) Plan. As a result, for a period of time, there was an administrative Freeze Period during which former participants of the NAMCO Plan (the Former NAMCO Participants) could not direct the investment of their accounts under the Dime 401(k) Plan, including any Warrants allocated to such accounts. During the Freeze Period, HSBC Bank USA (HSBC), acting as an independent fiduciary with respect to such accounts, had the authority to hold, sell or exercise (to the extent the Warrants were then exercisable) all of the Warrants transferred from the NAMCO Plan and allocated to the accounts of the Former NAMCO Participants under the Dime 401(k) Plan. Once the Freeze Period ceased, the Former NAMCO Participants immediately regained the ability to direct the investment of their accounts under the Dime 401(k) Plan, including any Warrants allocated to such accounts.

11. HSBC's U.S. headquarters are located in New York, NY. HSBC has been in existence for 150 years. The trust department of HSBC has \$15 billion of assets under management, of

which \$7 billion is held by HSBC as fiduciary of approximately 400 plans that are subject to the Act. HSBC is not in any way related to Dime, Dime Savings or NAMCO.

12. In contrast to the Dime 401(k) Plan and the NAMCO Plan, the investments of the Dime Plan and the ESOP are not participant-directed. The Dime Plan investments are managed either by investment managers selected by Dime's Benefits Committee (the Benefits Committee) or are directed by the Benefits Committee itself. The investment in the Stock is directed by the Benefits Committee. The ESOP, which is required to be invested primarily in Stock, has its investments directed by the Benefits Committee or by the Plan's trustee, HSBC. In this regard, the trust agreement for the ESOP has been amended to clarify that HSBC, as the ESOP's trustee, will have all investment authority with respect to the Warrants.

13. HSBC also has been retained by Dime for the purpose of acting as the independent fiduciary on behalf of the Dime Plan with respect to the Warrants to be received by that Plan. HSBC has the authority to direct the holding, sale or exercise of the Warrants received by both the Dime Plan and the ESOP.

14. HSBC has represented that it is fully aware of its duties and responsibilities as a fiduciary under the Act with respect to the Dime Plan, the Dime 401(k) Plan, and the ESOP. In fulfilling its duties, HSBC reviewed the terms and conditions of the Warrants and the Warrant Distribution and reviewed the most recent financial statements of Dime and other material it considered appropriate to determine the financial condition of Dime and the possible market value of the Warrants. Based on this review, HSBC concluded, as of December 20, 2000, that it was in the best interests of the participants and beneficiaries of the Dime Plan, the ESOP and the Dime 401(k) Plan for such Plans to acquire and retain all Warrants issued to such Plans pursuant to the Warrant Distribution.

15. HSBC has represented that it will continue to monitor the holding of the Warrants by the Dime Plan and the ESOP. In this regard, HSBC represents that it monitored the holding of the Warrants by the Dime 401(k) Plan during the Freeze Period. In exercising its discretion as a fiduciary under the Act, HSBC will on an on-going basis review all relevant financial information related to Dime and all relevant information related to the market value of the Warrants to determine whether those Plans should hold, sell, or, when exercisable, exercise the Warrants.

<sup>7</sup> As noted in footnote 3, Warburg will not receive Warrants.

16. In the event that HSBC is relieved of its obligation to act as the independent fiduciary on behalf of the Dime Plan and the ESOP, Dime and Dime Savings have established a process to replace HSBC as independent fiduciary. Dime and Dime Savings represent that any new independent fiduciary will be an established institution that has substantial experience as a fiduciary of plans that are subject to the Act, and that is not related to, or otherwise controlling of, controlled by or under common control with Dime, Dime Savings or NAMCO. Dime further represents that any new independent fiduciary will be in place at the time HSBC's departure as independent fiduciary so that there will be no period of time without an independent fiduciary acting on behalf of the Dime Plan and the ESOP with respect to the Warrants.

17. The applicants represent that the Plans are all holders of Stock. As a result of Dime's corporate business decision to distribute the Warrants to all of its common stockholders, the Plans received Warrants through no request or action on their part, but solely as a result of their ownership of Stock. Thus, the Plans' acquisition of the warrants was not volitional on the part of any of the Plans or their respective trustees or other fiduciaries.

18. The applicants represent that each Plan's acquisition of the Warrants enables its participants to have the same economic investment opportunities offered to other holders of Stock. With respect to the Dime 401(k) Plan and, to the extent applicable, the NAMCO 401(k) Plan, the sale or exercise direction opportunities will be passed through under each Plan to participants who had account balances invested in the Plan's Stock Fund as of the Record Date, thereby affording them the same rights and privileges as other holders of Stock as well as the same investment rights and privileges they have with respect to other amounts credited to their accounts. With respect to the Dime Plan and the ESOP, the applicants state that participants will be able to reap the potential economic rewards of their Plan's acquisition and ultimate disposition or exercise of the warrants. To deny the Plans' ability to participate in the warrant Distribution would deny participants the opportunity to be treated in the same manner as other holders of Stock. It is noted that, while the Warrants are expected to trade on a national securities market, an exemption is not being requested to permit the Plans to acquire additional Warrants on the market. Thus, the requested exemption relates only to the

past distribution of Warrants to the Plans by Dime.

19. In summary, the applicants represent that the transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The Plans' acquisition of the Warrants resulted from an independent act of Dime as a corporate entity, and all holders of Stock, including the Plans, were treated in a like manner with respect to the Warrant Distribution (with the exception of one holder of Stock (i.e., Warburg), who did not receive Warrants); (b) with respect to Warrants allocated to the Dime 401(k) Plan and the NAMCO Plan, the Warrants were acquired solely for the accounts of participants who had directed investment of all or a portion of their account balances in Stock pursuant to plan provisions for individually-directed investment of participant accounts; (c) with respect to Warrants allocated to the Dime Plan and the ESOP, the authority for all decisions regarding the holding, disposition or exercise of the Warrants by such Plans will be exercised by an independent fiduciary (i.e., HSBC or its successor) acting on behalf of such Plans; and (d) with respect to Warrants allocated to the Dime 401(k) Plan and the NAMCO Plan, all decisions regarding the holding, disposition or exercise of the Warrants have been made (other than during the Freeze Period), and will continue to be made, in accordance with Plan provisions for individually-directed investment of participant accounts, by the individual Plan participants whose accounts in the Plan received Warrants in connection with the Warrant Distribution.

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

**Barclays Bank PLC and Barclays Capital Inc. Located in London, England and New York, New York**

[Application No. D-10966]

**Proposed Exemption**

The Department of Labor 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 as set forth in 29 C.F.R. Part 2570, Subpart B (55 Fed. Reg. 32836, 32847, August 10, 1990).<sup>8</sup>

<sup>8</sup> For the purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

**Section I—Transactions**

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply as of January 24, 2001, to:

(a) The lending of securities, under certain exclusive borrowing arrangements, to:

(1) Barclays Bank PLC (Barclays);

(2) Barclays Capital Inc. (BCI) and any other affiliate of Barclays that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or U.S. bank;

(3) Barclays Capital Securities

Limited, which is subject to regulation in the United Kingdom by the Securities and Futures Authority of the United Kingdom (the UK SFA); and

(4) Any broker-dealer or bank that, now or in the future, is an affiliate of Barclays which is subject to regulation by the UK SFA or the Bank of England, (each such affiliated foreign broker-dealer or bank referred to as a "Foreign Borrower," and, together with Barclays and BCI, collectively referred to as the "Borrowers"), by employee benefit plans, including commingled investment funds holding assets of such plans (Plans), with respect to which Barclays or any of its affiliates is a party in interest; and

(b) The receipt of compensation by Barclays or any of its affiliates in connection with securities lending transactions, provided that the following conditions set forth in Section II, below, are satisfied.

**Section II—Conditions**

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

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

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

(d) The terms of each loan of securities by a Plan to a Borrower are at

least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Plan receives from the Borrower either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (ii) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the remaining earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee (the Lending Fee) (the Lending Fee and the Shared Earnings Compensation are collectively referred to as the "Transaction Lending Fee"). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing

Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day the loaned securities are delivered to the Borrower, the Plan receives from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than Barclays or any affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6 (46 FR 7527, Jan. 23, 1981, as amended at 52 FR 18754, May 19, 1987) (PTE 81-6) (as amended or superseded).<sup>9</sup> Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan.

(h) The market value (or in the case of a letter of credit, the stated amount) of the collateral initially equals at least 102 percent of the market value of the loaned securities on the close of business on the day preceding the day of the loan and, if the market value of the collateral at any time falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent. The level of the collateral is monitored daily by the Plan or its designee, which may be Barclays or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan. The applicable Borrowing Agreement shall give the Plan a continuing security interest in and lien on the collateral.

<sup>9</sup>PTE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act) (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein) or to a U.S. bank, that is a party in interest with respect to such plan.

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

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

(k) The Plan receives the equivalent of all distributions made during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)<sup>10</sup> had it remained the record owner of the securities.

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

(m) In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with

<sup>10</sup>The Department notes the Applicants' representation that dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings and that the Borrower will always put the Plan back in at least as good a position as it would have been had it not loaned securities.

expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

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

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

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

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

are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

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

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

(p) Prior to any Plan's approval of the lending of its securities to the Borrowers, a copy of this exemption, if granted, (and the notice of pendency) is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.<sup>11</sup>

(q) The independent fiduciary of the Plan receives monthly reports with respect to the securities lending transactions, including but not limited to the information set forth in the following sentence, so that an independent Plan fiduciary may monitor such transactions with the Borrowers. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

(r) In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(1) Such Foreign Borrower is a bank which is subject to regulation by the

Bank of England or is a registered broker-dealer subject to regulation by the UK SFA;

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

(3) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit;

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

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

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

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

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

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

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

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

(2) No party in interest other than the Borrower shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required below by paragraph (t)(1).

(t)(1) Except as provided in subparagraph (t)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in

<sup>11</sup> The Department notes the Applicants' representation that, under the proposed exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, i.e., the Applicants will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities or the fiduciary who decides to lend securities pursuant to an exclusive arrangement. However, the Applicants or their affiliates may monitor the level of collateral and the value of the loaned securities.

paragraph (s) are unconditionally available at their customary location for examination during normal business hours by—

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

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

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

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

(2) None of the persons described above in subparagraphs (t)(1)(ii)–(t)(1)(iv) are authorized to examine the trade secrets of Barclays or its affiliates or commercial or financial information which is privileged or confidential.

### Section III—Definitions

(a) An “affiliate” of a person means:

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

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

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

(b) The term “Foreign Borrower” or “Foreign Borrowers” means Barclays Capital Securities Limited and any broker-dealer or bank that, now or in the future, is an affiliate of Barclays which is subject to regulation by the UK SFA or the Bank of England.

(c) The term “Borrower” includes Barclays, BCI, the Foreign Borrowers and any other affiliate of Barclays that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or U.S. bank.

*Effective Date:* This proposed exemption, if granted, will be effective as of January 24, 2001.

### Summary of Facts and Representations

1. Barclays, a full-line investment service firm, is an authorized institution under the Banking Act of 1987 of the United Kingdom and is regulated by the Bank of England. As of June 30, 2000,

Barclays (based on its Consolidated Balance Sheet) had approximately £286,385 million in assets and £9,237 million in stockholder's equity.

Barclays has several affiliates which are broker-dealers or banks. BCI, a subsidiary of Barclays, is incorporated under the laws of the State of Connecticut and is registered with and regulated by the Securities and Exchange Commission (the SEC) as a U.S. broker-dealer under Section 15 of the Securities Exchange Act of 1934, as amended (the 1934 Act). As of November 2000, BCI had approximately \$55 billion in assets. The affiliated foreign broker-dealers of Barclays that will be covered by this proposed exemption (i.e., the Foreign Borrowers), and their respective regulating entities, are as follows: (a) Barclays Capital Securities Limited (BCSL) is a foreign broker-dealer affiliate of Barclays located in London, and is subject to regulation by the United Kingdom Securities and Futures Authority (the UK SFA) and (b) any broker-dealer or bank that, now or in the future, is an affiliate of Barclays which is subject to regulation by the UK SFA or the Bank of England. As of June 30, 2000, BCSL had approximately £18,942 million in assets. Barclays, BCI and the Foreign Borrowers are collectively referred to as the Borrowers or the Applicants.

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

The Applicants wish to enter into exclusive borrowing arrangements with employee benefit plans, including commingled investment funds holding assets of such plans (Plans), for which Barclays or any affiliate of Barclays may be a party in interest. For example, Barclays or an affiliate of Barclays may be an investment manager for assets of a Plan that are unrelated to the assets involved in the transaction. Barclays or any of its affiliates may provide securities custodial services, directed trustee services, clearing and/or reporting functions in connection with securities lending transactions, or other services to the Plan.

3. Barclays represents that it or any other Foreign Borrower that is a bank is regulated by the Bank of England whose powers include licensing banks in the United Kingdom, issuing directives to address violations by or irregularities involving such banks, requiring information from a bank or its auditor regarding supervisory matters and revoking bank licenses. Barclays also states that the Bank of England ensures that it has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, administration and financial resources. Barclays further states that it is required to provide the Bank of England on a recurring basis with information regarding capital adequacy, country risk exposure and foreign exchange exposures as well as periodic, consolidated financial reports on the financial condition of Barclays and its affiliates.

4. The Applicants represent that although the Foreign Borrowers that are broker-dealers will not be registered with the SEC, their activities are governed by the rules, regulations and membership requirements of the UK SFA. In this regard, the Applicants state that the Foreign Borrowers are subject to the UK SFA rules relating to, among other things, minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules, and books and records requirements with respect to client accounts. The Applicants represent that the rules and regulations set forth by the UK SFA and the SEC share a common objective: the protection of the investor by the regulation of the securities industry. The Applicants represent that the UK SFA rules require each firm which employs registered representatives or registered traders to have positive tangible net worth and to be able to meet its obligations as they may fall due, and that the UK SFA rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. In addition, to demonstrate capital adequacy, the Applicants state that the UK SFA rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting and recordkeeping requirements. In this regard, required records must be produced at the request of the UK SFA at any time. The Applicants further state that the rules and regulations of the UK SFA for broker-dealers are backed up by

potential fines and penalties as well as a comprehensive disciplinary system.

5. The Applicants represent that in addition to the protections afforded by the Bank of England and the UK SFA, compliance by the Applicants with the requirements of Rule 15a-6 of the 1934 Act (and the amendments and interpretations thereof) will offer further protections to the Plans.<sup>12</sup> SEC Rule 15a-6 provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor," provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Act if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment advisor, or (b) the employee benefit plan has total assets in excess of \$5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term "major U.S. institutional investor" is defined as a person that is a U.S. institutional investor that has, or has under management, total assets in excess of \$100 million or an investment adviser registered under section 203 of the Investment Advisers Act of 1940 that

<sup>12</sup> According to the Applicants, section 3(a)(4) of the 1934 Act defines "broker" to mean "any person engaged in the business of effecting transactions in securities for the account of others, but it does not include a bank." Section 3(a)(5) of the 1934 Act provides a similar exclusion for "banks" in the definition of the term "dealer." However, section 3(3)(6) of the 1934 Act defines "bank" to mean a banking institution organized under the laws of the United States or a State of the United States. Further, Rule 15a-6(b)(3) provides that the term "foreign broker-dealer" means "any non-U.S. resident person \* \* \* whose securities activities, if conducted in the United States, would be described by the definition of 'broker' or 'dealer' in sections 3(a)(4) or 3(a)(5) of the [1934] Act." Therefore, the test of whether an entity is a "foreign broker" or "dealer" is based on the nature of such foreign entity's activities and, with certain exceptions, only banks that are regulated by either the United States or a State of the United States are excluded from the definition of the term "broker" or "dealer." Thus, for purposes of this exemption request, the Applicants are willing to represent that they will comply with the applicable provisions and relevant SEC interpretations and amendments of Rule 15a-6.

has total assets under management in excess of \$100 million.<sup>13</sup> The Applicants represent that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

The Applicants represent that under SEC Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance with Rule 15a-6<sup>14</sup> must, among other things:

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

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

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

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

(2) Issue all required confirmations and statements;

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

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

(5) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance

<sup>13</sup> Note that the categories of entities that qualify as "major U.S. institutional investors" has been expanded by a No-Action letter issued by the SEC. See SEC No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997 (April 9, 1997 No-Action Letter).

<sup>14</sup> If it is determined that applicable regulation under the 1934 Act does not require Barclays or the borrower to comply with SEC Rule 15a-6, both entities will nevertheless comply with subparagraphs (a) and (b) of Representation 5 above.

with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities)<sup>15</sup> and

(6) Participate in certain oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the major U.S. institutional investor), and accompany the foreign associated person on certain visits with both U.S. institutional and major U.S. institutional investors. The Applicants represent that, under certain circumstances, the foreign associated person may have direct communications and contact with the U.S. Institutional Investor.<sup>16</sup> (See April 9, 1997 No-Action Letter.)

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

<sup>15</sup> Under certain circumstances described in the April 9, 1997 No-Action Letter (e.g., clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and Barclays or between a Plan and the Foreign Borrower. The Applicants note that in such situations, the U.S. registered broker-dealer will not be acting as principal with respect to any duties it is required to undertake pursuant to Rule 15a-6.

<sup>16</sup> The term "foreign associated person" as defined in Rule 15a-6(b)(2) means any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the 1934 Act, of the foreign broker or dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under Rule 15a-6(a)(3)

different groups of securities subject to the Borrowing Agreement.

7. The Borrowers request an exemption for the lending of securities, under certain exclusive borrowing arrangements, by Plans with respect to which Barclays or any of its affiliates is a party in interest (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act. For each Plan, neither the Borrowers nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan, nor will they render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets. The Applicants represent that because the Borrowers, by exercising their contractual rights under the proposed exclusive borrowing arrangements, will have discretion with respect to whether there is a loan of particular Plan securities to the Borrowers, the lending of securities to the Borrowers may be outside the scope of relief provided by PTE 81–6.<sup>17</sup>

8. For each Plan, the Borrowers will directly negotiate a Borrowing Agreement with a Plan fiduciary which is independent of the Borrowers. Under the Borrowing Agreement, the Borrowers will have exclusive access for a specified period of time to borrow certain securities of the Plan pursuant to certain conditions. The Borrowing Agreement will specify all material terms of the agreement, including the basis for compensation to the Plan under each category of securities available for loan. The Borrowing Agreement will also contain a requirement that the Borrowers pay all transfer fees and transfer taxes relating to the securities loans. The terms of each loan of securities by a Plan to a Borrower will be at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

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

<sup>17</sup>PTE 81–6 requires in part that neither the borrower nor an affiliate of the borrower may have discretionary authority or control over the investment of the plan assets involved in the transaction.

10. In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay the Plan either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement), (ii) a periodic payment that is equal to a percentage of the value of the total balance outstanding borrowed securities, or (iii) any combination of (i) and (ii) (i.e., the Exclusive Fee).

If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the remaining earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee. The Lending Fee, together with the Shared Earnings Compensation, is referred to as the Transaction Lending Fee.

The Transaction Lending Fee, if any, may be in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. For example, in addition to the Borrower paying different fees to different Plans, the Borrower may pay different fees for different portfolios of securities (i.e., the fee for a domestic securities portfolio may be different than the fee for a foreign securities portfolio). The Borrower may also pay different fees for securities of issuers in different foreign countries; for example, there may be a different fee for German securities than for French securities. In addition, with respect to, for example, the French securities, there may be different fees for liquid securities than for illiquid securities.

Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive

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

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

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

The applicable Borrowing Agreement will give the Plan a continuing security interest in and lien on the collateral.

If the Borrower deposits cash collateral, the Plan invests the collateral, and all earnings on such cash collateral shall be returned to the Borrower; provided that the Borrowing Agreement may provide that the Plan receive Shared Earnings Compensation, which, as discussed above, may be a percentage of the earnings on the collateral which may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the remaining earnings on the collateral. The terms of the rebate fee for each loan will be at least as favorable to the Plan as those of comparable arm's length transactions between unrelated parties taking into account the exclusive arrangement, and will be based upon an objective methodology which takes into account several factors, including potential demand for the loaned securities, the applicable benchmark cost of fund indices (typically, the U.S. Federal Funds rate established by the U.S. Federal Reserve System (the Federal Funds), the overnight REPO<sup>18</sup> rate, or the like) and anticipated investment return on overnight investments permitted by the independent fiduciary of the Plan. If the Borrower deposits non-cash collateral, such as government securities or irrevocable bank letters of credit, the Borrower shall be entitled to the earnings on its non-cash collateral; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a Lending Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

The Borrower will provide a monthly report to the independent fiduciary of the Plan which includes the following information. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of

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

12. Before entering into a Borrowing Agreement, the Borrower will furnish to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement. Further, the Borrowing Agreement will contain a representation by the Borrower that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statements.

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

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

15. The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty. Upon termination of any securities loan, the Borrower will deliver securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

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

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

(a) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement shall be deemed satisfied if such trust or

<sup>18</sup> An overnight REPO is an overnight repurchase agreement that is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes and bonds. The dealer or bank sells securities to an investor with a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a rate below the Federal Funds rate (the rate charged by the banks lending funds to each other).

other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

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

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

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

The Applicants represent that the opportunity for the Plans to enter into exclusive borrowing arrangements with the Borrowers under the flexible fee structures described herein is in the interests of the Plans because the Plans will then be able to choose among an expanded number of competing exclusive borrowers, as well as maximizing the volume of securities lent and the return on such securities.

18. In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(i) Such Foreign Borrower is a bank which is subject to regulation by the Bank of England or is a registered

broker-dealer subject to regulation by the UK SFA;

(ii) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 C.F.R. 240.15a-6) under the 1934 Act which provides foreign broker-dealers a limited exception from United States registration requirements;

(iii) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit;

(iv) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under Section 404(b) of the Act and the regulations promulgated under 29 C.F.R. 2550.404(b)-1; and

(v) Prior to entering into a transaction involving a Foreign Borrower, Barclays or the Foreign Borrower must:

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

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

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

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

19. In addition to the protections cited above, Barclays or the Borrower will maintain, or cause to be maintained, within the United States for a period of six years from the date of a transaction, such records as are necessary to enable the Department and other persons (as specified herein in Section II(t)(1)) to determine whether the conditions of the exemption have been met.

20. In summary, the Applicants represent that the described transactions satisfy the statutory criteria of section 408(a) of the Act because:

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

(b) The Plans will be permitted to lend to the Borrower, a major securities borrower who will be added to an expanded list of competing exclusive borrowers, enabling the Plans to earn additional income from the loaned securities on a secured basis, while continuing to enjoy the benefits of owning the securities;

(c) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay the Plan the Exclusive Fee, which as discussed above may be either (i) a flat fee (which may be a percentage of the value of the total securities subject to

the Borrowing Agreement), (ii) a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii);

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

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

(f) The collateral posted with respect to each loan of securities to the Borrower initially will be at least 102 percent of the market value of the loaned securities and will be monitored daily by the independent fiduciary;

(g) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty, except for the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan, and whereupon the Borrower will return any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities;

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

(i) The minimum Plan size requirement (as specified in Section II(o) above) will ensure that the Plans will have the resources necessary to adequately review and negotiate all aspects of the exclusive borrowing arrangements; and

(j) All the procedures will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as applicable securities laws of the United States and/or the United Kingdom, as appropriate.

**FOR FURTHER INFORMATION CONTACT:**

Karen Lloyd of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

**Gooch Enterprises, Inc. Money Purchase Pension Plan (the Plan) Located in Thomasville, North Carolina**

[Application No. D-10969]

*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 of two tracts of land (the Property) by the Plan to Harold L. Gooch, Jr. and Susan M. Gooch (collectively; the Gooches), who are shareholders of the Plan sponsor, the trustees of the Plan and, therefore, parties in interest with respect to the Plan; provided that the following conditions are satisfied:

- (a) the proposed sale is a one-time cash transaction;
- (b) the Plan receives the current fair market value for the Property, as established by an independent qualified appraiser at the time of the sale; and
- (c) the Plan pays no commissions or other expenses associated with the sale.

*Summary of Facts and Representations*

1. The Plan was established on February 1, 1983, and is a defined contribution plan. As of February, 2001, the Plan had 15 participants and beneficiaries. As of December 31, 1999, the Plan had \$1,198,714 in total assets. Gooch Enterprises Inc. (the Company) is the sponsor of the Plan. The Plan's trustees are Harold L. Gooch, Jr. and Susan M. Gooch (i.e., the Gooches). The Company was incorporated on November 24, 1982, and is a subchapter "C" North Carolina corporation which is in the business of coordinating trade shows.

2. In 1984, the Plan purchased the Property from Austin T. and Leena Batten, who were unrelated third parties, for the amount of \$25,000, of which \$22,500 was financed by a loan, as evidenced by a note and deed of trust, from North Carolina National Bank (now Bank of America). The applicant represents that the note on the Property was paid and cancelled as of November 1, 1988. It is represented that the Gooches, as the Plan's trustees, made the decision to purchase the Property as an investment for the Plan. The Gooches believed that the Property

would be a good investment for the Plan and would appreciate in value. At the time of purchase, the Property represented approximately 30% of the Plan's total assets. However, the applicant states that as of the end of 1999, the Property represented approximately 6.4% of the total value of the Plan's assets.

3. The applicant represents that the Property has not been used or leased by anyone, including the parties in interest to the Plan described herein. Since it was originally acquired by the Plan in 1984, the Property has not been an income-producing asset. The Property is undeveloped land that is adjacent to property owned by the Gooches.<sup>19</sup> The applicant represents that the Plan paid no expenses or taxes during the period of time the Property has been a Plan asset. All real estate and related taxes and assessments were paid by the Gooches personally.

4. The Property, which consists of Lots 2 and 3, is located on Curtis Court in Thomasville, North Carolina. The Property is part of a semi-developed residential area. The Property was appraised on March 14, 2001 (the Appraisal). The Appraisal was prepared by Gerry C. Crowder, SRA (Mr. Crowder), who is an independent qualified appraiser. Mr. Crowder is with Hylton-Crowder & Associates, Inc., located at 132 East Parris Avenue, P.O. Box 5174, in High Point, North Carolina. After inspecting the Property and using a direct sales comparison analysis of recent sales of similar properties (i.e., undeveloped land), Mr. Crowder determined that the aggregate fair market value of the Property was \$77,000 (i.e., \$38,500 for each Lot) as of March 7, 2001. Because the Property is adjacent to property owned by the Gooches, Mr. Crowder also considered whether the adjacency factor merits a premium above fair market value for any sale of the Property to the Gooches. However, Mr. Crowder determined that no adjustments are necessary because of the adjacency issue.

The applicant represents that the Appraisal will be updated at the time of the proposed transaction (the Update), in order to ensure that the Plan receives no less than the current fair market value of the Property on the date of the sale. The Update will take into consideration any recent sales of similar properties in the local real estate area which may affect the Appraisal's

conclusion regarding the fair market value of the Property.

5. The applicant proposes that the Gooches purchase the Property from the Plan in a one-time cash transaction. The applicant represents that the proposed transaction would be in the best interest and protective of the Plan because, among other things, the Plan will pay no expenses or commissions associated with the sale. The Gooches will pay the Plan an amount equal to the current fair market value of the Property, as established by an independent, qualified appraiser. The sale of the Property to the Gooches will enable the Plan to sell an illiquid, non-income producing asset and reinvest the sale proceeds in other assets that may yield greater returns. Thus, the sale will enhance the liquidity of the Plan's investment portfolio and allow the trustees to further diversify the Plan's assets.

6. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

- (a) The proposed sale will be a one-time cash transaction;
- (b) The Plan will receive the current fair market value for each Property, as established by an independent qualified appraiser at the time of the sale;
- (c) The Plan will pay no commissions or other expenses associated with the sale; and
- (d) The sale will enable the Plan to sell an illiquid, non-income producing asset and reinvest the sale proceeds in other assets that may yield greater returns.

**FOR FURTHER INFORMATION CONTACT:**  
Ekaterina A. Uzlyan of the Department at (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

<sup>19</sup> The Department is not providing any opinion in this proposed exemption as to whether the acquisition and holding of the Property by the Plan violated any of the provisions of Part 4 of Title I of the Act.

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 25th day of June, 2001.

**Ivan Strasfeld,**

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

[FR Doc. 01-16235 Filed 6-27-01; 8:45 am]

BILLING CODE 4510-29-P

## NATIONAL COUNCIL ON DISABILITY

### International Watch Advisory Committee; Notice of Meeting

**AGENCY:** National Council on Disability (NCD).

**Type:** Advisory Committee Meetings/Conference Calls.

**SUMMARY:** This notice sets forth the schedule of the forthcoming meeting/conference call for NCD's advisory committee—International Watch. Notice of this meeting is required under Section 10(a)(1)(2) of the Federal Advisory Committee Act (P.L. 92-463).

*International Watch:* The purpose of NCD's International Watch is to share information on international disability issues and to advise NCD's Foreign Policy Team on developing policy proposals that will advocate for a foreign policy that is consistent with the

values and goals of the Americans with Disabilities Act.

*Work Group:* Inclusion of People with Disabilities in Foreign Assistance Programs.

**DATE AND TIME:** July 19, 2001, 12 p.m.–1 p.m. EDT.

*For International Watch Information, Contact:* Kathleen A. Blank, Attorney/Program Specialist, NCD, 1331 F Street NW, Suite 1050, Washington, DC 20004; 202-272-2004 (Voice), 202-272-2074 (TTY), 202-272-2022 (Fax), kblank@ncd.gov (e-mail).

*Agency Mission:* NCD is an independent federal agency composed of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Its overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature of severity of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

This committee is necessary to provide advice and recommendations to NCD on international disability issues.

We currently have balanced membership representing a variety of disabling conditions from across the United States.

*Open Meeting/Conference Call:* This advisory committee meeting/conference call of NCD will be open to the public. However, due to fiscal constraints and staff limitations, a limited number of additional lines will be available. Individuals can also participate in the conference call at the NCD office. Those interested in joining this conference call should contact the appropriate staff member listed above.

Records will be kept of all International Watch meetings/conference calls and will be available after the meeting for public inspection at NCD.

Signed in Washington, DC, on June 25, 2001.

**Ethel D. Briggs,  
Executive Director.**

[FR Doc. 01-16284 Filed 6-27-01; 8:45 am]

BILLING CODE 6820-MA-M

## NATIONAL COUNCIL ON DISABILITY

### Advisory Committee Meeting/Conference Call

**AGENCY:** National Council on Disability (NCD).

**SUMMARY:** This notice sets forth the schedule of the forthcoming meeting/

conference call for NCD's advisory committee—International Watch. Notice of this meeting is required under Section 10(a)(1)(2) of the Federal Advisory Committee Act (Pub. L. 92-463).

*International Watch:* The purpose of NCD's International Watch is to share information on international disability issues and to advise NCD's Foreign Policy Team on developing policy proposals that will advocate for a foreign policy that is consistent with the values and goals of the Americans with Disabilities Act.

**Date and Time:** September 20, 2001, 12 p.m.–1 p.m. EDT.

*For International Watch Information, Contact:* Kathleen A. Blank, Attorney/Program Specialist, NCD, 1331 F Street NW, Suite 1050, Washington, DC 20004; 202-272-2004 (voice), 202-272-2074 (TTY), 202-272-2022 (fax), kblank@ncd.gov (e-mail).

*Agency Mission:* NCD is an independent federal agency composed of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Its overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature of severity of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

This committee is necessary to provide advice and recommendations to NCD on international disability issues.

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*Open Meeting/Conference Call:* This NCD advisory committee meeting/conference call will be open to the public. However, due to fiscal constraints and staff limitations, a limited number of additional lines will be available. Individuals can also participate in the conference call at the NCD office, which is located at 1331 F Street, NW, Suite 1050, Washington, DC. Those interested in joining this conference call should contact the appropriate staff member listed above.

Records will be kept of all International Watch meetings/conference calls and will be available after the meeting for public inspection at NCD.