

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Application No. D-10188, et al.]

Proposed Exemptions; Barclays Bank PLC and its Affiliates (Collectively, Barclays)**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.

Barclays Bank PLC and its Affiliates (collectively, Barclays)

Located in London, England
[Application No. D-10188]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act, section 4975(c)(2) of the Code, and section 8477(c)(3) of FERSA, in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Retroactive Exemption for the Acquisition, Holding and Disposition of Barclays PLC Stock

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(D), 406(b)(1) and 406(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)(D) and (E) of the Code, shall not apply, as of December 31, 1995 until the date this proposed exemption is granted, to the acquisition, holding and disposition of the common stock of Barclays PLC (the Barclays PLC Stock) by Index and Model-Driven Funds managed by Barclays, provided that the following conditions and the general conditions in Section III are met:

(a) The acquisition or disposition of the Barclays PLC Stock is for the sole purpose of maintaining strict

quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the Barclays PLC Stock which is intended to benefit Barclays or any party in which Barclays may have an interest.

(b) All aggregate daily purchases of Barclays PLC Stock by the Funds do not exceed on any particular day the greater of:

(1) 15 percent of the average daily trading volume for the Barclays PLC Stock occurring on the applicable exchange or automated trading system (as described in paragraph (c) below) for the previous five (5) business days, or

(2) 15 percent of the trading volume for Barclays PLC Stock occurring on the applicable exchange or automated trading system on the date of the transaction, as determined by the best available information for the trades occurring on that date.

(c) All purchases and sales of Barclays PLC Stock occur either (i) on the London Stock Exchange, a recognized securities exchange as defined in Section IV(k) below, (ii) through an automated trading system (as defined in Section IV(j) below) operated by a broker-dealer independent of Barclays that is subject to regulation and supervision by the Securities and Futures Authority of the United Kingdom (pursuant to the applicable securities laws) that provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) in a direct, arms-length transaction entered into on a principal basis with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Barclays and is either registered under the Securities Exchange Act of 1934 (the '34 Act), and thereby subject to regulation by the U.S. Securities and Exchange Commission (SEC), or subject to regulation and supervision by the Securities and Futures Authority of the United Kingdom (UK).

(d) No transactions by a Fund involve purchases from, or sales to, Barclays (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund.

(e) No more than five (5) percent of the total amount of Barclays PLC Stock issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by Barclays.

(f) Barclays PLC Stock constitutes no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(g) A plan fiduciary independent of Barclays authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Barclays PLC Stock, pursuant to the procedures described herein (see Paragraph 11 of the Summary of Facts and Representations below regarding portfolio management services provided for particular plans).

(h) A fiduciary independent of Barclays directs the voting of the Barclays PLC Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Barclays PLC Stock are required or permitted to vote.

Section II—Prospective Exemption for the Acquisition, Holding and Disposition of Barclays Stock

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, section 8477(c)(2)(A) and (B) of FERSA, and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(D) and (E) of the Code, shall not apply to the acquisition, holding and disposition of Barclays PLC Stock or the common stock of an Affiliate of Barclays PLC (Barclays PLC Affiliate Stock) by Index and Model-Driven Funds managed by Barclays, provided that the following conditions and the general conditions in Section III are met:

(a) The acquisition or disposition of Barclays PLC Stock or Barclays PLC Affiliate Stock (collectively, Barclays Stock) is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the Barclays Stock which is intended to benefit Barclays or any party in which Barclays may have an interest.

(b) Whenever Barclays Stock is initially added to an index on which an Index or Model-Driven Fund is based, or initially added to the portfolio of an Index or Model-Driven Fund, all acquisitions of Barclays Stock necessary to bring the Fund's holdings of such Stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the model

which has been used to transform the index, occur in the following manner:

(1) Purchases are from, or through, only one broker or dealer on a single trading day;

(2) Based on the best available information, purchases are not the opening transaction for the trading day;

(3) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(4) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(5) Aggregate daily purchases do not exceed 15 percent of the average daily trading volume for the security, as determined by the greater of either (i) the trading volume for the security occurring on the applicable exchange or automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange or automated trading system for the previous five (5) business days, both based on the best information reasonably available at the time of the transaction;

(6) All purchases and sales of Barclays Stock occur either (i) on a recognized securities exchange (as defined in Section IV(k) below), (ii) through an automated trading system (as defined in Section IV(j) below) operated by a broker-dealer independent of Barclays that is either registered under the '34 Act, and thereby subject to regulation by the SEC, or subject to regulation and supervision by the Securities and Futures Authority of the UK, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section IV(j) below) that is operated by a recognized securities exchange (as defined in Section IV(k) below), pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(7) If the necessary number of shares of Barclays Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require Barclays Stock, Barclays appoints a fiduciary which is independent of Barclays to design acquisition procedures and monitor Barclays' compliance with such procedures.

(c) Subsequent to acquisitions necessary to bring a Fund's holdings of Barclays Stock to its specified weighting

in the index or model pursuant to the restrictions described in paragraph (b) above, all aggregate daily purchases of Barclays Stock by the Funds do not exceed on any particular day the greater of:

(1) 15 percent of the average daily trading volume for the Barclays Stock occurring on the applicable exchange or automated trading system (as defined below) for the previous five (5) business days, or

(2) 15 percent of the trading volume for Barclays Stock occurring on the applicable exchange or automated trading system (as defined below) on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

(d) All transactions in Barclays Stock not otherwise described in paragraph (b) above are either: (i) Entered into on a principal basis in a direct, arms-length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Barclays and is either registered under the '34 Act, and thereby subject to regulation by the SEC, or subject to regulation and supervision by the Securities and Futures Authority of the UK (SFA-UK), (ii) effected on an automated trading system (as defined in Section IV(j) below) operated by a broker-dealer independent of Barclays that is subject to regulation by either the SEC or SFA-UK, or an automated trading system operated by a recognized securities exchange (as defined in Section IV(k) below) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined in Section IV(k) below) so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from, or sales to, Barclays (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund.

(f) No more than five (5) percent of the total amount of either Barclays PLC Stock or any Barclays PLC Affiliate Stock, that is issued and outstanding at any time, is held in the aggregate by Index and Model-Driven Funds managed by Barclays.

(g) Barclays Stock constitutes no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(h) A plan fiduciary independent of Barclays authorizes the investment of

such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Barclays Stock, pursuant to the procedures described herein (see Paragraph 11 of the Summary of Facts and Representations below regarding portfolio management services provided for particular plans).

(i) A fiduciary independent of Barclays directs the voting of the Barclays Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Barclays Stock are required or permitted to vote.

Section III—General Conditions

(a) Barclays maintains or causes to be maintained for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of this 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, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than Barclays 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 by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this Section are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or a representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph (b) shall be authorized to examine trade secrets of Barclays or commercial or financial information which is considered confidential.

Section IV—Definitions

(a) The term "Index Fund" means any investment fund, account or portfolio sponsored, maintained, trustee, or managed by Barclays, in which one or more investors invest, and—

(1) which is designed to track the rate of return, risk profile and other characteristics of an independently maintained securities Index, as described in Section IV(c) below, by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) for which Barclays does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) that contains "plan assets" subject to the Act, pursuant to the Department's regulations (see 29 CFR 2510.3–101, Definition of "plan assets"—plan investments); and,

(4) that involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit Barclays or any party in which Barclays may have an interest.

(b) The term "Model-Driven Fund" means any investment fund, account or portfolio sponsored, maintained, trustee, or managed by Barclays, in which one or more investors invest, and—

(1) which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of Barclays, to transform an independently maintained Index, as described in Section IV(c) below;

(2) which contains "plan assets" subject to the Act, pursuant to the Department's regulations (see 29 CFR 2510.3–101, Definition of "plan assets"—plan investments); and

(3) that involves no agreement, arrangement, or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit Barclays or any party in which Barclays may have an interest.

(c) The term *Index* means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) the organization creating and maintaining the index is—

(A) engaged in the business of providing financial information,

evaluation, advice or securities brokerage services to institutional clients,

(B) a publisher of financial news or information, or

(C) a public stock exchange or association of securities dealers; and,

(2) the index is created and maintained by an organization independent of Barclays; and,

(3) the index is a generally accepted standardized index of securities which is not specifically tailored for the use of Barclays.

(d) The term *opening date* means the date on which investments in or withdrawals from an Index or Model-Driven Fund may be made.

(e) The term *Buy-up* means an acquisition of Barclays Stock by an Index or Model-Driven Fund in connection with the initial addition of such Stock to an independently maintained index upon which the Fund is based or the initial investment of a Fund in such Stock.

(f) The term *Barclays* refers to Barclays PLC and its Affiliates, as defined below in paragraph (g), including BZW Barclays Global Investors, N.A., BZW Barclays Global Fund Advisors, BZW Barclays Global Investors Services, BZW Investment Management, Inc., Barclays Bank PLC (London), Barclays Bank of Canada, Barclays Bank Zimbabwe, Barclays Bank of Kenya, and Barclays Bank of Botswana, Ltd.

(g) The term *Affiliate* means, with respect to Barclays PLC, an entity which, directly or indirectly, through one or more intermediaries, is controlled by Barclays PLC;

(h) An *affiliate* of Barclays includes:

(1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with the person;

(2) Any officer, director, employee or relative of such person, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(i) The term *control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(j) The term *automated trading system* means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an "alternative trading system" within the meaning of the SEC's Reg. ATS [17 CFR part 242.300], as such definition may be amended from time to time, or an "automated

quotation system” as described in Section 3(a)(51)(A)(ii) of the '34 Act [15 U.S.C. 78c(a)(51)(A)(ii)].

(k) The term *recognized securities exchange* means a U.S. securities exchange that is registered as a “national securities exchange” under Section 6 of the '34 Act (15 U.S.C. 78f), or a designated offshore securities market, as defined in Regulation S of the SEC [17 CFR part 230.902(b)], as such definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (*e.g.*, 17 CFR part 240.3b–16).

EFFECTIVE DATE: The proposed exemption, if granted, will be effective as of December 31, 1995, for those transactions described in Section I above, and as of the date the final grant is published in the **Federal Register** for those transactions described in Section II above.

Summary of Facts And Representations

1. Barclays Global Investors, N.A. (“BGI”) is a national banking association which provides investment advisory, trust and related services to employee benefit plans and other fiduciary clients. BGI is an indirect subsidiary of Barclays PLC, a bank holding company incorporated under the laws of England and Wales, and Barclays Bank PLC (Barclays Bank), a bank incorporated under the laws of England and Wales and a subsidiary of Barclays PLC. BGI currently has two subsidiaries, both of which are California corporations and investment advisers registered under the Investment Advisers Act of 1940 (the “Advisers Act”). The first subsidiary, BZW Barclays Global Fund Advisers, provides investment advice to accounts and funds, including as an investment adviser or sub-adviser to certain mutual funds. The second subsidiary, BZW Barclays Global Investors Services, is registered as a broker-dealer and provides services to BGI and certain of its affiliates. In addition to BGI and its subsidiaries, Barclays Bank and certain of its affiliates may act as fiduciaries to ERISA-covered accounts and funds. BZW Investment Management, Inc., a Delaware corporation, is an investment adviser under the Advisers Act. BZW Asset Risk Management Limited, a corporation organized under the laws of England and Wales, is also registered as an investment adviser under the Advisers Act. The “Applicants” are BGI and those other Affiliates of Barclays

PLC that act or may act in the future as fiduciaries to ERISA-covered plans.

2. On December 31, 1995, Barclays Bank and certain of its affiliates acquired Wells Fargo Nikko Investment Advisors (WFNIA) and Wells Fargo Institutional Trust Company, N.A. (WFITC). WFITC became BZW Barclays Global Investors, N.A. (*i.e.* BGI) and WFNIA became BZW Barclays Global Fund Advisers (BZW Advisors).

Prior to January 1, 1996, WFITC and WFNIA maintained and managed Index and Model-Driven Funds which held assets of ERISA-covered employee benefit plans. Cross-trades of securities occurred among these Funds, as well as between the Funds and certain large pension plans, pursuant to Prohibited Transaction Exemption (PTE) 92–11 (56 FR 7800, March 4, 1992), an exemption issued to Wells Fargo Bank, N.A. and its affiliates (including at such time WFNIA and WFITC).¹ Part II of PTE 92–11 permitted Index and Model-Driven Funds maintained by Wells Fargo to acquire, hold and dispose of the common stock of Wells Fargo & Co. (WFC Stock).

The Applicants represent that as a result of the sale of WFNIA and WFITC to Barclays Bank, an individual exemption similar to that granted to Wells Fargo (*i.e.*, Part II of PTE 92–11) for the acquisition, holding and disposition of WFC Stock is necessary, after December 31, 1995, to enable certain Index and Model-Driven Funds maintained by Barclays Bank and its Affiliates to acquire, hold and dispose of the common stock of Barclays PLC (*i.e.*, Barclays PLC Stock). In this regard, there have been seven (7) Funds that, since December 31, 1995, have acquired, held and/or disposed of Barclays PLC Stock.² The Applicants request a retroactive exemption, effective as of December 31, 1995, to the date this proposed exemption is granted to permit such transactions by these Funds. The Applicants are not requesting any retroactive relief for the acquisition, holding or disposition of the common stock of any Affiliates of Barclays PLC (*i.e.*, Barclays PLC

Affiliate Stock). The Applicants represent that no Index or Model-Driven Funds containing “plan assets” covered by the Act³ have held such Stock. The Applicants also request that any further exemptive relief for cross-trades of securities by Index and Model-Driven Funds maintained by Barclays be considered separately.⁴

3. The Applicants represent that they provide investment advisory and management services to ERISA-covered plans through separately managed accounts and through collective investment vehicles. The Applicants’ investment management services include indexed, quantitative, and structured investment strategies. In addition to ERISA-covered plans, the Applicants’ clients include retirement plans with non-U.S. participants, governmental entities, governmental plans, church plans, mutual funds, and other institutional investors.

One of BGI’s clients is the Federal Employees’ Thrift Savings Plan (the Federal Thrift Plan) established pursuant to the provisions of the Federal Employees Retirement System Act of 1986 (FERSA) with respect to which BGI manages the assets of the Common Stock Index Investment Fund (the C Fund) and Fixed Income Investment Fund (the F Fund) through investing such assets in collective investment funds maintained by BGI. The Applicants state that the Federal Retirement Thrift Investment Board is planning to begin investing the Federal Thrift Plan in an Index Fund consisting of international equity securities, and such Fund is anticipated to include Barclays PLC Stock. Thus, the Applicants request that this proposed exemption provide prospective relief

³ See 29 CFR 2510.3–101; Definition of “plan assets”—plan investments.

⁴ In this regard, the Department directs interested persons to the Proposed Class Exemption for Cross-Trades of Securities by Index and Model-Driven Funds (the Cross-Trading Proposal) which was published in the **Federal Register** on December 15, 1999 (64 FR 70057). The Department notes that Section II(h) of the Cross-Trading Proposal states that the cross-trading of securities by an Index or Model-Driven Fund may not involve any security issued by the investment manager for the Fund unless such manager has obtained a separate prohibited transaction exemption for the acquisition of such security. Thus, the Cross-Trading Proposal would, if granted, permit Index and Model-Driven Funds maintained by Barclays to cross-trade Barclays Stock, pursuant to the conditions to be contained therein, if this proposed exemption is granted. The Applicants represent that currently cross-trades of Barclays PLC Stock by the Funds which hold such Stock are covered by PTE 92–11. However, the Department is providing no opinion in this proposed exemption as to whether any cross-trades of stocks, including Barclays PLC Stock, by such Funds meet the conditions necessary for relief under PTE 92–11.

¹ PTE 92–11 superseded PTE 87–51 (52 FR 22558, June 12, 1987). Currently, Wells Fargo has an exemption application before the Department which seeks to amend PTE 92–11 (see Exemption Application No. D–9584).

² The Applicants state that acquisitions of Barclays PLC Stock have been made only by Funds that already held such Stock in their portfolios as of December 31, 1995. Thus, there have been no new acquisitions of Barclays PLC Stock by any Funds as a result of an initial addition of such Stock to their portfolios since that time. Such initial additions of Barclays PLC Stock will only be made by a Fund once this proposed exemption is granted, under the conditions required herein for a “buy-up” period (see Section II(b) above).

under FERSA to acquire, hold and dispose of Barclays Stock.

4. In their capacity as fiduciary of an employee benefit plan, the Applicants may be directed by an independent plan fiduciary or a plan participant that has the ability to direct investments for his/her plan account under the plan document. Alternatively, in those cases in which the Applicants manage investments made for the plan, the Applicants represent that their discretionary authority over whether the plan invests in particular Funds is restricted by an independent plan fiduciary, unless the plan subscribes to Applicants' Portfolio Management in Funds (PMF) services (as discussed below).

5. The Applicants request that Index and Model-Driven Funds be permitted to invest in Barclays Stock if such Stock is included among the securities listed in the index utilized by the Fund. The Applicants have identified over twenty (20) indices that currently include either Barclays PLC Stock or Barclays PLC Affiliate Stock. Indexes which include Barclays PLC Stock are the FT-SE All Share Index, the MSCI UK Index, the FT-SE 100 Index, the FTSE Eurotop 100 Index, the FTSE Eurotop 300 Index, the FTSE E300 Financial Index, and the Bloomberg Europe Index. These indexes are compiled by financial information agencies, such as Standard & Poor's, Financial Times Ltd., and Morgan Stanley & Company International. These agencies are engaged in the provision of financial information or securities brokerage services to institutional investors and/or are publishers of financial information. In each instance, the indexes are compiled by organizations that are independent of Barclays and are generally accepted standardized indices of securities that are not tailored for the use of Barclays. While many of these indexes are not currently utilized by BGI for its Index and Model-Driven Funds, there is a possibility that Funds holding assets of ERISA-covered plans will be established in the future that are based on these indexes.

The Applicants represent that there were at least seven (7) different Index Funds maintained by BGI that included Barclays PLC Stock in their portfolios as of December 31, 1995. These Funds were the BGI MSCI Equity Index Fund—UK; the BGI MSCI Equity Index Fund B—UK; the BGI EAFE Equity Index Fund P; the BGI Exxon UK Alpha Tilts Fund; the BGI UK Equity Index Fund; the BGI UK Alpha Tilts Fund; and the BGI UK Alpha Tilts Fund B.

However, since December 31, 1995, BGI has excluded Barclays Stock from

the portfolios of any new Index and Model-Driven Funds even though such Stock is included in independently maintained indexes upon which such Funds are based. For those Index Funds whose goal is to replicate the rate of return of the index by tracking the capitalization-weighted composition of securities listed in the index, such exclusions of Barclays Stock create tracking errors which must be accounted for by re-weighting other securities in the index. For Model-Driven Funds that transform an index in a model-prescribed way, such exclusions of Barclays Stock create operational inefficiencies and strategic uncertainties that affect the criteria and data necessary to achieve the desired rates of return.

6. The Applicants state that the proposed exemption is necessary to allow Funds holding "plan assets" to purchase and hold Barclays Stock in order to replicate the capitalization-weighted or other specified composition of Barclays Stock in an independently maintained third party index used by an Index Fund or to achieve the desired transformation of an index used to create a portfolio for a Model-Driven Fund.⁵

In addition, the Applicants represent that there will be instances, once this proposed exemption is granted, when Barclays Stock will be added to an index on which a Fund is based or will be added to the portfolio of a Fund which seeks to track an index that includes such Stock. These instances will be referred to hereafter as a "Buy-up".⁶ In such instances, acquisitions of Barclays Stock will be necessary to bring the Fund's holdings of such Stock either to its capitalization-weighted or other specified composition in the index, as determined by the

⁵ The Applicants are not requesting any relief from sections 406 or 407(a) of the Act in connection with the acquisition and holding of Barclays Stock by any employee benefit plans established and maintained by Barclays for its own employees (the Barclays Plans) which invest in the Applicants' Index Funds. In this regard, such transactions may be covered by the statutory exemption under section 408(e) of the Act, if the conditions of that exemption are met. However, the Department is not providing an opinion in this proposed exemption as to whether the conditions of section 408(e) of the Act are met.

⁶ The Applicants anticipate that generally acquisitions of Barclays Stock by an Index or Model-Driven Fund in a "Buy-up" will occur within 10 business days from the date of the event which causes the particular Fund to require Barclays Stock. Barclays does not anticipate that the amounts of Barclays Stock acquired by any Fund in a "Buy-up" will be significant. In this regard, the Department notes that the conditions required herein are designed to minimize the market impact of purchases made by the Funds in any "Buy-up" of Barclays Stock.

independent organization maintaining such index, or to the correct weighting for such Stock as determined by the computer model which has been used to transform the index. If the Index or Model-Driven Fund holds "plan assets," the Applicants represent that all acquisitions of Barclays Stock by such Fund will comply with the "Buy-up" conditions of this proposed exemption. These conditions are as follows:

(A) Purchases will be from or through only one broker or dealer on a single trading day;

(B) Based on the best available information, purchases will not be the opening transaction for the trading day;

(C) Purchases will not be effected in the last half hour before the scheduled close of the trading day;

(D) Purchases will be at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(E) Purchases will not exceed 15 percent of the daily trading volume for the security, as determined by the greater of either (i) the trading volume for the security occurring on the applicable exchange or automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange or automated trading system for the previous five (5) business days, both based on the best information reasonably available at the time of the transaction;

(F) All purchases and sales of Barclays Stock will occur either (i) on a recognized securities exchange (as defined in Section IV(k)), (ii) through an automated trading system (as defined in Section IV(j)) operated by a broker-dealer that is either registered under the Securities Exchange Act of 1934 (the '34 Act) and thereby subject to regulation by the SEC, or subject to regulation and supervision by the SFA-UK, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section IV(j) above) that is operated by a recognized securities exchange (as defined in Section IV(k)), pursuant to the applicable securities laws which provide a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(G) If the necessary number of shares of Barclays Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require Barclays Stock, Barclays

will appoint a fiduciary which is independent of Barclays to design acquisition procedures and monitor Barclays' compliance with such procedures.⁷

The independent fiduciary and its principals will be completely independent from the Applicants. The independent fiduciary will also be experienced in developing and operating investment strategies for individual and collective investment vehicles that track third-party indices. Furthermore, the independent fiduciary will not act as the broker for any purchases or sales of Barclays Stock and will not receive any commissions as a result of this initial acquisition program.

The independent fiduciary will have as its primary goal the development of trading procedures that minimize the market impact of purchases made pursuant to the initial acquisition program by the Funds. The Applicants would expect that, under the trading procedures established by the independent fiduciary, the trading activities will be conducted in a low-profile, mechanical, non-discretionary manner and would involve a number of small purchases over the course of each day, randomly timed. The Applicants further expect that such a program will allow the Applicants to acquire the necessary shares of Barclays Stock for the Funds with minimum impact on the market and in a manner that will be in the best interests of any employee benefit plans that participate in such Funds.

The independent fiduciary will also be required to monitor the Applicants' compliance with the trading program and procedures developed for the initial acquisition of Barclays Stock. During the course of any initial acquisition program, the independent fiduciary will be required to review the activities weekly to determine compliance with the trading procedures and notify the Applicants should any non-compliance be detected. Should the trading procedures need modifications due to unforeseen events or consequences, the independent fiduciary will be required to consult with the Applicants and must approve in advance any alteration of the trading procedures.

7. Subsequent to initial acquisitions necessary to bring a Fund's holdings of Barclays Stock to its specified weighting in the index or model pursuant to the restrictions described above, all aggregate daily purchases of Barclays Stock by the Funds will not exceed on any particular day the greater of:

(i) 15 percent of the average daily trading volume for the Barclays Stock occurring on the applicable exchange or automated trading system (as described herein) for the previous five (5) business days, or

(ii) 15 percent of the trading volume for Barclays Stock occurring on the applicable exchange or automated trading system (as described herein) on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

The Applicants state that recent changes in the London Stock Exchange (LSE) have made that exchange more transparent for trading in Barclays PLC Stock by the Index and Model-Driven Funds. In late 1997, the LSE adopted the Stock Exchange Electronic Trading Service (SETS) for all stocks listed in the FTSE Indexes, which include Barclays PLC Stock. SETS is an order-driven system on which members post bids and offers, permitting trading on an agency basis. Prior to the use of SETS, trading on the LSE was a quote-driven principal market.

The Applicants state further that the advent of SETS has improved the availability of volume information about stocks traded on the LSE. Currently, all trades in stocks included in the SETS (whether executed through SETS or not) are reported to SETS within minutes of the trade and this data is available through various data providers, such as Reuters. Thus, the Applicants represent that the volume limitations imposed under this proposed exemption for transactions by the Funds involving Barclays PLC Stock will be effectively monitored by Barclays.

8. Barclays represents that as of December 31, 1995 until the date this proposed exemption is granted, all purchases and sales of Barclays PLC Stock by the Funds have occurred and will continue to occur in one of the following ways: (i) Through the London Stock Exchange, a recognized securities exchange as defined in Section IV(k) above; (ii) through an automated trading system (as defined in Section IV(j) above) operated by a broker-dealer that is subject to regulation by the SFA-UK (pursuant to the applicable securities laws), that provides a mechanism for customer orders to be matched on an anonymous basis without the

participation of a broker-dealer; or (iii) through a direct, arms-length transaction entered into on a principal basis with a broker-dealer⁸ that is either registered under the '34 Act, and thereby subject to regulation by the SEC, or subject to regulation and supervision by the SFA-UK. In addition, Barclays states that as of the date this proposed exemption is granted, all future transactions by the Funds involving Barclays Stock which do not occur in connection with a Buy-up of such Stock by a Fund, as described above, will be either: (i) Entered into on a principal basis with a broker-dealer that is either registered under the '34 Act, and thereby subject to regulation by the SEC, or subject to regulation and supervision by the SFA-UK; (ii) effected on an automated trading system (as defined in Section IV(j) above) operated by a broker-dealer subject to regulation by either the SEC or SFA-UK, or on an automated trading system operated by a recognized securities exchange (as defined in Section IV(k) above) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; or (iii) effected through a recognized securities exchange (as defined in Section IV(k) above) so long as the broker is acting on an agency basis.

9. With respect to all acquisitions and dispositions of Barclays PLC Stock by the Funds since December 31, 1995, the Applicants state that no such transactions have involved purchases from or sales to Barclays (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund. The Applicants represent that all future acquisitions and dispositions of Barclays Stock by any Index or Model-Driven Funds maintained by Barclays will also not involve any purchases from or sales to Barclays (including officers, directors, or employees thereof), or any party in interest that is

⁸ The Department notes that no relief is being provided herein for purchases and sales of securities between a Fund and a broker-dealer, acting as a principal, which may be considered prohibited transactions as a result of such broker-dealer being a party in interest, under section 3(14) of the Act, with respect to any plans that are investors in the Fund. However, such transactions may be covered by one or more of the Department's existing class exemptions. For example, PTE 84-14 (49 FR 9497, March 13, 1984) permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are invested in an investment fund managed by a "qualified professional asset manager" (QPAM) who is independent of the parties in interest (with certain limited exceptions) and meets specified financial standards.

⁷ In this regard, all Funds holding Barclays Stock as of December 31, 1995, which have continued to acquire, hold and dispose of Barclays Stock in order to track indexes including Barclays Stock will not need to have daily transactions involving such Stock directed by an independent fiduciary. Barclays states that the amount of Barclays Stock involved in such transactions has been and continues to be determined by the independent organization which created and maintains the relevant index, and all other conditions required under this proposed exemption have been met.

a fiduciary with discretion to invest plan assets into the Fund.

10. The Applicants state that no more than five (5) percent of the total amount of either Barclays PLC Stock or Barclays PLC Affiliate Stock, that is issued and outstanding at any time, will be held in the aggregate by Index and Model-Driven Funds managed by Barclays.

For purposes of the acquisition and holding of Barclays PLC Stock by Funds from December 31, 1995 until the date this proposed exemption is granted, such Stock will constitute no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based. For example, Barclays PLC Stock currently represents only 2.03% of the MSCI UK Index and 1.86% of the FTSE 100 Index. Although some indexes include Barclays PLC Stock in percentages that exceed three (3) percent of the index, Barclays does not currently utilize such indices for its Index and Model-Driven Funds with "plan assets" subject to the Act.

For purposes of future acquisitions and holdings of Barclays Stock by such Funds once this proposed exemption is granted, neither the Barclays PLC Stock nor the Barclays PLC Affiliate Stock will constitute no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based. In this regard, the Applicants have identified at least seven (7) indexes which include Barclays Stock where the current approximate capitalization weight of the index represented by Barclays Stock exceeds three (3) percent. The Applicants request that the proposed exemption allow Barclays to design a passive investment strategy for an Index or Model-Driven Fund which seeks to track an index that contains Barclays Stock, or which transforms such an index in a model-prescribed way, as long as the Barclays Stock does not constitute more than five (5) percent of the index.⁹

With respect to an index's specified composition of particular stocks in its portfolio, the Applicants state that future Funds may track an index where the appropriate weighting for stocks listed in the index is not capitalization-weighted. In this regard, the Applicants

note that the exemption received by WFITC and WFNIA (now BGI and BZW Advisors, respectively) from the Department in 1992 (*i.e.* PTE 92-11) covered transactions by index and model-driven funds that were designed to replicate the capitalization-weighted composition of an independently maintained stock index. However, the Applicants state that Funds maintained by BGI and other Affiliates of Barclays PLC may track indexes where the selection of a particular stock by the index, and the amount of stock to be included in the index, is not established based on the market capitalization of the corporation issuing such stock. Therefore, since an independent organization may choose to create an index where there are other index weightings for stocks composing the index, the Applicants request that the proposed exemption allow for Barclays Stock to be acquired by a Fund in the amounts which are specified by the particular index, subject to the other restrictions imposed under this proposed exemption. The Applicants represent that, in all instances, acquisitions or dispositions of Barclays Stock by a Fund will be for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Fund is based or, in the case of a Model-Driven Fund, a modified version of such an index as created by a computer model based on prescribed objective criteria and third-party data.

11. The Applicants state that plan fiduciaries independent of Barclays have authorized and will continue to authorize the investment of any plan's assets in an Index or Model-Driven Fund which purchases and/or holds Barclays Stock.

With respect to transactions involving Barclays Stock, the Applicants state that they may provide portfolio management services (*i.e.*, PMF services) to a particular plan (a PMF Plan). In this regard, the Applicants may exercise some discretion in allocating and reallocating the plan's assets among various collective investment funds, including Funds which may hold Barclays Stock. These allocations are based on a plan's investment objectives, risk profile and market conditions. However, the Applicants make the following representations with respect to the purchase, directly or indirectly, of Barclays Stock by such plans:

(a) The Applicants represent that any prohibited transactions which might occur as a result of the discretionary allocation and reallocation of plan assets among collective investment funds will be exempt from the

prohibitions of section 406 of the Act by reason of section 408(b)(8).¹⁰

(b) Before Barclays Stock is purchased by a Fund, the appropriate independent fiduciary for each PMF Plan which is currently invested or could be invested in such Fund will be furnished an explanation and a simple form to return to Barclays for the purpose of indicating either approval or disapproval of investments in the Fund including Barclays Stock, together with a postage-paid return envelope. If the form is not returned to the Applicants, the Applicants may obtain a verbal response by telephone. If a verbal response is obtained by telephone, the Applicants will confirm the fiduciary's decision in writing within five (5) business days. In the event no response is obtained from a plan fiduciary, the assets of the plan will not be invested in any Fund which invests in Barclays Stock and any plan assets currently invested in such Fund at that time would be withdrawn.

(c) Each new management agreement with such a plan will contain language specifically approving or disapproving the investment in any Fund which holds or might hold Barclays Stock. The fiduciary for each such plan will be informed that the existing management agreement could be modified in the same way. However, if the fiduciary does not specifically approve language in the agreement allowing the investment of plan assets in Funds which hold or might hold Barclays Stock, then no such investment will be made by the Applicants.

(d) Each such plan will be informed on a quarterly basis of any investment in, or withdrawal from, any Fund holding Barclays Stock. The plan would be granted the election to override the Applicants' discretionary decision to invest in, or withdraw from, such Funds. If the plan overrides the Applicants' decision to invest in, or withdraw from, the Funds, then the Applicants will carry out the plan's election as soon as possible after being notified of such election.

12. The Applicants will appoint an independent fiduciary which will direct the voting of Barclays Stock held by the Funds. Currently, the independent fiduciary that directs the voting of Barclays PLC Stock held by the Funds is Institutional Shareholders Services, Inc.

¹⁰ The Department is expressing no opinion in this proposed exemption as to whether Applicants' discretionary allocation and reallocation services for any collective investment funds maintained by the Applicants satisfy the requirements of section 408(b)(8) of the Act and is not proposing any exemptive relief beyond that offered by section 408(b)(8).

⁹ The Applicants have identified certain independent third party indexes where the current approximate capitalization weight of the index represented by Barclays Stock exceeds five (5) percent. However, the Applicants have agreed to limit the prospective relief that would be provided by this proposed exemption to Index and Model-Driven Funds which track indexes where the specified composition of Barclays Stock in the index does not exceed five (5) percent of such index.

Barclays states that in all instances the independent fiduciary chosen to vote Barclays Stock for the Funds will be a consulting firm specializing in corporate governance issues and proxy voting on behalf of institutional investors with large equity portfolios. The fiduciary will develop and follow standard guidelines and procedures for the voting of proxies by institutional fiduciaries. The Applicants will provide the independent fiduciary with all necessary information regarding the Funds that hold Barclays Stock, the amount of Barclays Stock held by the Funds on the record date for shareholder meetings of the Applicants, and all proxy and consent materials with respect to Barclays Stock. The independent fiduciary will maintain records with respect to its activities as an independent fiduciary on behalf of the Funds, including the number of shares of Barclays Stock voted, the manner in which they were voted, and the rationale for the vote if the vote was not consistent with the independent fiduciary's procedures and current voting guidelines in effect at the time of the vote. The independent fiduciary will supply the Applicants with such information after each shareholder meeting. The independent fiduciary will be required to acknowledge that it will be acting as a fiduciary with respect to the plans which invest in the Funds which own Barclays Stock, when voting such stock.

16. In summary, with respect to all acquisitions, holdings, and dispositions of Barclays PLC Stock by the Funds since December 31, 1995, the Applicants represent that such transactions meet the criteria of section 408(a) of the Act for the following reasons:

(a) Each Index or Model-Driven Fund involved is based on an Index, as defined in Section IV(c) above;

(b) The acquisition, holding and disposition of the Barclays PLC Stock by the Index or Model-Driven Fund is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the Barclays PLC Stock which is intended to benefit Barclays or any party in which Barclays may have an interest;

(c) All aggregate daily purchases of Barclays PLC Stock by the Funds do not exceed, on any particular day, 15 percent of the average daily trading volume for such Stock occurring on the applicable exchange or automated trading system, as determined by the

best available information for the trades occurring on that date;

(d) All purchases and sales of Barclays PLC Stock occur either (i) on the London Stock Exchange, a recognized securities exchange as defined herein, (ii) through an automated trading system (as defined herein) operated by a broker-dealer that is subject to regulation by the SFA-UK (pursuant to the applicable securities laws) that provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) in a direct, arms-length transaction entered into on a principal basis with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Barclays and is either registered under the '34 Act, and thereby subject to regulation by the SEC, or subject to regulation and supervision by the SFA-UK;

(e) No transactions by a Fund involve purchases from or sales to Barclays (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund;

(f) No more than five (5) percent of the total amount of Barclays PLC Stock issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by Barclays;

(g) Barclays PLC Stock constitutes no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based;

(h) A plan fiduciary independent of Barclays authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Barclays PLC Stock; and

(i) A fiduciary independent of Barclays (*i.e.* Institutional Shareholders Services, Inc.) directs the voting of the Barclays PLC Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Barclays PLC Stock are required or permitted to vote.

With respect to all acquisitions, holdings, and dispositions of Barclays PLC Stock or Barclays PLC Affiliate Stock by the Funds after this proposed exemption is granted, the Applicants represent that such transactions will meet the criteria of section 408(a) of the Act for the following reasons:

(a) Each Index or Model-Driven Fund involved will be based on an Index, as defined in Section IV(c) above;

(b) The acquisition or disposition of Barclays Stock will be for the sole purpose of maintaining strict quantitative conformity with the

relevant Index upon which the Index or Model-Driven Fund is based, and will not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the Barclays Stock which is intended to benefit Barclays or any party in which Barclays may have an interest;

(c) Whenever Barclays Stock is initially added to an index on which a Fund is based, or initially added to the portfolio of a Fund (*i.e.*, a Buy-up), all acquisitions of Barclays Stock necessary to bring the Fund's holdings of such Stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the computer model which has been used to transform the index, will be restricted by conditions which are designed to prevent possible market price manipulations;

(d) Subsequent to acquisitions necessary to bring a Fund's holdings of Barclays Stock to its specified weighting in the index or model, pursuant to the restrictions noted in paragraph (c) above, all aggregate daily purchases of Barclays Stock by the Funds will not exceed, on any particular day, 15 percent of the average daily trading volume for such Stock occurring on the applicable exchange or automated trading system, as determined by the best available information for the trades that occurred on such date;

(e) All transactions in Barclays Stock, other than acquisitions of such Stock in a Buy-up described in paragraph (c) above, will be either: (i) Entered into on a principal basis with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Barclays and is either registered under the '34 Act, and thereby subject to regulation by the SEC, or subject to regulation and supervision by the SFA-UK, (ii) effected on an automated trading system operated by a broker-dealer subject to regulation by either the SEC or SFA-UK, or by a recognized securities exchange which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined herein) so long as the broker is acting on an agency basis.

(f) No transactions by a Fund will involve purchases from or sales to Barclays (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund;

(g) No more than five (5) percent of the total amount of either Barclays PLC Stock or Barclays PLC Affiliate Stock, that is issued and outstanding at any time, will be held in the aggregate by Index and Model-Driven Funds managed by Barclays;

(h) Barclays Stock will constitute no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based;

(i) A plan fiduciary independent of Barclays will authorize the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Barclays Stock pursuant to the procedures described herein, including those which relate to portfolio management services provided to certain plans (see Paragraph 11 of the Summary of Facts and Representations above); and

(k) A fiduciary independent of Barclays will direct the voting of the Barclays Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Barclays Stock are required or permitted to vote.

NOTICE TO INTERESTED PERSONS: Notice of the proposed exemption should be mailed by first class mail to interested persons, including the appropriate fiduciaries for employee benefit plans currently invested in the Index and/or Model-Driven Funds that acquire and hold Barclays Stock. The notice should contain a copy of the proposed exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment on or request a hearing regarding the proposed exemption. All notices should be sent to interested persons within 15 days of the publication of this proposed exemption in the **Federal Register**. Any written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

In addition, Barclays shall provide a copy of the proposed exemption and, if granted, a copy of the final exemption upon request to all ERISA-covered plans that invest in any Index or Model-Driven Fund that will include Barclays PLC Stock or Barclays PLC Affiliate Stock in its portfolio after the date the final exemption is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

BOSC, Inc. (BOSC)

Located in Tulsa, Oklahoma
[Application No. D-10834]

Proposed Exemption

I. Transactions

A. The restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A.(1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.¹¹

B. The restrictions of sections 406(b)(1) and 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code, shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;
(ii) solely in the case of an acquisition of certificates in connection with the

initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) a plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.¹² For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1)(i), (iii) and (iv) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B.(1) or (2).

C. The restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or described in all material respects in, the prospectus or private placement memorandum provided to investing plans before they purchase certificates issued by the trust.¹³

¹² For purposes of this proposed exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

¹³ In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the

¹¹ Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3-21(c).

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act, or from the taxes imposed by reason of section 4975(c) of the Code, for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. The restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

II. General Conditions

A. The relief provided under Part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating from a rating agency (as defined in section III.W.) at the time of such acquisition that is in one of the three highest generic rating categories;

(4) The trustee is not an affiliate of any other member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in

connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith;

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933; and

(7) In the event that the obligations used to fund a trust have not all been transferred to the trust on the closing date, additional obligations as specified in subsection III.B.(1) may be transferred to the trust during the pre-funding period (as defined in section III.BB.) in exchange for amounts credited to the pre-funding account (as defined in section III.Z.), provided that:

(a) The pre-funding limit (as defined in section III.AA.) is not exceeded;

(b) All such additional obligations meet the same terms and conditions for eligibility as those of the original obligations used to create the trust corpus (as described in the prospectus or private placement memorandum and/or pooling and servicing agreement for such certificates), which terms and conditions have been approved by a rating agency.

Notwithstanding the foregoing, the terms and conditions for determining the eligibility of an obligation may be changed if such changes receive prior approval either by a majority of the outstanding certificateholders or by a rating agency;

(c) The transfer of such additional obligations to the trust during the pre-funding period does not result in the certificates receiving a lower credit rating from a rating agency upon termination of the pre-funding period than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

(d) The weighted average annual percentage interest rate (the average interest rate) for all of the obligations in the trust at the end of the pre-funding period will not be more than 100 basis points lower than the average interest rate for the obligations which were

transferred to the trust on the closing date;

(e) In order to ensure that the characteristics of the receivables actually acquired during the pre-funding period are substantially similar to those which were acquired as of the closing date, the characteristics of the additional obligations will be either monitored by a credit support provider or other insurance provider which is independent of the sponsor, or an independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the rating agency, the underwriter and the trustees) stating whether or not the characteristics of the additional obligations conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the closing date;

(f) The pre-funding period shall be described in the prospectus or private placement memorandum provided to investing plans; and

(g) The trustee of the trust (or any agent with which the trustee contracts to provide trust services) will be a substantial financial institution or trust company experienced in trust activities and familiar with its duties, responsibilities and liabilities as a fiduciary under the Act. The trustee, as the legal owner of the obligations in the trust, will enforce all the rights created in favor of certificateholders of such trust, including employee benefit plans subject to the Act.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance

Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this proposed exemption:

A. *Certificate* means:

(1) A certificate—

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of section 860D(a) or section 860L, respectively, of the Internal Revenue Code of 1986; and

(b) That is issued by, and is an obligation of, a trust; with respect to certificates defined in (1) and (2) above for which BOSC or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this proposed exemption, references to “certificates representing an interest in a trust” include certificates denominated as debt which are issued by a trust.

B. *Trust* means an investment pool, the corpus of which is held in trust and consists solely of:

(1) (a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans and obligations secured by shares issued by a cooperative housing association); and/or

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T); and/or

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interests on commercial real property); and/or

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U); and/or

(e) “Guaranteed governmental mortgage pool certificates,” as defined in 29 CFR 2510.3–101(i)(2); and/or

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1);

(2) Property which had secured any of the obligations described in subsection B.(1);

(3) (a) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders; and/or

(b) Cash or investments made therewith which are credited to an account to provide payments to certificateholders pursuant to any yield supplement agreement or similar yield maintenance arrangement to supplement the interest rates otherwise payable on obligations described in subsection III.B.(1) held in the trust, provided that such arrangements do not involve swap agreements or other notional principal contracts; and/or

(c) Cash transferred to the trust on the closing date and permitted investments made therewith which:

(i) Are credited to a pre-funding account established to purchase additional obligations with respect to which the conditions set forth in clauses (a)–(g) of subsection II.A.(7) are met and/or;

(ii) Are credited to a capitalized interest account (as defined in section III.X.); and

(iii) Are held in the trust for a period ending no later than the first distribution date to certificateholders occurring after the end of the pre-funding period.

For purposes of this clause (c) of subsection III.B.(3), the term “permitted investments” means investments which are either: (i) Direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by the United States, or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States or (ii) have been rated (or the obligor has been rated) in one of the three highest generic rating categories by a rating agency; are described in the pooling and servicing agreement; and are permitted by the rating agency; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship, yield supplement agreements described in clause (b) of subsection III.B.(3) and other credit support arrangements with respect to any obligations described in subsection III.B.(1).

Notwithstanding the foregoing, the term “trust” does not include any investment pool unless: (i) The investment pool consists only of assets of the type described in clauses (a) through (f) of subsection III.B.(1) which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by a rating agency for at least one year prior to the plan’s acquisition of certificates pursuant to this proposed exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan’s acquisition of certificates pursuant to this proposed exemption.

C. *Underwriter* means:

(1) BOSC;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with BOSC; or

(3) Any member of an underwriting syndicate or selling group of which BOSC or a person described in (2) is a manager or co-manager with respect to the certificates.

D. *Sponsor* means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. *Master Servicer* means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. *Subservicer* means an entity which, under the supervision of and on behalf of the master servicer, services obligations contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services obligations contained in the trust, including the master servicer and any subservicer.

H. *Trustee* means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. *Insurer* means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. *Obligor* means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the

trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. *Excluded Plan* means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. *Restricted Group* with respect to a class of certificates means:

- (1) each underwriter;
- (2) each insurer;
- (3) the sponsor;
- (4) the trustee;
- (5) each servicer;
- (6) any obligor with respect to

obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) any affiliate of a person described in (1)-(6) above.

M. *Affiliate* of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. *Control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. *Sale* includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to

an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this proposed exemption (if granted) applicable to sales are met.

Q. *Forward delivery commitment* means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. *Reasonable compensation* has the same meaning as that term is defined in 29 CFR 2550.408c-2.

S. *Qualified Administrative Fee* means a fee which meets the following criteria:

(1) the fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) the servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) the ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) the amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer

T. *Qualified Equipment Note Secured by a Lease* means an equipment note:

(1) which is secured by equipment which is leased;

(2) which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(3) with respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as would be the case if the equipment note were secured only by the equipment and not the lease.

U. *Qualified Motor Vehicle Lease* means a lease of a motor vehicle where:

(1) the trust owns or holds a security interest in the lease;

(2) the trust owns or holds a security interest in the leased motor vehicle; and

(3) the trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as would be the case if the trust consisted of motor vehicle installment loan contracts.

V. *Pooling and Servicing Agreement* means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as

debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. *Rating Agency* means Standard & Poor's Structured Rating Group (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Credit Rating Co. (D & P) or Fitch IBCA, Inc. (Fitch), or their successors.

X. *Capitalized Interest Account* means a trust account: (i) which is established to compensate certificateholders for shortfalls, if any, between investment earnings on the pre-funding account and the pass-through rate payable under the certificates; and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

Y. *Closing Date* means the date the trust is formed, the certificates are first issued and the trust's assets (other than those additional obligations which are to be funded from the pre-funding account pursuant to subsection II.A.(7)) are transferred to the trust.

Z. *Pre-Funding Account* means a trust account: (i) Which is established to purchase additional obligations, which obligations meet the conditions set forth in clauses (a)-(g) of subsection II.A.(7); and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

AA. *Pre-Funding Limit* means a percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered which is less than or equal to 25 percent.

BB. *Pre-Funding Period* means the period commencing on the closing date and ending no later than the earliest to occur of: (i) the date the amount on deposit in the pre-funding account is less than the minimum dollar amount specified in the pooling and servicing agreement; (ii) the date on which an event of default occurs under the pooling and servicing agreement; or (iii) the date which is the later of three months or 90 days after the closing date.

CC. *BOSC* means BOSC, Inc. an Oklahoma corporation, and its affiliates.

The Department notes that this proposed exemption is included within the meaning of the term "Underwriter Exemption" as it is defined in section V(h) of Prohibited Transaction Exemption 95-60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts (see 60 FR at 35932).

Summary Of Facts and Representations

1. BOSC is a broker-dealer registered with the Securities and Exchange Commission (SEC) and is a member of

the National Association of Securities Dealers, Inc. As of June 30, 1999, it had total assets of \$15.1 million.

BOSC is a wholly-owned subsidiary of BOK Financial Corporation (BOK Financial), a bank holding with its principal offices located in Tulsa, Oklahoma. BOSC was established as a broker-dealer subsidiary of BOK Financial pursuant to an order of the Board of Governors of the U.S. Federal Reserve System (the Federal Reserve Board) effective April 29, 1997 (the Tier 1 Order). The Federal Reserve Board regulates BOK Financial as a bank holding company and restricts activities of BOSC and its affiliates under the Glass-Steagall Act.

Under the Tier 1 Order, BOSC is authorized to engage, subject to certain prudential limitations established by the Federal Reserve Board, in underwriting and dealing in certain mortgage-related securities, municipal revenue bonds, commercial paper and consumer receivables-related securities (Tier 1 Activities). In addition, BOSC is authorized to act as agent in the private placement of all types of securities, including providing related advisory services, and to buy and sell securities on the order of investors. The Tier 1 Order is subject to the condition that BOSC does not derive more than a limited percentage of its total gross revenues over any two-year period from underwriting and dealing in certain categories of securities, including asset-backed securities of the type described herein.

BOSC has also been authorized by the Federal Reserve Board to engage, subject to certain prudential limitations established by the Federal Reserve Board dated December 2, 1998, in certain additional securities activities, including underwriting and dealing in corporate debt and equity securities (Tier 2 Activities).

BOSC has been involved in the structuring and placement of asset-backed securities transactions since July 1998. In March, 1999, BOSC has served as lead underwriter in public offerings of trust certificates of the BOK Auto Grantor Trust 1999-A. BOSC is developing additional offerings of asset backed securities.

BOK Financial, the parent of BOSC, is the largest financial institution headquartered in Oklahoma, with total assets of approximately \$8.2 billion as of June 30, 1999 and approximately \$15.5 billion in assets under management and administration. BOK Financial's subsidiaries include Bank of Oklahoma, National Association (the largest national bank headquartered in Oklahoma), Bank of Texas, National

Association (headquartered in the Dallas-Ft. Worth Metropolitan Area), Bank of Arkansas, National Association (headquartered in Fayetteville, Arkansas), and Bank of Albuquerque, National Association (headquartered in Albuquerque, New Mexico). BOK Financial, through its subsidiary banks, provides a full range of consumer and commercial banking services, trust services, mortgage origination and servicing, and investment advisory services. The Bank of Oklahoma Trust Division serves as the investment advisor for the American Performance Funds Group of Mutual Funds.

Trust Assets

2. BOSC seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts;¹⁴ (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.¹⁵

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of

¹⁴ The Department notes that PTE 83-1 [48 FR 895, January 7, 1983], a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. BOSC requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, BOSC has stated that it may still avail itself of the exemptive relief provided by PTE 83-1.

¹⁵ Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of "plan assets" (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts may be plan assets.

the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.¹⁶

Trust Structure

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee.¹⁷ The sponsor or servicer of a trust selects assets to be included in the trust.¹⁸ These assets are receivables which may have been originated by a sponsor or servicer of the trust, an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.¹⁹

Typically, on or prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. Typically, all receivables to be held in the trust are transferred as of the closing date, but in some transactions, as described more fully below, a limited percentage of the receivables to be held in the trust may

¹⁶ Trust assets may also include obligations that are secured by leasehold interests on residential real property. See PTE 90-32 involving Prudential-Bache Securities, Inc. (55 FR 23147, June 6, 1990 at 23150).

¹⁷ The Department is of the view that the term "trust" includes a trust: (a) The assets of which, although all specifically identified by the sponsor or the originator as of the closing date, are not all transferred to the trust on the closing date for administrative or other reasons but will be transferred to the trust shortly after the closing date, or (b) with respect to which certificates are not purchased by plans until after the end of the pre-funding period at which time all receivables are contained in the trust.

¹⁸ It is the Department's view that the definition of "trust" contained in section III.B. includes a two-tier structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues securities that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

¹⁹ It is the view of the Department that section III.B.(4) includes within the definition of the term "trust" rights under any yield supplement or similar arrangement which obligates the sponsor or master servicer, or another party specified in the relevant pooling and servicing agreement, to supplement the interest rates otherwise payable on the obligations described in section III.B.(1), in accordance with the terms of a yield supplement arrangement described in the pooling and servicing agreement, provided that such arrangements do not involve swap agreements or other notional principal contracts.

be transferred during a limited period of time following the closing date, through the use of a pre-funding account.

BOSC, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. All of the public offerings of certificates presently contemplated are to be underwritten by BOSC on a firm commitment basis. In addition, BOSC anticipates that it may privately place certificates on both a firm commitment and an agency basis. BOSC may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders will be entitled to receive distributions of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable. These distributions will be made monthly, quarterly, semi-annually, or at such other intervals and dates as specified in the related prospectus or private placement memorandum.

When installments or payments are made on a semi-annual basis, funds are not permitted to be commingled with the servicer's assets for longer than would be permitted for a monthly-pay security. A segregated account is established in the name of the trustee (on behalf of certificateholders) to hold funds received between distribution dates. The account is under the sole control of the trustee, who invests the account's assets in short-term securities which have received a rating comparable to the rating assigned to the certificates. In some cases, the servicer may be permitted to make a single deposit into the account once a month. When the servicer makes such monthly deposits, payments received from obligors by the servicer may be commingled with the servicer's assets during the month prior to deposit. Usually, the period of time between receipt of funds by the servicer and deposit of these funds in a segregated account does not exceed one month. Furthermore, in those cases where distributions are made semi-annually, the servicer will furnish a report on the operation of the trust to the trustee on a monthly basis. At or about the time this report is delivered to the trustee, it will be made available to certificateholders and delivered to or made available to each rating agency that has rated the certificates.

5. Some of the certificates will be multi-class certificates. BOSC requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip

certificates are a type of security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.²⁰

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities or the same maturities with different payment schedules. Interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal, and/or earlier payment schedule, and only when that class of certificates has been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing a certificate be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less than the amount required to be so distributed, all senior certificateholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.²¹

6. The trust will be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing

²⁰ It is the Department's understanding that where a plan invests in REMIC "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this proposed exemption.

²¹ If a trust issues subordinated certificates, holders of such subordinated certificates may not share in the amount distributed on a pro rata basis with the senior certificateholders. The Department notes that the proposed exemption does not provide relief for plan investment in such subordinated certificates.

agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a short time after the issuance of trust certificates (within 120 days, except in the case of obligations having an original term of 30 years, in which case the period will not exceed two years). Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

In some cases the trust will be maintained as a Financial Asset Securitization Investment Trust ("FASIT"), a statutory entity created by the Small Business Job Protection Act of 1996, adding sections 860H, 860J, 860K and 860L to the Code. In general, a FASIT is designed to facilitate the securitization of debt obligations, such as credit card receivables, home equity loans, and auto loans, and thus, allows certain features such as revolving pools of assets, trusts containing unsecured receivables and certain hedging types of investments. A FASIT is not a taxable entity and debt instruments issued by such trusts, which might otherwise be recharacterized as equity, will be treated as debt in the hands of the holder for tax purposes. However, a trust which is the subject of the proposed exemption will be maintained as a FASIT only where the assets held by the FASIT will be comprised of secured debt; revolving pools of assets or hedging investments will not be allowed unless specifically authorized by the exemption, if granted, so that a trust maintained as a FASIT will be maintained as an essentially passive entity.

Trust Structure With Pre-Funding Account

Pre-Funding Accounts

7. As described briefly above, some transactions may be structured using a pre-funding account or a capitalized interest account. If pre-funding is used, cash sufficient to purchase the receivables to be transferred after the closing date will be transferred to the trust by the sponsor or originator on the closing date. During the pre-funding period, such cash and temporary investments, if any, made therewith will be held in a pre-funding account and used to purchase the additional receivables, the characteristics of which will be substantially similar to the

characteristics of the receivables transferred to the trust on the closing date. The pre-funding period for any trust will be defined as the period beginning on the closing date and ending on the earliest to occur of (i) the date on which the amount on deposit in the pre-funding account is less than a specified dollar amount, (ii) the date on which an event of default occurs under the related pooling and servicing agreement or (iii) the date which is the later of three months or ninety (90) days after the closing date. Certain specificity and monitoring requirements described below will be met and will be disclosed in the pooling and servicing agreement and/or the prospectus or private placement memorandum.

For transactions involving a trust using pre-funding, on the closing date, a portion of the offering proceeds will be allocated to the pre-funding account generally in an amount equal to the excess of (i) the principal amount of certificates being issued over (ii) the principal balance of the receivables being transferred to the trust on such closing date. In certain transactions, the aggregate principal balance of the receivables intended to be transferred to the trust may be larger than the total principal balance of the certificates being issued. In these cases, the cash deposited in the pre-funding account will equal the excess of the principal balance of the total receivables intended to be transferred to the trust over the principal balance of the receivables being transferred on the closing date.

On the closing date, the sponsor transfers the assets to the trust in exchange for the certificates. The certificates are then sold to an underwriter for cash or to the certificateholders directly if the certificates are sold through a placement agent. The cash received by the sponsor from the certificateholders (or the underwriter) from the sale of the certificates issued by the trust in excess of the purchase price for the receivables and certain other trust expenses, such as underwriting or placement agent fees and legal and accounting fees, constitutes the cash to be deposited in the pre-funding account. Such funds are either held in the trust and accounted for separately, or are held in a sub-trust. In either event, these funds are not part of assets of the sponsor.

Generally, the receivables are transferred at par value, unless the interest rate payable on the receivables is not sufficient to service both the interest rates to be paid on the certificates and the transaction fees (*i.e.*, servicing fees, trustee fees and fees to credit support providers). In such cases,

the receivables are sold to the trust at a discount, based on an objective, written, mechanical formula which is set forth in the pooling and servicing agreement and agreed upon in advance between the sponsor, the rating agency and any credit support provider or other insurer. The proceeds payable to the sponsor from the sale of the receivables transferred to the trust may also be reduced to the extent they are used to pay transaction costs (which typically include underwriting or placement agent fees and legal and accounting fees). In addition, in certain cases, the sponsor may be required by the rating agencies or credit support providers to set up trust reserve accounts to protect the certificateholders against credit losses.

The pre-funding account of any trust will be limited so that the percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered (the pre-funding limit) will not exceed 25%. The pre-funding limit (which may be expressed as a ratio or as a stated percentage or a combination thereof) will be specified in the prospectus or the private placement memorandum.

Any amounts paid out of the pre-funding account are used solely to purchase receivables and to support the certificate pass-through rate (as explained below). Amounts used to support the pass-through rate are payable only from investment earnings and are not payable from principal. However, in the event that, after all of the requisite receivables have been transferred into the trust, any funds remain in the pre-funding account, such funds will be paid to the certificateholders as principal prepayments. Upon termination of the trust, if no receivables remain in the trust and all amounts payable to certificateholders have been distributed, any amounts remaining in the trust would be returned to the sponsor.

A dramatic change in interest rates on the receivables held in a trust using a pre-funding account would be handled as follows. If the receivables (other than those with adjustable or variable rates) had already been originated prior to the closing date, no action would be required as the fluctuations in the market interest rates would not affect the receivables transferred to the trust after the closing date. In contrast, if interest rates fall after the closing date, loans originated after the closing date will tend to be originated at lower rates, with the possible result that the receivables will not support the certificate pass-through rate. In such

situations, the sponsor could sell the receivables into the trust at a discount, and more receivables would be used to fund the trust in order to support the pass-through rate. In a situation where interest rates drop dramatically and the sponsor is unable to provide sufficient receivables at the requisite interest rates, the pool of receivables would be closed. In this latter event, under the terms of the pooling and servicing agreement, the certificateholders would receive a repayment of principal from the unused cash held in the pre-funding account. In transactions where the certificate pass-through rates are variable or adjustable, the effects of market interest rate fluctuations are mitigated. In no event will fluctuations in interest rates payable on the receivable affect the pass-through rate for fixed rate certificates.

The cash deposited into the trust and allocated to the pre-funding account is invested in certain permitted investments (see below), which may be commingled with other accounts of the trust. The allocation of investment earnings to each trust account is made periodically as earned in proportion to each account's allocable share of the investment returns. As pre-funding account investment earnings are required to be used to support (to the extent authorized in the particular transaction) the pass-through amounts payable to the certificateholders with respect to a periodic distribution date, the trustee is necessarily required to make periodic, separate allocations of the trust's earning to each trust account, thus ensuring that all allocable commingled investment earnings are properly credited to the pre-funding account on a timely basis.

The Capitalized Interest Account

8. In certain transactions where a pre-funding account is used, the sponsor and/or originator may also transfer to the trust additional cash on the closing date, which is deposited in a capitalized interest account and used during the pre-funding period to compensate the certificateholders for any shortfall between the investment earnings on the pre-funding account and the pass-through interest rate payable under the certificates.

The capitalized interest account is needed in certain transactions since the certificates are supported by the receivables and the earnings on the pre-funding account, and it is unlikely that the investment earnings on the pre-funding account will equal the interest rates on the certificates (although such investment earnings will be available to pay interest on the certificates). The

capitalized interest account funds are paid out periodically to the certificateholders as needed on distribution dates to support the pass-through rate. In addition, a portion of such funds may be returned to the sponsor from time to time as the receivables are transferred into the trust and the need for the capitalized interest account diminishes. Any amounts held in the capitalized interest account generally will be returned to the sponsor and/or originator either at the end of the pre-funding period or periodically as receivables are transferred and the proportionate amount of funds in the capitalized interest account can be reduced. Generally, the capitalized interest account terminates no later than the end of the pre-funding period. However, there may be some cases where the capitalized interest account remains open until the first date distributions are made to certificateholders following the end of the pre-funding period.

In other transactions, a capitalized interest account is not necessary because the interest paid on the receivables exceeds the interest payable on the certificates at the applicable pass-through rate and the fees of the trust. Such excess is sufficient to make up any shortfall resulting from the pre-funding account earning less than the certificate pass-through rate. In certain of these transactions, this occurs because the aggregate principal amount of receivables exceeds the aggregate principal amount of certificates.

Pre-Funding Account and Capitalized Interest Account Payments and Investments

9. Pending the acquisition of additional receivables during the pre-funding period, it is expected that amounts in the pre-funding account and the capitalized interest account will be invested in certain permitted investments or will be held uninvested. Pursuant to the pooling and servicing agreement, all permitted investments must mature prior to the date the actual funds are needed. The permitted types of investments in the pre-funding account and capitalized interest account are investments which are either: (i) Direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States or (ii) have been rated (or the obligor has been rated) in one of the three highest generic rating categories by a rating agency, as set forth in the pooling and servicing agreement

and as required by the rating agencies. The credit grade quality of the permitted investments is generally no lower than that of the certificates. The types of permitted investments will be described in the pooling and servicing agreement.

The ordering of interest payments to be made from the pre-funding and capitalized interest accounts is pre-established and set forth in the pooling and servicing agreement. The only principal payments which will be made from the pre-funding account are those made to acquire the receivables during the pre-funding period and those distributed to the certificateholders in the event that the entire amount in the pre-funding account is not used to acquire receivables. The only principal payments which will be made from the capitalized interest account are those made to certificateholders if necessary to support the certificate pass-through rate or those made to the sponsor either periodically as they are no longer needed or at the end of the pre-funding period when the capitalized interest account is no longer necessary.

The Characteristics of the Receivables Transferred During the Pre-Funding Period

10. In order to ensure that there is sufficient specificity as to the representations and warranties of the sponsor regarding the characteristics of the receivables to be transferred after the closing date:

(i) All such receivables will meet the same terms and conditions for eligibility as those of the original receivables used to create the trust corpus (as described in the prospectus or private placement memorandum and/or pooling and servicing agreement for such certificates), which terms and conditions have been approved by a rating agency. However, the terms and conditions for determining the eligibility of a receivable may be changed if such changes receive prior approval either by a majority vote of the outstanding certificateholders or by a rating agency;

(ii) The transfer to the trust of the receivables acquired during the pre-funding period will not result in the certificates receiving a lower credit rating from the rating agency upon termination of the pre-funding period than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

(iii) The weighted average annual percentage interest rate (the average interest rate) for all of the obligations in the trust at the end of the pre-funding period will not be more than 100 basis points lower than the average interest

rate for the obligations which were transferred to the trust on the closing date;

(iv) The trustee of the trust (or any agency with which the trustee contracts to provide trust services) will be a substantial financial institution or trust company experienced in trust activities and familiar with its duties, responsibilities, and liabilities as a fiduciary under the Act. The trustee, as the legal owner of the obligations in the trust, will enforce all the rights created in favor of certificateholders of such trust, including employee benefit plans subject to the Act.

In order to ensure that the characteristics of the receivables actually acquired during the pre-funding period are substantially similar to receivables that were acquired as of the closing date, the characteristics of the additional obligations subsequently acquired will be either: (i) Monitored by a credit support provider or other insurance provider which is independent of the sponsor; or (ii) an independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the rating agency, BOSC and the trustee) stating whether or not the characteristics of the additional obligations acquired after the closing date conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the closing date.

Each prospectus, private placement memorandum and/or pooling and servicing agreement will set forth the terms and conditions for eligibility of the receivables to be included in the trust as of the related closing date, as well as those to be acquired during the pre-funding period, which terms and conditions will have been agreed to by the rating agencies which are rating the applicable certificates as of the closing date. Also included among these conditions is the requirement that the trustee be given prior notice of the receivables to be transferred, along with such information concerning those receivables as may be requested. Each prospectus or private placement memorandum will describe the amount to be deposited in, and the mechanics of, the pre-funding account and will describe the pre-funding period for the trust.

Parties to Transactions

11. The *originator* of a receivable is the entity that initially lends money to

a borrower (obligor), such as a home owner or automobile purchaser, or leases property to a lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their businesses, including finance companies for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidental part of its operations. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer. The originator may be an affiliate of BOSC.

12. The *sponsor* will be one of three entities: (i) A special-purpose or other corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

13. The *trustee* of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to BOSC, the trust sponsor, the servicer or any other member of the Restricted Group (as defined in section III.L.). BOSC represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which will be paid by the servicer or sponsor or out of the trust assets. The method of compensating the trustee which is specified in the pooling and servicing agreement will be disclosed in the prospectus or private placement memorandum relating to the offering of the certificates.

14. The *servicer* of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In

cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, the receivables may be "subserviced" by their respective originators and a single entity may "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

Receivables of the type suitable for inclusion in a trust invariably are serviced with the assistance of a computer. After the sale, the servicer keeps the sold receivables on the computer system in order to continue monitoring the accounts. Although the records relating to sold receivables are kept in the same master file as receivables retained by the originator, the sold receivables are flagged as having been sold. To protect the investor's interest, the servicer ordinarily covenants that this "sold flag" will be included in all records relating to the sold receivables, including the master file, archives, tape extracts and printouts.

The sold flags are invisible to the obligor and do not affect the manner in which the servicer performs the billing, posting and collection procedures related to the sold receivables. However, the servicer uses the sold flag to identify the receivables for the purpose of reporting all activity on those receivables after their sale to investors.

Depending on the type of receivable and the details of the servicer's computer system, in some cases the servicer's internal reports can be adapted for investor reporting with little or no modification. In other cases, the servicer may have to perform special calculations to fulfill the investor reporting responsibilities. These calculations can be performed on the servicer's main computer, or on a small computer with data supplied by the main system. In all cases, the numbers produced for the investors are reconciled to the servicer's books and reviewed by public accountants.

The *underwriter* (i.e., BOSC, its affiliate, or a member of an underwriting syndicate or selling group of which BOSC or its affiliate is a manager or co-manager) will be a registered broker-dealer that acts as underwriter or placement agent with respect to the sale

of the certificates. Public offerings of certificates are generally made on a firm commitment basis. Private placement of certificates may be made on a firm commitment or agency basis. It is anticipated that the lead and co-managing underwriters will make a market in certificates offered to the public.

In some cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (although they may themselves be related) will be unrelated to BOSC. In other cases, however, affiliates of BOSC may originate or service receivables included in a trust or may sponsor a trust.

Certificate Price, Pass-Through Rate and Fees

15. In some cases, the sponsor will obtain the receivables from various originators pursuant to existing contracts with such originators under which the sponsor continually buys receivables. In other cases, the sponsor will purchase the receivables at fair market value from the originator or a third party pursuant to a purchase and sale agreement related to the specific offering of certificates. In other cases, the sponsor will originate the receivables itself.

As compensation for the receivables transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust, or the cash proceeds of the sale of such certificates. If the sponsor receives certificates from the trust, the sponsor sells all or a portion of these certificates for cash to investors or securities underwriters.

16. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces, including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is equal to the interest rate on receivables included in the trust minus a specified servicing fee.²² This rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate

²² The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

17. As compensation for performing its servicing duties, the servicer (who may also be the sponsor or an affiliate thereof, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables in the trust and payments payable (at the pass-through rate) to certificateholders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer typically will be required to pay the administrative expenses of servicing the trust, including in some cases the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is either paid out of the interest income received on the receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

18. The servicer may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (a) prepayment fees; (b) late payment and payment extension fees; and (c) expenses, fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

19. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts maintained with itself or to commingle such payments with its

own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the servicer's own funds, the servicer is required to deposit these payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

20. The underwriter will receive a fee in connection with the securities underwriting or private placement of certificates. In a firm commitment underwriting, this fee would consist of the difference between what the underwriter receives for the certificates that it distributes and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor. In a best efforts underwriting in which the underwriter would sell certificates in a public offering on an agency basis, the underwriter would receive an agency commission rather than a fee based on the difference between the price at which the certificates are sold to the public and what it pays the sponsor. In some private placements, the underwriter may buy certificates as principal, in which case its compensation would be the difference between what it receives for the certificates that it sells and what it pays the sponsor for these certificates.

Purchase of Receivables by the Servicer

21. The applicant represents that as the principal amount of the receivables in a trust is reduced by payments, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase the receivables remaining in the trust when the aggregate unpaid balance payable on the receivables is reduced to a specified percentage (usually 5 to 10 percent) of the initial aggregate unpaid balance.

The purchase price of a receivable is specified in the pooling and servicing agreement and will be at least equal to: (1) The unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer; or (2) the greater of (a) the amount in (1) or (b) the fair

market value of such obligations in the case of a REMIC, or the fair market value of the receivables in the case of a trust that is not a REMIC.

Certificate Ratings

22. The certificates will have received one of the three highest ratings available from a rating agency. Insurance or other credit support (such as surety bonds, letters of credit, guarantees, or overcollateralization) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

Provision of Credit Support

23. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (*i.e.*, act as an insurer). In these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (a) out of late payments by the obligors, (b) from the credit support provider (which may be the master servicer or an affiliate thereof) or, (c) in the case of a trust that issues subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. When the servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism. In some cases, however, the master servicer may not be obligated to advance funds but instead would be called upon to provide funds to cover defaulted payments to the full extent of its obligations as insurer. Moreover, a master servicer typically can recover advances either from the provider of credit support or from future payments on the affected assets.

If the master servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover delinquent payments, or otherwise fails in its duties, the trustee would be required and would be able to enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the trust estate, including rights under the credit support mechanism. Therefore, the

trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

When a master servicer advances funds, the amount so advanced is recoverable by the master servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations in the trust as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly, quarterly or semi-annually, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee annually a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent

accountants' review are delivered to the trustee; and

(d) The credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur towards the end of the life of the trust, whether due to servicer advances or any other cause. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount thereafter is subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, since the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

Disclosure

24. In connection with the original issuance of certificates, the prospectus or private placement memorandum will be furnished to investing plans. The prospectus or private placement memorandum will contain information material to a fiduciary's decision to invest in the certificates, including:

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates;

(b) A description of the trust as a legal entity and a description of how the trust was formed by the seller/servicer or other sponsor of the transaction;

(c) Identification of the independent trustee for the trust;

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets, including the terms and conditions for eligibility of any receivables transferred during the pre-funding period and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; a description of permitted investments for

any pre-funding account or capitalized interest account; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the pass-through securities by a typical investor;

(i) A description of the underwriters' plan for distributing the pass-through securities to investors;

(j) Information about the scope and nature of the secondary market, if any, for the certificates; and

(k) A statement as to the duration of any pre-funding period and the pre-funding limit for the trust.

25. Reports indicating the amount of payments of principal and interest are provided to certificateholders at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

26. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many trusts obtain, by application to the SEC, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on Form 8-K to report material developments concerning the trust and the certificates and copies of the statements sent to certificateholders. While the SEC's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the

extent required under the Securities Exchange Act of 1934.

27. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets (including those purchased by the trust from any pre-funding account), payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer. Such report also will be delivered to or made available to the rating agency or agencies that have rated the trust's certificates.

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the servicer or trustee summarizing information regarding the trust and its assets. Such statement will include information regarding the trust and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

Forward Delivery Commitments

28. BOSC may contemplate entering into forward delivery commitments in connection with the offering of pass-through certificates. The utility of forward delivery commitments has been recognized with respect to offering similar certificates backed by pools of residential mortgages, and BOSC may find it desirable in the future to enter into such commitments for the purchase of certificates.

Secondary Market Transactions

29. BOSC may attempt to make a market for securities for which it is lead or co-managing underwriter, although it is under no obligation to do so. At times, BOSC will facilitate sales by investors who purchase certificates if BOSC has acted as agent or principal in the original private placement of the certificates and if such investors request BOSC's assistance.

Summary

30. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) In the case where a pre-funding account is used, the characteristics of the receivables to be transferred to the trust during the pre-funding period will be substantially similar to the characteristics of those transferred to the trust on the closing date, thereby giving the sponsor and/or originator little discretion over the selection process, and compliance with this requirement will be assured by the specificity of the characteristics and the monitoring mechanisms contemplated under the proposed exemption. In addition, certain cash accounts will be established to support the certificate pass-through rate and such cash accounts will be invested in short-term, conservative investments; the pre-funding period will be of a reasonably short duration; a pre-funding limit will be imposed; and any Internal Revenue Service requirements with respect to pre-funding intended to preserve the passive income character of the trust will be met. The fiduciary of the plans making the decision to invest in certificates is thus fully apprised of the nature of the receivables which will be held in the trust and has sufficient information to make a prudent investment decision.

(c) Certificates in which plans invest will have been rated in one of the three highest rating categories by a rating agency. Credit support will be obtained to the extent necessary to attain the desired rating;

(d) All transactions for which BOSC seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(e) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(f) BOSC anticipates that it will make a secondary market in certificates (although it is under no obligation to do so).

NOTICE TO INTERESTED PERSONS: The applicant represents that because those potentially interested participants and beneficiaries cannot all be identified, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of

proposed exemption in the **Federal Register**.

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

Bankers Trust Company (BTC)

Located in New York, New York
[Application Nos. D-10838]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to: (1) The proposed granting to BTC (a) by the Cheslock-Bakker Opportunity Fund, L.P. (the LP) of security interests in (i) the capital commitments (the Capital Commitments) and capital contributions (Capital Contributions) of certain employee benefit plans (the Plans) investing in the LP and (ii) a borrower collateral account to which all Capital Contributions will be deposited when paid (Borrower Collateral Account) and (b) by the LP and by CBA Real Estate Partners, LLC, a Delaware limited liability company (the General Partner) of the right to make calls for cash contributions (Contribution Calls) under the Cheslock-Bakker Opportunity Fund, L.P. Limited Partnership Agreement (the Agreement), where BTC is the representative of certain lenders (the Lenders) that will fund a so-called "credit facility" (the Credit Facility) providing credit to the LP, and where the Lenders are parties in interest with respect to the Plans; and (2) the execution of a partner agreement and estoppel (the Estoppel) under which the Plans agree to honor the Contribution Calls; provided that (a) the proposed grants and Estoppels are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (b) the decisions on behalf of each Plan to invest in the LP and to execute such Estoppels in favor of BTC are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BTC; (c) with respect to Plans that have invested or may invest in the LP in the future, such Plans have or will have assets of not less than \$100 million and

not more than 5% of the assets of any such Plan are or will be invested in the LP. For purposes of this condition (c), in the case of multiple plans maintained by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis, (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans; and (d) the general partner of the LP must be independent of BTC, the Lenders and the Plans.

Summary of Facts and Representations

1. The LP was formed by the General Partner (as sole general partner and sponsor) with the intent of seeking Capital Commitments from a limited number of prospective investors who would become limited partners (the Partners) of the LP. The General Partner (i.e., CBA Real Estate Partners, LLC) is an entity unrelated to BTC, the Lenders and the Plans. Under the terms of the

Agreement, the LP is expected to dissolve in the year 2008. There are three current and prospective Partners having, in the aggregate, irrevocable, unconditional capital commitments of approximately \$140 million.

2. The LP is designed to invest in real estate-related assets including portfolios, individual assets, privately-held operating companies, commercial mortgage-backed securities, mezzanine financing and other forms of real estate related debt, limited partnerships, and other joint ventures. As described in the Private Placement Memorandum, the LP believes that significant opportunities exist to achieve superior risk-adjusted returns on its investments in excess of 20% per annum.

3. Proceeds from investments may be reinvested to the extent they represent a return of capital invested by the LP. To the extent they are not reinvested, net proceeds will be distributed to the Partners on a quarterly basis or more

frequently at the General Partner's discretion.

4. The Agreement requires each Partner to execute a subscription agreement that obligates the Partner to make contributions of capital up to a specified maximum. The Agreement requires Partners to make Capital Contributions to fulfill this obligation upon receipt of notice from the General Partner. Under the Agreement, the General Partner may make Contribution Calls up to the total amount of a Partner's Capital Commitment upon 10 business days' notice, subject to certain limitations. The Partners' Capital Commitments are structured as unconditional, binding commitments to contribute capital when Contribution Calls are made by the General Partner. In the event of a default by a Partner, the LP may exercise any of a number of specific remedies.

The Partners constituting over 90% of the equity interests and their investments in the LP are:

Name of partner	Capital commitment
General Motors Hourly Rate Employees Pension Trust, by Chase Manhattan Bank, as Trustee	\$65,000,000.01
General Motors Salaried Employees Pension Trust, by Chase Manhattan Bank, as Trustee	\$34,999,999.99
Kodak Income Retirement Plan, by Boston Safe Trust and Deposit Company, as Trustee	\$30,000,000

5. The applicant states that the LP will incur indebtedness in connection with many of its investments. In addition to mortgage indebtedness, the LP will incur short-term indebtedness for the acquisition of particular investments. This indebtedness will take the form of the Credit Facility, described in representation 6 below, secured by, among other things, a pledge and assignment of each Partner's Capital Commitment. This type of facility will allow the LP to consummate investments quickly without having to finalize the debt/equity structure for an investment or having to arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Partners and the LP. Under the Agreement, the General Partner may encumber Partners' Capital Commitments and Capital Contributions, including the right to make Contribution Calls, to one or more financial institutions as security for the Credit Facility. Each of the Partners has appointed the General Partner as its attorney-in-fact to execute all documents and instruments of transfer necessary to implement the provisions of the Agreement. In connection with this Credit Facility, each of the Partners is required to execute documents customarily required in secured

financings, including an agreement to honor Contribution Calls unconditionally.

6. BTC will become agent for a group of Lenders providing a \$25 million revolving Credit Facility to the LP. BTC will also be a participating Lender. Some of the Lenders may be parties in interest with respect to some of the Plans that invest in the LP by virtue of such Lenders' (or their affiliates') provisions of fiduciary or other services to such Plans with respect to assets other than the Plans' interests in the LP. BTC is requesting an exemption to permit the Plans to enter into security agreements with BTC, as the representative of the Lenders, whereby such Plans' Capital Commitments and Capital Contributions to the LP will be used as collateral for loans made under the Credit Facility to the LP, when such loans are funded by Lenders who are parties in interest to one or more of the Plans. However, BTC represents that neither it nor any Lender will act in any fiduciary capacity for the decision made by any of the Plans to invest in the LP (as discussed in Paragraph 13, below).

The Credit Facility will be used to provide immediate funds for real estate acquisitions made by the LP, as well as for the payment of LP expenses. Repayments will be secured generally

by the LP from the Partners' Capital Contributions and Contribution Calls on the Partners' Capital Commitments. The Credit Facility is intended to be available until May 31, 2002. The LP can use its credit under the Credit Facility either by direct or indirect borrowings, by requesting guaranties, or by requesting that letters of credit be issued. All Lenders will participate on a pro rata basis with respect to all cash loans, guaranties or letters of credit up to the maximum of the Lenders' respective commitments. All such loans, guaranties and letters of credit will be issued to the LP, or an entity in which the LP owns a direct or indirect interest (a Qualified Borrower), and not to any individual Partner. All payments of principal and interest made by the LP or a Qualified Borrower will be allocated pro rata among all Lenders.

7. The Credit Facility will be a recourse obligation of the LP, the repayment of which is secured primarily by the grant of a security interest to BTC, as agent under the Credit Facility for the benefit of the Lenders, from the LP, in (a) the Partners' Capital Commitments and Capital Contributions; and (b) the Borrower Collateral Account. In addition, the LP and the General Partner will grant BTC, as agent under the Credit Facility for the

benefit of the Lenders, a security interest in the right to Contribution Calls under the Agreement. The Borrower Collateral Account will be assigned to BTC to secure repayment of the indebtedness incurred under the Credit Facility. BTC has the right to apply any or all funds in the Borrower Collateral Account toward payment of the indebtedness in any manner it may elect. The Capital Commitments are fully recourse to all the Partners and to the General Partner. In the event of default under the Credit Facility, the agent (*i.e.*, BTC) has the right to make Contribution Calls unilaterally on the Partners to pay their unfunded Capital Commitments, and will apply cash received from such Contribution Calls to any outstanding debt.

8. Under the Credit Facility, each Partner that is a Plan will execute an acknowledgment (the Estoppel) pursuant to which it acknowledges that the LP and the General Partner have pledged and assigned to BTC, for the benefit of each Lender which may be a party in interest (as defined in Act section 3(14)) of such Partner, all of their rights under the Agreement relating to Capital Commitments and Contribution Calls. The Estoppel will include an acknowledgment and covenant by the Plan that, if an event of default exists, such Plan will unconditionally honor any Contribution Call made by BTC in accordance with the Agreement up to the unfunded Capital Commitment of such Plan to the LP.

9. The applicant represents that at the present time the Kodak Retirement Income Trust (the Kodak Trust) holds the assets of one defined benefit plan, the Kodak Retirement Income Plan (the Kodak Plan), which owns an interest in the LP. The Kodak Trust has made a capital commitment of \$30 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to the Kodak Plan by virtue of such Lenders' (or their affiliates') provision of fiduciary services to the Kodak Plan with respect to Kodak Trust assets other than its limited partnership interests in the LP. The total number of participants in the Kodak Plan is approximately 99,000, and the approximate fair market value of the total assets of the Kodak Plan held in the Kodak Trust as of December 31, 1997 is \$7 billion.

The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of the Kodak Plan is the Kodak Retirement Income Plan Committee (the Kodak Plan Committee), which was responsible for reviewing

and authorizing the investment in the LP. The Kodak Plan Committee is composed of individuals who are officers of Eastman Kodak Company, and such individuals are independent of BTC and the other Lenders (as discussed in Paragraph 13, below).

10. The applicant represents that the Kodak Plan is currently the only employee benefit plan subject to the Act that is a Partner of the LP which requires the relief to be provided by the exemption proposed herein. Two other Partners, the General Motors Hourly Rate Employees Pension Trust and the General Motors Salaried Employees Pension Trust (the GM Trusts), are master trusts for certain qualified plans sponsored by the General Motors Corporation and its affiliates, which are covered by the Act. However, the applicant has received a representation from the relevant independent fiduciary for the GM Trusts that the investment in the LP by the GM Trusts qualifies for the protections set forth in Prohibited Transaction Exemption 96-23 (PTE 96-23, 61 FR 15975, April 10, 1996), the class exemption for transactions by a plan with certain parties in interest where such plan's assets are managed by an in-house asset manager.²³ The applicant states that it is possible that one or more other Plans will become Partners of the LP in the future. Thus, the applicant requests relief for any such Plan under this proposed exemption, provided the Plan meets the standards and conditions set forth herein. In this regard, such Plan must be represented by a fiduciary independent of the General Partner, the Lenders and BTC. Furthermore, the General Partner, who also must be independent of the Lenders and BTC, must receive from the Plan one of the following:

(1) a representation letter from the applicable fiduciary with respect to such Plan substantially identical to the representation letter submitted by the fiduciary of the Kodak Plan, in which case this proposed exemption, if granted, will apply to the investments made by such Plan if the conditions required herein are met; or

(2) evidence that such Plan is eligible for a class exemption²⁴ or has obtained

²³ In this regard, the Department is providing no opinion in this proposed exemption as to whether the investment in the LP by the GM Trusts meets all of the conditions required for relief under PTE 96-23.

²⁴ For example, in addition to the relief provided by PTE 96-23 noted above, PTE 84-14 (49 FR 9497, March 13, 1984) permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are managed by a "qualified professional asset manager" (QPAM) who is independent of the parties in interest (with

an individual exemption from the Department covering the potential prohibited transactions which are the subject of this proposed exemption.

11. BTC represents that the LP has obtained an opinion of counsel as of June 8, 1999 that the LP constitutes an "operating company" under the Department's plan asset regulations [see 29 CFR 2510.3-101(c)] and further states that the General Partner is required under the Agreement to use its best efforts to cause the LP to conduct its affairs so as to constitute an "operating company."²⁵

12. BTC represents that the Estoppel constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships or limited liability companies, wherein the financing institutions do not obtain security interests in the real property assets of the partnership or limited liability companies. BTC also represents that the obligatory execution of the Estoppel by the Partners for the benefit of the Lenders was fully disclosed in the Private Placement Memorandum as a requisite condition of investment in the LP during the private placement of the partnership interests. BTC represents that the only direct relationship with respect to the LP between any of the Partners and any of the Lenders is the execution of the Estoppel. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, are exclusively between the Lenders and the LP. BTC represents that the proposed execution of the Estoppel will not affect the ability of the Kodak Trust to withdraw from investment and participation in the LP.²⁶ The only Plan

certain limited exceptions) and meets specified financial standards.

²⁵ The Department notes that the term "operating company" as used in the Department's plan asset regulation cited above includes an entity that is considered a "real estate operating company" as described therein (see 29 CFR 2510.3-101(e)). However, the Department expresses no opinion in this proposed exemption regarding whether the LP would be considered either an operating company or a real estate operating company under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the LP or for transactions involving third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to carefully examine all aspects of the LP's proposed real estate investment program in order to determine whether the requirements of the Department's regulations will be met.

²⁶ In this regard, the Department cautions Plan fiduciaries to fully understand all aspects of the Agreement, including the terms of the Estoppel, prior to making any capital commitments to the LP. The Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a

Continued

assets to be affected by the proposed transactions are any funds which must be contributed to the LP in accordance with requirements under the Agreement to make Contribution Calls to honor a Partner's Capital Commitments.

13. BTC represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to the Kodak Trust's investment in the LP and that BTC is independent of and unrelated to the fiduciary responsible for authorizing and overseeing the Kodak Trust's investment in the LP (the Kodak Trust Fiduciary). The Kodak Trust Fiduciary is the Kodak Plan Committee. The Kodak Trust Fiduciary represents that its authorization of Kodak Trust investments in the LP was free of any influence, authority or control by the Lenders, including BTC. The Kodak Trust Fiduciary states that the Kodak Trust's investments in, and Capital Commitments to, the LP were made with the knowledge that each Partner would be required subsequently to grant a security interest in Contribution Calls and Capital Commitments to the Lenders and to honor unconditionally Contribution Calls made on behalf of the Lenders without recourse to any defenses against the General Partner. The Kodak Trust Fiduciary represents that it is independent of and unrelated to BTC and the Lenders and that the investment by the Kodak Trust for which the Kodak Trust Fiduciary is responsible continues to constitute a favorable investment for the Kodak Plan participating in the Kodak Trust. The Kodak Trust Fiduciary represents further that the execution of the Estoppel is in the best interests and protective of the participants and beneficiaries of the Kodak Plan.

In the event another Plan proposes to become a Partner, the applicant represents that it will require representations to be made by such Plan's independent fiduciary that are similar to those that have been made by the Kodak Trust Fiduciary on behalf of the Kodak Plan. In addition, any Plan proposing to become a Partner in the future and needing to avail itself of the exemption proposed herein will have assets of not less than \$100 million,²⁷ and not more than 5% of the assets of such Plan will be invested in the LP. As noted in paragraph 9 above, the Kodak Plan has total assets which exceed \$100

million and has committed amounts to the LP which are less than 5% of its total assets.

14. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The Kodak Plan's investment in the LP was authorized and is overseen by the Kodak Trust Fiduciary, which is independent of the Lenders and BTC, and other Plan investments in the LP from other employee benefit plans subject to the Act will be authorized and monitored by independent Plan fiduciaries; (2) none of the Lenders (including BTC) had any influence, authority or control with respect to the Kodak Trust's investment in the LP or the Kodak Trust's execution of the Estoppel; (3) the Kodak Trust Fiduciary invested in the LP on behalf of the Kodak Plan with the knowledge that the Estoppel is required of all Partners investing in the LP, and all other Plan fiduciaries that invest their Plan's assets in the LP will be treated the same as other Partners are currently treated with regard to the Estoppel; (4) any Plan which has invested or may invest in the LP in the future, which needs to avail itself of the exemption proposed herein, has or will have assets of not less than \$100 million,²⁸ and not more than 5% of the assets of any such Plan are or will be invested in the LP; and (5) the General Partner of the LP is independent of BTC, the Lenders and the Plans.

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

Bay Internists, Inc. Profit Sharing Plan (the Plan)

Located in Kilmarnock, Virginia
[Application No. D-10847]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the Plan of certain unimproved real property (the Property) located in Kilmarnock, Virginia, to Bay-Med, a

general partnership which is a party 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 Property, as established at the time of the sale by an independent, qualified appraiser; 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 April 30, 1980, and was amended and restated effective July 1, 1989. The Plan is a defined contribution plan. As of June 30, 1998, the Plan had 19 participants. As of June 30, 1999, the Plan had \$822,451 in total assets. Bay Internists Inc. (Bay) is the sponsor of the Plan. The Plan's trustees are Dr. Charles D. Price (Dr. Price) and Steven F. Glessner. Bay was established on July 10, 1978, and is a professional subchapter "C" State of Virginia medical corporation specializing in internal medicine.

Bay-Med was established on May 23, 1985, for the purpose of building and maintaining the building in which Bay now conducts its medical practice (the Bay Office). Bay-Med is a State of Virginia general partnership comprised of the physician-stockholders in Bay, the Plan sponsor. Four physician partners in Bay-Med have a 16.67% partnership share, and Dr. Price has a 33.32% partnership share in Bay-Med.

2. On May 2, 1986, the Plan purchased the Property from the Town of Kilmarnock, Virginia, an unrelated third party, for \$15,000 in cash. The Property is an approximately 1.5 acre parcel of unimproved real property located on DMV Drive in Kilmarnock, Virginia. The Property is adjacent to the Bay's corporate offices (*i.e.*, the Bay Office).²⁹ It is represented that the Plan trustees made the decision to purchase the Property as a investment for the Plan. The Plan trustees thought that the Property would be a good investment for the Plan because it could be developed in the future and would be marketable to third parties. At the time of purchase, the Property represented approximately 25% of the Plan's total assets. The applicant represents that as of June 30, 1998, the Property represented less than 6% of the total value of the Plan's assets.

3. The applicant represents that since it was originally acquired by the Plan,

plan act prudently when making investment decisions for the plan.

²⁷ In the case of multiple plans maintained by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis, (*e.g.*, through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans.

²⁸ See footnote 4, *ibid.*

²⁹ 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.

the Property has not been used or leased by anyone, including any parties in interest described herein. Since it was originally acquired by the Plan in 1986, the Property has not been an income-producing asset.

4. The Property was appraised on November 1, 1999 (the Appraisal). The Appraisal was prepared by Sandra Hargett (Ms. Hargett), who is an independent Virginia state certified appraiser. Ms. Hargett was assisted by George W. Yeatman (Mr. Yeatman, collectively; the Appraisers). Ms. Hargett and Mr. Yeatman are with Bay Appraisal Co., located at 111 N. Main Street in Kilmarnock, Virginia.

The Appraisers relied primarily on the market approach, with an analysis of recent sales of similar properties in the local geographic area, to value the Property. The Appraisers determined that the fair market value of the Property was \$48,000, as of November 1, 1999.³⁰ Because the Property is adjacent to the Bay Office, the Appraisers considered whether this adjacency factor merits a premium above the Property's fair market value for a sale of the Property to Bay-Med. In this regard, the Appraisers state that the Bay Office has vacant sites on each side. Further, due to the large amount of land available in the vicinity and because the Bay Office currently is very large, the Appraisers represent that there is no data which supports adding a premium to the fair market value of the Property because of the adjacency to the Bay Office.

5. The applicant proposes that Bay-Med 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 the

Plan will pay no expenses or commissions associated with the sale.

Bay-Med will pay the Plan the current fair market value for the Property, as established by an independent qualified appraiser at the time of the transaction. The proposed sale of the Property to Bay-Med will increase the liquidity of the Plan's portfolio, will enable the trustees to diversify the assets of the Plan, and will enable the Plan to sell an illiquid, non-income producing asset. The applicant maintains that Bay-Med does not have any specific plans for the development or future sale of the Property at this time.

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 established at the time of the sale by an independent, qualified appraiser;

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

(d) the sale will provide the Plan with liquidity and enable the Plan to reinvest the proceeds of the sale in financial instruments that will provide 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 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 8th day of March, 2000.

Ivan Strasfeld,

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

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BILLING CODE 4510-29-P

³⁰ The Appraisers state that the Property is currently zoned for commercial use and the Appraisal is contingent on the Property meeting all relevant local, state and federal regulations for a suitable business site. The Appraisers also state that the valuation conclusions of the Appraisal are based on the highest and best use of the land.