

organization or individual ceases to be an Independent Fiduciary, or negotiates any such transaction during the period that such organization or individual serves as Independent Fiduciary.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 22, 2009 at 74 FR 68106.

#### Written Comments and Hearing Requests

During the comment period, the Department received approximately 30 telephone calls and three written comments in response to the notice of proposed exemption, one of which also requested a hearing. The request for a hearing was subsequently withdrawn. The telephone calls and written comments raised no substantive issues, but rather reflected the commenters' failure to fully understand the notice of proposed exemption or the effect of the proposed exemption on the commenters' health care benefits. The Department provided explanations to each of the commentators by telephone, and each was satisfied with the responses provided by the Department.

The Department has given full consideration to the entire record, including the comment letters received. Because the comments were not germane to the subject matter of the proposed exemption, the Department has determined to grant the exemption as it was proposed.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 693-8546. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

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

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory 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 this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 30th day of March, 2010.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

[FR Doc. 2010-7446 Filed 4-1-10; 8:45 am]

**BILLING CODE 4510-29-P**

#### DEPARTMENT OF LABOR

##### Employee Benefits Security Administration

**Application Nos. and Proposed Exemptions; D-11533 and D-11534; CUNA Mutual Pension Plan for Non-Represented Employees (Together, the Plans); and D-11565; Citizens Bank Wealth Management, N.A., et al.**

**AGENCY:** Employee Benefits Security 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 (ERISA or 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 requests 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 requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "[moffitt.betty@dol.gov](mailto:moffitt.betty@dol.gov)", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**Warning:** If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

##### 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.

CUNA Mutual Pension Plan for Represented Employees and CUNA Mutual Pension Plan for Non-Represented Employees (together, the Plans), Located in Madison, Wisconsin.

[Application Nos. D-11533 and 11534, Respectively]

### 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)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 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: (i) The February 20, 2009 cash sale (the Sale), at aggregate cost basis plus interest, by each of the Plans of interests in certain private equity funds (the Funds) to the CUNA Mutual Insurance Society (the Applicant), the sponsor of the Plans and a party in interest with respect to the Plans, pursuant to a contract between the Applicant and the trustee of the Plans concluded on that same date; (ii) the September 14, 2009 payment by the Applicant of certain additional cash amounts, including interest (the Top-Up Payments); to the Plans pursuant to the terms of the foregoing contract; and (iii) the extension of credit between the Plans and the Applicant from the date of the Sale (February 20, 2009) to the date of the Top-Up Payments (September 14, 2009), provided that the following conditions were satisfied:

(a) An independent fiduciary reviewed the terms and conditions of the Sale and of the Top-Up Payments prior to their execution, and determined that both were protective of the interests of the Plans;

(b) The independent fiduciary determined that the terms and conditions of both the Sale and of the Top-Up Payments were at least as favorable to the Plans as those that would have been obtained in an arm's

length transaction between unrelated parties;

(c) The terms and conditions of both the Sale and of the Top-Up Payments were at least as favorable to the Plans as those that would have been obtained in an arm's length transaction between unrelated parties; and

(d) The independent fiduciary provided its opinion in written reports on behalf of the Plans as to the fairness and reasonableness of the Sale of the Plans' interests in the Funds to the Applicant, and determined that the terms of the original Sale and subsequent Top-Up Payments were especially beneficial to each of the Plans because: (i) On February 20, 2009, the Plans received a return of their aggregate cost basis of their interests in the Funds (which cost basis was determined by the independent fiduciary to exceed the aggregate fair market value of the Plans' interests in the Funds as of October 31, 2008), plus interest accrued on the Funds from their date of acquisition by each Plan through the date of the Sale; and (ii) On September 14, 2009, the independent fiduciary determined that, in instances where the fair market value of any Fund on December 31, 2008 exceeded its original cost basis, each of the Plans received a Top-Up Payment on September 14, 2009 comprised of the increased value of such Fund, plus interest accrued on such increased value from December 31, 2008 to the date of the Top-Up Payments (September 14, 2009).

### Summary of Facts and Representations

1. The Applicant is the parent of each of the companies forming the CUNA Mutual Group, which is a leading provider of financial services to cooperatives, credit unions, their members, and other customers. The Applicant represents that its primary products include group credit life and group credit disability products sold to credit unions; retirement plans and group life and disability products sold to credit union employees; and health, life, and annuity policies for credit union members.

2. The Applicant sponsors the Plans, each of which is a defined benefit pension plan. The Applicant represents that, as of December 31, 2008, the CUNA Mutual Pension Plan for Represented Employees had 1,271 participants and assets of \$90,282,987. The Applicant also represents that, as of December 31, 2008, the CUNA Mutual Pension Plan for Non-Represented Employees had 5,749 participants and assets of \$326,563,333. The trustee (Trustee) of each of the Plans is the State

Street Bank and Trust Company of Boston, Massachusetts.

3. The Applicant represents that, during the years 2006 and 2007, both it and the Plans co-invested their respective assets in ten private equity Funds.<sup>1</sup> The Applicant further represents the decision of each Plan to invest in the Funds<sup>2</sup> was made by the Employee Benefit Plan Administrative Committee (the Committee), the named fiduciary of both of the Plans, and that no additional interests in the Funds were acquired by the Plans after the year 2007.<sup>3</sup> The Applicant also states that, as of November of 2008, the Plans' interest in the Funds represented a relatively small portion (*i.e.*, less than 7%) of the Applicant's overall position in the Funds, and that the Applicant's overall interest in each Fund in turn represented only a small portion of the overall funding commitments to each Fund.

4. On November 25, 2008, the Committee contracted with U.S. Trust, Bank of America Private Wealth Management (U.S. Trust) to serve as an independent fiduciary (the Independent Fiduciary) on behalf of the Plans to determine whether the terms of the

<sup>1</sup> The ten private equity Funds in which each of the Plans acquired interests were: (1) AIG Highstar Capital III; (2) Audax Mezzanine Fund II LP; (3) Capital Partners Private Equity Fund; (4) Citigroup Capital Partners II; (5) CP Lone Star; (6) Crimson Capital Partners III; (7) EnerVest Energy Institutional Fund XI; (8) New Science Ventures Fund I; (9) Webster Capital II; and (10) Five Arrows Realty Securities V, LP.

<sup>2</sup> With respect to the co-investment arrangement of both the Applicant and the Plans in the Funds, the Department notes that if a plan fiduciary causes a plan to enter into a transaction where, by the terms or nature of the transaction, a conflict of interest between the plan and the fiduciary (or persons in which the fiduciary has an interest) exists or will arise in the future, that transaction would violate section 406(a)(1)(D) and 406(b)(1) of the Act (or the parallel provisions under the Code). In this connection, the fiduciary must not rely upon and cannot be otherwise dependent upon the participation of the plan in order for the fiduciary (or persons in which the fiduciary has an interest) to undertake or to continue his or her share of the investment. Furthermore, even if at its inception the transaction did not involve a violation, if a divergence of interests develops between the plan and the fiduciary (or persons in which the fiduciary has an interest), the fiduciary must take steps to eliminate the conflict of interest in order to avoid engaging in a prohibited transaction. See ERISA Advisory Opinion Letter 2000-10A (July 27, 2000).

<sup>3</sup> Section 404 of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making decisions on behalf of a plan. Accordingly, the Department is not expressing an opinion herein as to whether any investment decisions or other actions taken by the Committee regarding the acquisition and subsequent holding of the interests in the Funds by the Plans were consistent with, or in violation of, its fiduciary obligations under Part 4 of Title I of the Act.

proposed Sale of the Plans' interests in the Funds to the Applicant would be in the interest of the Plans.<sup>4</sup> The Applicant represents that both U.S. Trust and its eventual successor as Independent Fiduciary, Evercore Trust Company N.A. (Evercore) are experienced and qualified fiduciaries with extensive trust and management capabilities such as discretionary asset management, asset allocation and diversification, investment advice, securities trading, and the performance of independent fiduciary assignments for plans covered by the Act. In addition, U.S. Trust and Evercore each represent that less than 1% of their annual revenues during their respective periods of service as Independent Fiduciary were derived from the Applicant and its affiliates.

In its engagement letter dated December 5, 2008, the original Independent Fiduciary, U.S. Trust, agreed to: (1) Review and evaluate the consideration to be paid to the Plans in connection with the Sale to determine whether such consideration is fair and reasonable and in the interests of the Plans; (2) review and evaluate the terms of the Sale to determine whether they are at least as favorable to the Plans as terms that would have been agreed to between unrelated parties; (3) determine whether the Plans should enter into the Sale on such terms; (4) direct the trustee of the Plans whether or not to enter into the Sale; and (5) provide a written opinion on behalf of the Plans concerning the fairness and reasonableness of the Sale.

5. In order to assist it in rendering its decision, the Independent Fiduciary engaged LCB Capital LLC (LCB) of Chicago, Illinois to perform an analysis of the Funds and to provide U.S. Trust with an initial report (the Initial LCB Report) detailing its conclusions. LCB represents that it receives less than 1% of its revenue directly from the Applicant and its affiliates. A supplement to the Initial LCB Report also states that the LCB managing director who conducted the valuation analysis of the Funds, Mr. Daniel Bayston, founded LCB in 2008 after a 25-year career with the financial services and business valuation firm of Duff & Phelps. The Applicant represents that during his career, Mr. Bayston managed a wide range of corporate finance and business valuation assignments for publicly-traded and

privately-held corporate clients and ERISA fiduciaries, and that such assignments have included merger and acquisition analyses, fairness opinions, shareholder liquidity analyses, private equity and debt placements, and corporate valuation matters. The Applicant also represents that Mr. Bayston is a member of the CFA Institute and the Business Valuation Association. In December of 2008, the Initial LCB Report was issued to the Independent Fiduciary. In the executive summary of this report, LCB stated that it had examined all relevant information that was provided by the Fund managers, including the amount and date of the original investment, current valuation information provided by the Fund managers, as well as business descriptions and relevant industry classifications.

6. Subsequent to the issuance of the Initial LCB Report, the Independent Fiduciary issued a report on January 15, 2009 (the Initial I/F Report) detailing its analysis and opinion regarding the proposed Sale of the Plans' interests in the Funds. The Independent Fiduciary represented that the valuation analysis contained in the Initial LCB Report focused on specific industry and financial market trends which were likely to have had an impact on the value of the Funds. The Independent Fiduciary further represented in the Initial I/F Report that it had reviewed the content of the Initial LCB Report, and determined that the assumptions, methodology, and conclusions contained in the report were reasonable and reliable. The Initial I/F Report stated that the comparison by LCB of market conditions at the end of 2008 relative to those prevailing in 2006 and 2007 when the interests in the Funds were acquired by the Plans provided compelling evidence that the value of the Funds had declined significantly from their original cost.

7. Taking into account the foregoing contents of the Initial LCB Report, the Independent Fiduciary determined in its Initial I/F Report that a purchase by the Applicant of the Plans' interests in the Funds at their original cost was fair and reasonable to, and in the interest of, the Plans. The Independent Fiduciary represented in this report that it had concluded that there was no separate benefit to the Applicant in engaging in the Sale transaction, and that the only discernible benefit was enabling the Plans to liquidate, at original cost, a series of investments which had lost money. Pursuant to its determination that the proposed Sale was in the interest of the Plans, the Independent Fiduciary issued a letter to the Trustee

of the Plans on February 18, 2009 directing the Trustee to sell the Plans' interests in the Funds to the Applicant.

In connection with the Independent Fiduciary's direction, the Applicant and the Trustee of each of the Plans entered into agreements (the Transfer Agreements) on February 20, 2009, pursuant to which all of the interests in the Funds held by each Plan were sold on that same date to the Applicant. In addition to determining the price paid by the Applicant for the Plans' interests in the Funds, each of the Transfer Agreements contained a provision (the Top-Up Provision) stipulating that in the event that year-end (*i.e.*, December 31, 2008) stated valuations of any of the Funds in which the Plans held an interest exceeded the Plans' original cost, the Trustee of each of the Plans would be entitled to receive on behalf of the Plans the difference between the December 31, 2008 valuation and the original cost. In accordance with the requirements of the Top-Up Provision, the Independent Fiduciary stated at the conclusion of the Initial I/F Report that it would update its analysis to reflect year-end December 31, 2008 Fund data as soon as it became available from the Fund managers.

The Applicant represents that, on February 20, 2009, the cash Sale of the Plans' interests in the Funds to the Applicant was consummated. The total cash payment to the Plans incident to the Sale was the higher of (i) the aggregate cost basis of the Plans' interests in the Funds as of October 31, 2008 or (ii) the aggregate stated fair market value of the interests in the Funds held by the Plans as of October 31, 2008. The Independent Fiduciary further represented that the total cash Sale price of \$20,754,736.58 was comprised of the Plans' aggregate cost basis in the Funds (\$19,168,999.58) plus interest (\$1,585,737.00).<sup>5</sup> The Applicant further represents that the total cash Sale price was allocated between the Plans, with \$4,981,186.84 being paid to the CUNA Mutual Pension Plan for Represented Employees and \$15,773,549.74 being paid to the CUNA Mutual Pension Plan for Non-Represented Employees.

<sup>5</sup> The Applicant represents that the interest paid to the Plans incident to the February 20, 2009 Sale was calculated based upon the Plans' original cost basis in the Funds, plus interest accrued from the date of the Plans' capital contribution to each Fund through the date of the Sale. Specifically, the per annum interest rate utilized was 5.49% for capital contributions made by the Plans in 2006 and 5.52% for capital contributions made in 2007. This interest rate reflects the credited interest rate paid by the Applicant's general account over the relevant time periods.

<sup>4</sup> It is represented that, in accordance with this contractual arrangement, Evercore Trust Company N.A. (a subsidiary of Evercore LP) assumed all of U.S. Trust's existing obligations as the Independent Fiduciary with respect to the Plans as a consequence of the May 1, 2009 sale of U.S. Trust's Special Fiduciary Services business to Evercore LP.

8. In September of 2009, immediately after the completion of the audits of the 2008 financial statements of the Funds (and in accordance with Top-Up Provisions of the Transfer Agreements), the Independent Fiduciary (which, as of July 1, 2009, was Evercore) issued an updated analysis of the Sale transaction (the Updated I/F Report) to determine, as of December 31, 2008, whether the fair market value of any of the Funds held by the Plans was greater than the Plans' cost basis in the Funds at the time of their acquisition. The Updated I/F Report relied upon an August 2009 written valuation analysis prepared by LCB (the Updated LCB Report) which, according to the Independent Fiduciary, utilized a valuation approach that was identical to that employed by LCB in its Initial Report. In the Updated LCB

Report, LCB stated that it examined information such as the date and amount of the original investment by the Plans, relevant industry classification, and any available current valuation information provided by the Fund manager. LCB then determined the appropriate industry valuation multiple at or near the time of the investment and compared that with the same industry valuation multiple as of December 31, 2008. The Updated LCB Report also noted that industry valuation metrics and earnings multiples for virtually all industries had declined significantly from the time of the Plans' original investments in the Funds through December 31, 2008.

Utilizing the updated information provided by the managers of the Funds and contained in the Updated LCB

Report, the Independent Fiduciary noted in its Updated I/F Report that the December 31, 2008 fair market value of eight of the ten Funds in which the Plans held an interest on that date remained below the Plans' original cost basis in those Funds. However, the Updated I/F Report also stated that the December 31, 2008 stated fair market value of two of the Funds (*i.e.*, CP Lone Star and New Science Venture Fund I) exceeded the Plans' cost basis in these Funds. The aggregate valuation gains (and losses) experienced by the Plans' combined holdings in the Funds through December 31, 2008, as compiled in the Updated I/F Report, are summarized below in the following chart:

Funds in which the plans held interests	Date of acquisition of interests in each fund by the plans	Aggregate amount invested in each fund by the plans (cost basis)	Value of each fund as stated by the fund managers as of 12/31/08	Aggregate gains (or losses) experienced by the plans based upon the 12/31/08 stated value of each fund
AIG Highstar Capital III .....	5/25/07	\$2,490,691	\$2,297,321	(\$193,370)
Audax Mezzanine Fund II LP .....	11/30/06	914,682	873,787	(40,894)
Capital Partners Private Equity Fund .....	5/3/07	1,128,158	1,022,935	(105,223)
Citigroup Capital Partners II .....	11/15/06	8,709,246	5,532,666	(3,176,579)
CP Lone Star .....	5/3/07	666,667	722,280	55,613
Crimson Capital Partners III .....	9/28/07	278,275	153,390	(124,885)
EnerVest Energy Institutional Fund XI .....	6/22/07	1,496,003	1,190,539	(305,464)
Five Arrows Realty Securities V, LP .....	8/23/07	358,123	342,081	(16,042)
New Science Ventures Fund I .....	10/31/06	2,452,255	2,489,795	37,495
Webster Capital II .....	5/11/07	675,000	587,378	(87,622)

9. The Independent Fiduciary's Updated I/F Report determined that a purchase price of the Plans' interests in the Funds at original cost plus interest (with additional Top-Up Payments plus interest to the Plans for those individual Funds whose December 31, 2008 fair market value exceeded their cost basis) was fair and reasonable to, and in the interest of, the Plans. Accordingly, the Independent Fiduciary further determined that, for those Funds whose stated fair market value was greater than cost, the Plans were entitled to receive Top-Up Payments totalling \$96,583, comprised of \$93,108 plus an interest payment of \$3,475.<sup>6</sup> On September 14, 2009, pursuant to the direction of the Independent Fiduciary and in accordance with the provisions of the February 20, 2009 Transfer Agreements between the Applicant and the Trustee

of the Plans, the Top-Up Payments were made to the Plans.<sup>7</sup> The Independent Fiduciary reaffirmed in its Updated I/F Report that there was no separate benefit to the Applicant of engaging in the Sale. Instead, the Independent Fiduciary represented that the only discernible benefit was to enable the Plans to liquidate a series of investments which had lost money at their original cost.

10. The Applicant represents that the Sale of the Plans' interests in the Funds was beneficial to, and in the interest of, each of the Plans for several reasons. First, the Applicant represents that the

Sale allowed the Plans to sell illiquid assets for a price that, in the aggregate, exceeded the fair market value of those assets. Second, the Applicant represents that the Sale allowed the Plans to reduce their exposure to a class of investments with an uncertain future. Third, the Applicant represents that the Sale allowed the Plans to obtain cash for their respective interests in the Funds, thereby permitting allocation of the assets of the Plans to more favorable investment vehicles. Fourth, in instances where the fair market value of any Fund on December 31, 2008 exceeded its original cost basis, each of the Plans received a Top-Up Payment on September 14, 2009 comprised of the increased value of such Fund, plus interest accrued on such increased value from December 31, 2008 to the date of the Top-Up Payments.

11. In summary, the Applicant represents that the past transactions described herein for which exemptive relief is sought satisfied the statutory criteria of section 408(a) of the Act because: (a) The Independent Fiduciary

<sup>6</sup> This Top-Up Payment figure was the sum of (1) an aggregate gain of \$37,495 experienced by the Plans from their investment in New Science Ventures Fund I, (2) an aggregate gain of \$55,613 experienced by the Plans from their investment in the CP Lone Star Fund, plus (3) the \$3,475 interest payment described above.

<sup>7</sup> In this connection, the Applicant represents that, on September 14, 2009, it made a Top-Up Payment of \$23,180 (including \$834 in interest accrued from December 31, 2008 to September 14, 2009) to the CUNA Mutual Pension Plan for Represented Employees and a Top-Up Payment of \$73,403 (including \$2,641 in interest accrued from December 31, 2008 to September 14, 2009) to the CUNA Mutual Pension Plan for Non-Represented Employees. The Applicant represents that the interest component of the Top-Up Payments was calculated at the rate of 5.28%, which was the rate of interest credited to the Plans when the Applicant purchased the Plans' interests in the Funds on February 20, 2009.

reviewed the terms and conditions of the Sale and of the Top-Up Payments and determined that both were protective of the interests of the Plans; (b) The Independent Fiduciary determined that the terms and conditions of both the Sale and the Top-Up Payments were at least as favorable to the Plans as those that would have been obtained in an arm's length transaction between unrelated parties; (c) The terms and conditions of both the Sale and of the Top-Up Payments were at least as favorable to the Plans as those that would have been obtained in an arm's length transaction between unrelated parties; and (d) The Independent Fiduciary provided its opinion in written reports on behalf of the Plans as to the fairness and reasonableness of the Sale of the Plans' interests in the Funds to the Applicant, and determined that the terms of the original Sale and subsequent Top-Up Payments were especially beneficial to each of the Plans because: (i) On February 20, 2009, the Plans received a return of their aggregate cost basis of their interests in the Funds (which cost basis was determined by the Independent Fiduciary to exceed the aggregate fair market value of the Plans' interests in the Funds as of October 31, 2008), plus interest accrued on the Funds from their date of acquisition by each Plan through the date of the Sale; and (ii) On September 14, 2009, the Independent Fiduciary determined that, in instances where the fair market value of any Fund on December 31, 2008 exceeded its original cost basis, each of the Plans received a Top-Up Payment on September 14, 2009 comprised of the increased value of such Fund, plus interest accrued on such increased value from December 31, 2008 to the date of the Top-Up Payments (September 14, 2009).

**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 the Department within 15 days of the date 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:** Mr. Mark Judge of the Department at (202) 693-8550. (This is not a toll-free number).

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve

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

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

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

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

Signed at Washington, DC, this 30th day of March 2010.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

[FR Doc. 2010-7447 Filed 4-1-10; 8:45 am]

**BILLING CODE 4510-29-P**

## LIBRARY OF CONGRESS

### Copyright Royalty Board

#### Notice of Intent To Audit

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Public notice.

**SUMMARY:** The Copyright Royalty Judges are announcing receipt of notices of intent to audit the 2009 statements of account submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Inc.

#### FOR FURTHER INFORMATION CONTACT:

Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor, by telephone at (202) 707-7658 or by e-mail at [crb@loc.gov](mailto:crb@loc.gov).

**SUPPLEMENTARY INFORMATION:** Section 106(6) of the Copyright Act, title 17 of the United States Code, gives a copyright owner of sound recordings an exclusive right to perform the copyrighted works publicly by means of a digital audio transmission. This right is limited by section 114(d), which allows certain non-interactive digital audio services, including preexisting satellite digital audio radio services, to make digital transmissions of a sound recording under a compulsory license. Moreover, these services may make any necessary ephemeral reproductions to facilitate the digital transmission of the sound recording under a second license set forth in section 112(e) of the Copyright Act.

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms of the licenses set by the Copyright Royalty Judges ("Judges"). On January 24, 2008, the Judges issued their final determination setting rates and terms for the section 112 and 114 licenses for the period 2007-2012. 73 FR 4080, *affirmed in part, remanded in part, SoundExchange v. Librarian of Congress*, 571 F.3d 1220 (DC Cir. 2009). As part of the terms set for these licenses, the Judges designated SoundExchange, Inc., as the organization charged with collecting the royalty payments and statements of account and distributing the royalties to the copyright owners and performers entitled to receive such royalties under the section 112 and 114 licenses. 37 CFR 382.13(b)(1). As the designated Collective, SoundExchange may conduct a single audit of a licensee for any calendar year for the purpose of verifying their royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and serve the notice on the licensee to be audited. 37 CFR 382.15(b), (c).

On March 23, 2010, pursuant to 37 CFR 382.15(c), SoundExchange filed with the Judges separate notices of intent to audit Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") for the year 2009.<sup>1</sup> Section

<sup>1</sup> On February 13, 2009, SoundExchange filed with the Judges separate notices of intent to audio