

proposed alternative method will provide at least the same measure of protection as the mandatory standard.

## 2. McElroy Coal Company

[Docket No. M-1999-122-C]

McElroy Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, Pennsylvania 15241-1421 has filed a petition to modify the application of 30 CFR 75.364(b)(1) and (2) (weekly examination) to its McElroy Mine (I.D. No. 46-01437) located in Marshall County, West Virginia. The petitioner requests a modification of the standard to permit weekly examinations of designated monitoring stations instead of traveling and conducting weekly examinations in certain intake and return entries of the mine. The petitioner states that the area of the mine affected by this petition is subject to previously granted petitions, docket numbers M-91-78-C, M-92-142-C, and M-93-007-C, which established the monitoring stations ("PCS") to be used instead of traveling the affected return air courses and granted the district manager discretion to relocate the PCS. The petitioner requests that the three existing petitions be withdrawn and consolidated into one petition. The petitioner proposes to: (i) conduct a weekly examination at each monitoring station for methane and to verify direction of air flow; (ii) instruct the person making the examinations and tests to place his/her initials, the date, and time the monitoring station and record the results in a book on the surface and made available for inspection by interested parties; (iii) maintain each monitoring station in a safe condition at all times; and (iv) have the monitoring stations shown on the ventilation and part of the approved ventilation plan. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

## 3. Blue Mountain Energy, Inc.

[Docket No. M-1999-123-C]

Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648 has filed a petition to modify the application of 30 CFR 75.500(d) (permissible electric equipment) to its Deserado Mine (I.D. No. 05-03505) located in Rio Blanco County, Colorado. The petitioner requests a modification of the standard to permit the use of low-voltage and nonpermissible diagnostic equipment within 150 feet of pillar workings in its continuous miners development sections. The petitioner proposes to use the nonpermissible electronic testing or diagnostic

equipment in or by the last open crosscut. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

## 4. Independence Coal Company, Inc.

[Docket No. M-1999-124-C]

Independence Coal Company, Inc., HC 78 Box 1800, Madison, West Virginia 25130 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Justice No. 1 Mine (I.D. No. 46-07273) located in Boone County, West Virginia. The petitioner proposes to use belt air to ventilate active working places. The petitioner proposes to install a low-level carbon monoxide detection system as an early warning fire detection system in all belt entries used as intake air courses. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

## 5. Genwal Resources, Inc.

[Docket No. M-1999-125-C]

Genwal Resources, Inc., P.O. Box 1420, 195 North 100 West, Huntington, Utah 84528 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Crandall Canyon Mine (I.D. No. 42-01715) located in Emery County, Utah. The petitioner requests that some of the language in the Decision and Order (D&O) for its previously granted petition, docket number M-96-71-C, be amended because the petitioner states that certain product availability for the exhaust systems have become limited and require an extensive lead time and to replace these products at frequent intervals would be substantially costly since durability is limited in the mining atmosphere. The petitioner proposes that diesel equipment include a means to prevent spray from ruptured fuel and oil lines from being ignited by contact with engine exhaust systems. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the granted D&O and will not result in a diminution of safety provided by the existing standard.

## 6. Mingo Logan Coal Company

[Docket No. M-1999-126-C]

Mingo Logan Coal Company, 1000 Mingo Logan Avenue, Wharnccliffe, West Virginia 25651 has filed a petition to modify the application of 30 CFR 75.1002 (location of feeder wires, trolley feeder wires, high-voltage cables and transformers) to its Mountaineer Alma-

A Mine (I.D. No. 46-08730) located in Mingo County, West Virginia. The petitioner proposes to use a high-voltage cable within 150 feet of pillar workings to power a 2400 VAC longwall mining machine. The petitioner asserts that the proposed alternative method will provide at least the same measure of protection as the mandatory standard.

### *Request for Comments*

Persons interested in these petitions are encouraged to submit comments via e-mail to "comments@msha.gov," or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 18, 2000. Copies of these petitions are available for inspection at that address.

Dated: December 9, 1999

**Carol J. Jones**

*Acting Director, Office of Standards, Regulations, and Variances.*

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## DEPARTMENT OF LABOR

### **Pension and Welfare Benefits Administration**

[Application No. D-10542, et al.]

### **Proposed Exemptions; Business Men's Assurance Company of America (BMA)**

**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**

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this **Federal Register** Notice. Comments and 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 Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 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 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

#### **Business Men's Assurance Company of America (BMA) Located in Kansas City, MO**

[Application No. D-10542]

##### *Proposed Exemption*

Based on the facts and representations set forth in the application, 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, August 10, 1990).<sup>1</sup>

##### Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The sales and transfers of assets of an employee benefit plan (the Plan) to BMA pursuant to the terms of a benefit-responsive or a non-benefit responsive synthetic guaranteed investment contract (the Benefit-Responsive BMA Synthetic GIC or the Non-Benefit Responsive BMA Synthetic GIC) entered into by the Plan sponsor with BMA; <sup>2</sup> (2) advances (the Advances) made by BMA to a Plan in order to make unanticipated benefit payments, if applicable, under a Benefit-Responsive BMA Synthetic GIC; and (3) the sweeping of interest and other proceeds (the Plan Interest Proceeds) to BMA from a Plan's Contractholder Custodial Account established under either a Benefit-Responsive BMA Synthetic GIC or a Non-Benefit Responsive BMA Synthetic GIC.

This proposed exemption is subject to the general conditions set forth below in Section II.

##### Section II. General Conditions

(a) The decision to enter into a BMA Synthetic GIC is made on behalf of a participating Plan in writing by a fiduciary of such Plan which is independent of BMA.

(b) Only Plans with total assets having an aggregate market value of at least \$50 million are permitted to purchase BMA Synthetic GICs; provided however that—

(1) In the case of two or more Plans which are maintained by the same

<sup>1</sup> For purposes of this proposed exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

<sup>2</sup> Unless specifically noted, references to the BMA Synthetic GIC refer to both types of Synthetic GIC products that are offered to Plan investors by BMA.

employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity has purchased a BMA Synthetic GIC, the foregoing \$50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million, or

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

(i) Has full investment responsibility with respect to Plan assets invested therein, and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of \$100 million;

(c) Prior to the execution of a BMA Synthetic GIC, the Plan fiduciary receives a full and detailed written disclosure of all material features concerning the BMA Synthetic GIC, including—

(1) A copy of the underlying agreement for the BMA Synthetic GIC (the BMA Synthetic GIC Contract or Contract) and accompanying

application, which stipulate the relevant provisions of the Contract, the applicable fees, if any, and the rights and obligations of the parties;

(2) Investment Guidelines defining the manner in which BMA will manage the assets in the Contractholder Custodial Account;

(3) A copy of the Custodial Agreement between BMA, the Plan fiduciary and the custodian (the Custodian);

(4) If granted, copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein.

(d) Upon the selection by a Plan fiduciary of a BMA Synthetic GIC, BMA will supply the Plan fiduciary of a Plan (including a Plan that provides for participant investment selection (the Section 404(c) Plan)), a summary of the pertinent features of the documents listed above in paragraphs (c)(1) through (c)(3) of this Section II which the Plan fiduciary, in its discretion, deems appropriate for distribution to such participant, to the extent necessary to satisfy the requirements of section 404(c) of the Act.

(e) Subsequent to a Plan's investment in a BMA Synthetic GIC, the Plan fiduciary will receive the following ongoing disclosures regarding such investment:

(1) A periodic report consisting of a Contract Value Record Report, which specifies the affected Plan's BMA Synthetic GIC Contract Value Record balance for the prior period, contributions, withdrawals (*i.e.*, Scheduled Withdrawals (the Scheduled Withdrawals) and, if applicable, Unscheduled Withdrawals (the Unscheduled Withdrawals)), interest earned, and the current period's ending Contract Value Record balance. (The time periods covered by the Contract Value Record Report will be selected in advance by the independent Plan fiduciary and may be sent monthly, quarterly or annually.);

(2) A periodic Market Value Statement, which is supplied by the Custodian on a quarterly basis, that specifies the prior period's ending market value for the assets in the Contractholder Custodial Account, contributions made by the Plan sponsor to the BMA Synthetic GIC after the initial deposit, Scheduled Withdrawals and, if applicable, Unscheduled Withdrawals, any fees paid to BMA, investment income, realized capital gains and/or losses from sales, changes in unrealized appreciation of assets, the current period's ending market value and rate of return, and a summary of transactions; and

(3) Upon request from the Custodian (*i.e.*, not more often than quarterly), a portfolio listing.

(The reports referred to in paragraphs (e)(1)–(e)(3) of this Section II will be made available to the Plan fiduciary, which, in turn, will provide copies to participants in a Section 404(c) Plan upon request, to the extent the Plan fiduciary deems it necessary.)

(f) Each BMA Synthetic GIC specifically provides an objective method for determining the fair market value of the securities owned by the Plan pursuant to such GIC.

(g) Each BMA Synthetic GIC has a predefined, fixed maturity date selected by the Plan fiduciary and agreed to by BMA.

(h) In the event BMA sells assets from a Plan's Contractholder Custodial Account to BMA's general account or to an affiliate during the term of the BMA Synthetic GIC or at such GIC's maturity, the transaction is—

(1) Effected for cash;

(2) The sales price of the security is equal to the fair market value of such asset as of the close of business on the date of the sale, as determined by independent sources; and

(3) The Plan incurs no brokerage or transaction costs in connection with the transaction.

(i) BMA maintains books and records of each BMA Synthetic GIC transaction for a period of six years. Such books and records are subject to annual audit by independent, certified public accountants.

#### *Summary of Facts and Representations*

1. The parties involved in the proposed transactions are described as follows:

(a) BMA is a stock life insurance company organized under Missouri law. As of December 31, 1998, BMA had total admitted assets of \$2.689 billion and \$71.6 billion of in force insurance policies. BMA is currently rated as follows: A.M. Best—A; Standard & Poor's—AA; Duff & Phelps—AA; and Moody's—A1.

BMA is a wholly owned subsidiary of Generali-Midi Expansion B.V., which is a wholly owned subsidiary of Assicurazioni Generali S.p.A. In addition, BMA owns 100 percent of BMA Financial Services, Inc. and Jones & Babson, Inc. (J&B). Although a significant portion of BMA's business consists of writing insurance and annuity contracts and guaranteed investment contracts for numerous Title I pension plans, BMA intends to become an investment adviser registered under the Investment Advisers Act of 1940 (the 1940 Act).

(b) J&B is an investment management company registered as an investment adviser under the 1940 Act. As of April 30, 1999, J&B had total assets under management of \$4.2 billion. J&B proposes to manage the underlying assets of BMA Synthetic GICs to the extent any BMA Synthetic GICs are sold prior to the time BMA becomes a registered investment adviser.<sup>3</sup>

(c) *The Plans* that BMA expects will purchase the BMA Synthetic GIC will be plans (both defined contribution and defined benefit) that are qualified under section 401(a) of the Code and/or subject to applicable provisions of the Act. BMA states that it is possible that Plans which are subject to section 457 of the Code (*i.e.*, deferred compensation plans of state and local government and tax exempt organizations) and section 414(d) of the Code (*i.e.*, governmental plans) may also purchase the BMA Synthetic GIC as well as commingled investment entities holding plan assets. The Plans will not consist of any plans that are maintained or sponsored by BMA. As a precondition to investing, each Plan or commingled investment vehicle must have total assets of at least \$50 million.

(d) *The Custodian* of the underlying assets of a BMA Synthetic GIC will be a bank, trust company or "other duly licensed provider of custodial services"<sup>4</sup> approved by BMA and specified in the BMA Synthetic GIC application. The Custodian will be selected by the independent Plan fiduciary that decides to invest in a BMA Synthetic GIC and will be an entity that is unrelated to BMA.

2. Since 1992, BMA has been offering a standard guaranteed investment contract (the Standard GIC) for sale to section 401(k) plans. A Standard GIC is a type of contract under which an insurance company, in exchange for a sum of money, which is deposited in the insurance company's general account, guarantees that it will return that sum to the contractholder on a specified maturity date with interest at a specified rate. In anticipation of its obligation to the contractholder, the insurance company invests the funds received from the contractholder primarily in fixed-income investments in order to achieve an investment return

<sup>3</sup> All references to BMA throughout this proposed exemption are intended to include J&B where it acts as the investment manager of the assets held in any BMA Synthetic GIC product.

<sup>4</sup> BMA represents that entities that are licensed under state law to provide custodial services may vary from state to state. So as not to limit a Plan fiduciary's choice of prospective custodians to banks or trust companies, BMA has decided to permit appropriately licensed entities to serve in this capacity.

that will enable the insurance company to meet its guarantee at maturity, pay its expenses and realize a reasonable profit margin. In the Standard GIC, the fixed-income investments purchased with the contractholder's deposit are held in the insurance company's general account and are available to meet the claims of any of its policyholders. Because the underlying fixed-income investments are not plan assets, BMA states that the insurance company is not a fiduciary of the plan as a result of issuing the Standard GIC.

According to BMA, Standard GICs have proven to be well-suited to meet the investment and liquidity needs of a pension plan because a plan achieves a predictable yield and a fixed maturity on its deposits. The insurance company bears all of the investment and market fluctuation risk. Therefore, Standard GICs perform an important role in the investment portfolios of both defined benefit and defined contribution plans.

Since the early 1990's fiduciaries of plans have become concerned that Standard GICs might be subject to losses if the insurance company becomes insolvent. In response to these concerns, "synthetic" GICs were created.

Under a synthetic GIC, instead of paying a premium to the insurance company on the effective date of the contract, the plan places assets in a custodial bank account owned by the plan. The assets are held in that account by the bank custodian and are managed exclusively by the insurance company, an affiliate, or other money manager until the contract's maturity. The pension plan bears all of the credit and market value fluctuation risk of the securities in the account. The yield achieved is not fixed but varies depending on the skill of the asset manager and market conditions. Because the underlying assets of the synthetic GIC are not owned by the insurance company, the plan's investment is not affected by risks to which the insurer's own general account assets may be subject.

3. BMA requests an administrative exemption from the Department in order to offer a "buy & hold" synthetic GIC to Plan investors. The aspects of the BMA Synthetic GIC for which BMA believes prohibited transaction relief may be necessary are (a) BMA's implementation of its Guarantee on Scheduled Withdrawal dates and the maturity date (the Maturity Date) by (i) sales of assets in the Contractholder's Custodial Account to BMA and the subsequent transfer of such assets to BMA, and (ii) transfers of assets remaining in the Contractholder Custodial Account to BMA at the Maturity Date of the BMA

Synthetic GIC when BMA pays the Plan the value of the Contract Value Record; (b) BMA's Advances to a Plan in order to make unanticipated benefit payments; and (c) the sweeping of interest and other proceeds (*i.e.*, the Plan Interest Proceeds) from a Plan's Contractholder Custodial Account to BMA. BMA represents that it would be a service provider to a Plan and, therefore, a party in interest with respect to such plan within the meaning of section 3(14)(B) of the Act. On the assumption that the assets in each Plan's Contractholder Custodial Account are "plan assets" within the meaning of 29 CFR 2510.3-101, BMA states that transfers or sales of securities held in a Contractholder Custodial Account under the terms of the BMA Synthetic GIC on Scheduled Withdrawal Dates and the Maturity Date could be viewed as a sale of property between a plan and a party in interest in violation of section 406(a)(1)(A) of the Act or a transfer to a party in interest in violation of section 406(a)(1)(D) of the Act. Similarly, BMA represents that its guarantee as to principal and interest as well as its making of Advances to a Plan in the case of a benefit-responsive BMA Synthetic GIC, could be construed as the execution of loans between a Plan and a party in interest in violation of section 406(a)(1)(B) and possibly, section 406(b)(1) and (b)(2) of the Act. BMA further represents that the sweeping of Plan Interest Proceeds from a Plan's Contractholder Custodial Account to its general account during the term of a BMA Synthetic GIC could be viewed as a transfer of plan assets to a party in interest in violation of section 406(a)(1)(D) of the Act and possibly, section 406(b)(1) and (b)(2) of the Act.

BMA notes that as a fiduciary with respect to the assets in a Plan's Contractholder Custodial Account, it would have discretion as to which assets in such Account to transfer or sell to BMA. Under such circumstances, BMA represents that it could be viewed as acting in its own interest or for its own account in selecting assets to sell or transfer to BMA on Scheduled Withdrawal Dates or the Maturity Date in violation of section 406(b)(1) and (b)(2) of the Act.

4. The BMA Synthetic GIC will offer the Plan a guaranteed fixed rate of return, a final, fixed maturity date ranging between 3-7 years and a liquidity provision. The fixed interest rate, which will approximate what is available for traditional GICs being offered in the marketplace at the time the BMA Synthetic GIC is purchased by the Plan, will apply at all times until the final Maturity Date of such BMA

Synthetic GIC.<sup>5</sup> In other words, at no time throughout the duration of the BMA Synthetic GIC will the fixed interest rate float or be reset. However, the fixed interest rate on BMA Synthetic GICs that are issued at different times may vary from one another.

To provide additional security to the Plan against the risk of BMA's insolvency, the cash deposited by the Plan will be placed in a separate Contractholder Custodial Account that will be registered in the name of the Plan trustees. Only high quality securities will be purchased by BMA to minimize the risk of loss. During the term of the contract, BMA will use funds in its general account to make interest payments to the Plan and to fund unanticipated payments. At maturity, the securities in the Contractholder Custodial Account will be delivered to BMA in exchange for a cash payment of principal and all accrued but unpaid interest to the Plan.

BMA notes that, under certain circumstances, a Plan fiduciary, such as the fiduciary of a defined benefit plan, may not desire the features of the Benefit-Responsive BMA Synthetic GIC that is described herein in order to utilize book value accounting methodology. Instead, BMA represents that a Plan fiduciary may prefer to invest in a BMA Synthetic GIC having a higher interest rate because BMA would not be taking the benefit-responsive risk. Therefore, BMA proposes to offer a Non-Benefit Responsive BMA Synthetic GIC to Plan investors in addition to the Benefit-Responsive BMA Synthetic GIC. Because there are very few differences between both types of investment vehicles, as previously stated, the Non-Benefit Responsive BMA Synthetic GIC and the Benefit-Responsive BMA Synthetic are both referred to as "the BMA Synthetic GIC."

5. The BMA Synthetic GIC will consist of a Contract under which BMA will manage Plan assets which have been placed with a Custodian selected by the Plan and which is subject to BMA's approval. BMA will guarantee that amounts placed in the Contractholder Custodial Account for management by BMA will be repaid to the Plan with interest at a specified rate

<sup>5</sup>In determining the interest rate that it will offer, BMA will consider the yields available to it in the market on securities suitable for the Contractholder Custodial Account, its likely expenses, and a reasonable premium for the risks that are being assumed by BMA in making its rate guarantee. Ultimately, the fixed interest rate for a BMA Synthetic GIC will be determined by market forces.

on certain specified dates.<sup>6</sup> BMA will bear investment risk-related to assets in the Contractholder Custodial Account except in certain limited circumstances that are described below. At all times, the Plan will remain the legal owner of the Contractholder Custodial Account.

6. BMA will acknowledge its fiduciary status to the independent Plan fiduciary. The general investment objectives of the Contractholder Custodial Account will be current income with stability of principal. The Contract governing each BMA Synthetic GIC will instruct BMA to manage the Contractholder Custodial Account to achieve a total return over the holding period to maturity which will be sufficient to provide the BMA Synthetic GIC's guaranteed rate of interest. In other words, BMA will not be required to maximize the Contractholder Custodial Account's return. Rather, it will manage the assets in a manner calculated to reach the guaranteed rate of interest and an interest spread over this rate. Thus, BMA will not be required to consider or acquire investments with a greater level of risk than would be normally associated with a BMA Synthetic GIC and it will be restricted to considering only fixed income securities of very high quality.

7. BMA's duties and obligations with respect to the BMA Synthetic GIC will be governed by the terms of an insurance contract between the Plan and BMA. The BMA Synthetic GIC will be submitted to the Missouri Department of Insurance, as well as the state departments of insurance in all other states BMA does business and it must be approved by these state agencies prior to BMA's selling this contract to investors. Once the BMA Synthetic GIC is executed, BMA will have no discretion over any of its terms.

8. BMA Synthetic GICs will be offered only to trustees of large pension plans that are sponsored by Fortune 500 companies (or companies of comparable size) or to fiduciaries of pooled investment vehicles having assets of \$50 million or more. However, as stated above, the BMA Synthetic GIC will not be offered to Plans that are sponsored by BMA or its affiliates. In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (i.e., the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets"

under the Plan Asset Regulation, which entity has purchased a BMA Synthetic GIC, the foregoing \$50 million requirement will be considered satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million. However, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary will be required to have total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of \$100 million.

In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (i.e., the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity has purchased a BMA Synthetic GIC, the foregoing \$50 million requirement will be considered satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity must have (a) full investment responsibility with respect to Plan assets invested therein; and (b) total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of \$100 million.

9. The decision by a Plan to enter into a BMA Synthetic GIC will be made by a Plan fiduciary which is independent of BMA. Such Plan fiduciary will receive full and detailed disclosure of all features regarding the BMA Synthetic GIC, including all applicable fees and charges. In this regard, prior to the execution of a BMA Synthetic GIC, each Plan fiduciary will receive (a) a copy of the BMA Synthetic GIC Contract and accompanying application, which stipulate the relevant provisions of the BMA Synthetic GIC Contract, the applicable fees, if any, and the rights and obligations of the parties;

(b) Investment Guidelines defining the manner in which BMA will manage the assets in the Contractholder Custodial Account; (c) a copy of the Custodial Agreement between BMA, the Plan fiduciary and the Custodian; and (d) if granted, copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein.

10. Upon the selection by a Plan fiduciary of a BMA Synthetic GIC, BMA will supply the fiduciary of a Plan (including a Section 404(c) Plan), certain information, which the Plan fiduciary, in its discretion, may pass on to Plan participants, to the extent required to satisfy the requirements of section 404(c) of the Act. This information will consist of a summary of the pertinent features of the BMA Synthetic GIC Contract, the Investment Guidelines and a copy of the Custodial Agreement.

Subsequent to a Plan's investment in a BMA Synthetic GIC, the Plan fiduciary will receive the following ongoing disclosures regarding such investment: (a) A periodic report consisting of a Contract Value Record Report, which specifies the affected Plan's BMA Synthetic GIC Contract Value Record balance for the prior period, contributions, Scheduled Withdrawals and, if applicable, Unscheduled Withdrawals, interest earned, the current period's ending Contract Value Record balance. (The time periods covered by the Contract Value Record Report will be selected by the independent Plan fiduciary and may be sent monthly, quarterly or annually.); (b) a periodic Market Value Statement, which is supplied by the Custodian to the Plan fiduciary on a quarterly basis, that specifies the prior period's ending market value for the assets in the Contractholder Custodian Account, contributions, Scheduled Withdrawals, and if applicable, Unscheduled Withdrawals, any fees paid to BMA, investment income, realized capital gains and/or losses from sales, changes in unrealized appreciation of assets, the current period's ending market value and rate of return, and a summary of transactions; and (c) upon request from the Custodian (i.e., not more often than quarterly), a portfolio listing. The foregoing reports will be made available to the Plan fiduciary, which, in turn, will provide copies to participants upon their request, to the extent the Plan fiduciary deems such information is necessary for participants of a Section 404(c) Plan.

11. When a Plan enters into a BMA Synthetic GIC Contract with BMA, a Contractholder Custodial Account will be established on behalf of the Plan.

<sup>6</sup> While there is no minimum interest rate that can be specified, BMA represents that the actual guaranteed fixed interest rate is unlikely ever to deviate significantly from yields available on comparable U.S. Treasury securities.

Contributions made by the Plan on the effective date of the BMA Synthetic GIC, as well as on any subsequent dates, will be delivered to the Custodian and credited to the Contractholder Custodial Account. These contributions will be credited by BMA to the Contract Value Record. The assets in the Contractholder Custodial Account will be subject to BMA's management and the assets will be maintained by the Custodian in the name of the Plan.

12. Under the Investment Guidelines established for the BMA Synthetic GIC, the Contractholder Custodial Account will be required to invest in fixed income and money market securities that have been purchased by the Custodian as directed by BMA. Only high credit quality securities will be purchased for a Contractholder Custodial Account. In this regard, covered puts and calls will not be used in the Contractholder Custodial Account. Treasury futures contracts will be used only for hedging and risk management purposes but will not be used for leveraging. Currently, BMA's minimum quality rating at the time of purchase is "Aa3/AA-."

The Investment Guidelines will be specifically disclosed to, negotiated with and agreed to by the independent Plan fiduciary. BMA notes that it is possible that other classes of securities may be included in the Investment Guidelines based on a Plan's needs. However, in the event the Plan fiduciary requests that other classes of securities be included in the Investment Guidelines, BMA will require that such securities be "investment grade" or better.

13. BMA's guarantee of principal and interest under the BMA Synthetic GIC will come into play on certain specified "Maturity Dates," any "Interest Payment Dates" specified in the BMA Synthetic GIC Contract prior to a Maturity Date and, with the exception of the non-benefit responsive BMA Synthetic GIC, on any dates on which BMA is required to provide funds for unanticipated benefit payments. On the Maturity Date, the Plan will be entitled to a distribution in cash, by BMA, of the Contract Value Record. In addition, Scheduled Withdrawals and Unscheduled Withdrawals will be made by BMA with corresponding book value adjustments to the Contract Value Record. (In the case of the non-benefit responsive BMA Synthetic GIC, no Unscheduled Withdrawals will be permitted.) The Contract Value Record will be equal to the amount of cash deposited by the Plan in the Contractholder Custodial Account on the effective date of the BMA Synthetic

GIC Contract. Subsequent to the effective date (i.e., the date of execution of the BMA Synthetic GIC Contract), the Contract Value Record will be increased by any accrued but unpaid interest owed by BMA to the Plan and will be further adjusted by subtracting the following: (a) All payments made by BMA to provide for Scheduled Withdrawals and/or if applicable, Unscheduled Withdrawals; (b) all contract expense charges, if any, if these have not been paid to BMA directly by the Plan; (c) a Market Value Adjustment Charge due to a Plan's discontinuance of a BMA Synthetic GIC before the Maturity Date under certain circumstances; (d) any prepayments on securities which have been made to the Plan; and (e) the difference between the proceeds from the sale of an impaired asset and its book value.<sup>7</sup> In other words, BMA will guarantee that on the Maturity Date, distributions will be made to the Plan in amounts at least equal to contributions previously made to the Account plus interest at the guaranteed rate of interest (with appropriate adjustments for Scheduled

<sup>7</sup> Section 1.19 of the BMA's sample Synthetic GIC Contract defines the term "impaired security" (except where bonds are called or assets or mortgage-backed securities are prepaid according to their terms) as: (a) any security, which since purchase, has been downgraded by Standard & Poor's, Moody's, or Duff & Phelps two or more levels; (b) any security for which the occurrence or existence of an event or condition results in an acceleration of payment; (c) any security for which the issuer fails to make one or more payments of principal or interest when due, after giving effect to any grace period; or (d) any security upon which interest is accruing on a principal balance less than the original par or face amount of such security, or upon which the rate of interest has been reset other than pursuant to the security's original terms.

If a security becomes "impaired," BMA will notify the Plan and give the Plan fiduciary the option of removing the security from the Contractholder Custodial Account or having BMA replace the impaired security. If the security is removed, the Contract Value Record will be reduced by the book value of the security. However, if the Plan fiduciary requests a replacement security, BMA will sell the security and purchase another one meeting the criteria of the BMA Synthetic GIC. The Contract Value Record will then be reduced by the difference between the sale price of the impaired security and the book value of the impaired security.

The Plan fiduciary may opt to retain an impaired security based on his or her assessment of the recovery potential of the security's market value. If the Plan fiduciary retains the impaired security, it will be removed from the Contractholder Custodial Account and the Contract Value Record will be debited by the book value of the impaired security.

Section 2.05 of the BMA Synthetic GIC Contract provides that if a security is downgraded one level by a credit rating agency, BMA will notify the Plan fiduciary and attempt to effect the sale of the security as soon as reasonably possible. The sale proceeds will then be used to purchase another security that meets the investment criteria of the BMA Synthetic GIC. In addition, BMA will bear any risk of loss from the sale of a downgraded security.

and Unscheduled Withdrawals).<sup>8</sup> Any appreciation on securities that are liquidated will be retained by the Contractholder Custodial Account to the extent the appreciation is not used to meet withdrawal requests or to repay Advances.

14. Scheduled Withdrawals (i.e., distributions prior to the Maturity Date which are subject to BMA's guarantee as to principal and interest, will occur on dates (i.e., Principal Distribution Dates) and in amounts that will be agreed upon between the Plan and BMA prior to execution of a BMA Synthetic GIC. In addition, Scheduled Withdrawals will be specified in writing. On each Principal Distribution Date, BMA will make a withdrawal from the Contractholder Custodial Account in an amount sufficient to fund such withdrawal. In this regard, BMA will pay the withdrawal amount to the Plan from BMA's own assets prior to any assets being transferred from the Contractholder Custodial Account to BMA. If sufficient cash is not available, BMA will direct the Custodian to sell securities designated by BMA that are held in the Contractholder Custodial Account<sup>9</sup> for a price reflecting the fair market value of the securities.<sup>10</sup> The cash proceeds from such sales will be added to the available cash in the Contractholder Custodial Account sufficient to make a payment to BMA of an amount equal to the Scheduled Withdrawal. However prior to receiving any transfer of assets from the Contractholder Custodial Account, BMA will first make a payment to the Plan in amount of the Scheduled Withdrawal. Any capital loss from such liquidation will be borne by BMA and not by the Plan.

The Contract Value Record of the Account will be reduced by the amount of such Scheduled Withdrawal. In addition, BMA will pay interest to the Plan equal to the unpaid accrual of the guaranteed rate of interest on the amount of the Scheduled Withdrawal.

15. Under certain limited circumstances, a Plan holding a Benefit-

<sup>8</sup> Again, in the case of the non-benefit responsive BMA Synthetic GIC, there will be no adjustments for Unscheduled Withdrawals since such withdrawals are not permitted.

<sup>9</sup> BMA will determine the appropriate security to be sold based upon such factors as (a) the amount of cash needed by the Plan fiduciary; (b) the relative investment returns of the securities available; and (c) market factors affecting the price of the security.

<sup>10</sup> If the purchaser of the securities is BMA, fair market value will be determined in the manner described in Representation 21 under the discussion of illiquid assets. If the purchaser is an unrelated party, the fair market value will be the price established by the marketplace in an arm's length transaction between the buyer and the seller (i.e., the Contractholder Custodial account).

Responsive BMA Synthetic GIC will be permitted to make an Unscheduled Withdrawal from its Contractholder Custodial Account in order to make benefit payments and annuity purchases prior to the Maturity Date of such BMA Synthetic GIC.<sup>11</sup> To make an Unscheduled Withdrawal, an independent Plan fiduciary will be required to certify that the benefit payment is in accordance with the terms of the Plan. However, as with Scheduled Withdrawals, BMA will fund the Plan's withdrawal amount from its own assets prior to receiving cash in the Contractholder Custodial Account equal to the premium for the annuity. If sufficient cash is not available in the Contractholder Custodial Account, BMA will have the right to direct the Custodian to liquidate securities held in the Contractholder Custodial Account at their fair market value.<sup>12</sup> The proceeds of such sale will be added to the cash available in the Contractholder Custodial Account to make a payment to BMA of an amount equal to the premium for the annuity. Similarly, the amount of cash withdrawn will be subtracted from the Contract Value Record. Assuming there are capital losses associated with the securities liquidated, BMA will bear the risk of loss.

16. At its discretion, BMA may advance the requested amount for benefit payments to Plan participants under a benefit-responsive BMA Synthetic GIC. However, cumulative Advances must not exceed 5 percent of the fair market value of the Contractholder Custodial Account and no single Advance may be outstanding for more than 90 days. An Advance is intended to cover a Plan participant's request for a small withdrawal, which because of its timing, might require market-inefficient transactions by the Contractholder Custodial Account.<sup>13</sup>

<sup>11</sup> Under the BMA Synthetic GIC, withdrawals cannot be permitted on an unrestricted basis. Otherwise, BMA would be required to liquidate securities, from time to time, at prices that fluctuate unpredictably, thereby undermining the insurer's ability to meet its guarantees.

<sup>12</sup> See Representations 14 and 21 for a discussion of fair market value.

<sup>13</sup> For example, a Contractholder Custodial Account having a portfolio fully invested in asset-backed and mortgage-backed securities could receive a request for \$100,000 in benefit withdrawals. To meet such a request, some securities would have to be sold from the Contractholder Custodial Account. However, asset-backed and mortgage-backed securities generally trade only in multiples of \$1 million or more and such sale would be highly inefficient to meet a small cash requirement. Therefore, as an alternative, BMA may decide to advance the required cash to the Plan. Subsequently, when the Contractholder Custodial Account receives a regular coupon payment on a security held in its portfolio

BMA will not charge the Contractholder Custodial Account any interest in connection with an Advance.

According to BMA, the Advance and the repayment of the Advance can be viewed as distinct transactions between BMA and the Contractholder Custodial Account which do not affect the Contract Value Record or BMA's guarantees to the Plan. It is only the payment of the actual benefit to the Plan that reduces the Contract Value Record. Had no Advance been made, the Contractholder Custodial Account would have been required to liquidate collateral to meet the Plan's benefit obligations. Until the Advance is repaid to BMA, the Contractholder Custodial Account will hold assets that are in excess of BMA's obligations owed to the Plan. Repaying the Advance will restore the balance between collateral assets and BMA's obligations to the Plan that existed when the BMA Synthetic GIC was initiated.

17. On the Maturity Date, the Custodian will distribute to BMA all of the assets in the Contractholder Custodial Account. Thereafter, BMA will distribute to the Plan an amount equal to the aggregate Contract Value Record plus the applicable guaranteed rate of interest established by agreement between BMA and the Plan, less adjustments for previous Scheduled and Unscheduled Withdrawals.<sup>14</sup> If the aggregate market value of the assets in the Contractholder Custodial Account is less than the Contract Value Record on the Maturity Date, BMA will pay from its general account any such deficiency. Conversely, BMA will retain any excess.

18. BMA's guarantee at the Maturity Date will be implemented in the two steps. First, the Plan fiduciary will preinstruct the Custodian to transfer the balance of all assets in the Contractholder Custodial Account to BMA as of the date of discontinuance, regardless of whether such assets are in the form of securities or otherwise, and without the sale of such securities. Second, simultaneously with the transfer of assets, BMA will pay the Plan, by wire transfer, an amount equal to the adjusted Contract Value Record at the time of the discontinuance. As a result, the underlying investments in the Plan's Contractholder Custodial Account will end up in BMA's general account.

BMA notes that if assets trading at a discount from their face amount on the

or possibly a prepayment on an asset-backed or mortgage-backed security, it would use some of this cash flow to repay the Advance to BMA.

<sup>14</sup> The reference to Unscheduled Withdrawals is inapplicable to the non-benefit responsive BMA Synthetic GIC.

Maturity Date had to be disposed of or distributed to the Plan on the Maturity Date, BMA would be compelled to realize an immediate loss with respect to those assets in meeting its contractual guarantee. By allowing those assets to be transferred to BMA on the Maturity Date, BMA states that the procedures for implementing the contractual guarantees will make it possible for it to hold such assets to maturity or at least until market conditions warrant disposing of them. BMA states that the transfer of assets will enable it to guarantee a higher rate of return than it would otherwise be able to guarantee.

19. In liquidating assets to meet contractual obligations on Scheduled Withdrawal Dates and the Maturity Date, the BMA Synthetic GIC will entitle BMA to sell assets from a Plan's Contractholder Custodial Account to BMA's general account or to an affiliate for a cash price equal to the fair market value of the assets as of the close of business on the date of the sale.<sup>15</sup> BMA represents that no brokerage or transactions costs will be imposed.

20. BMA represents that most of the securities in a Contractholder Custodial

<sup>15</sup> BMA does not believe the purchase of securities by it or an affiliate from a Plan's Contractholder Custodial Account will lead to "cherry-picking" of the best securities and leaving the worst ones in the Contractholder Custodial Account because any potential abuse will be offset by BMA's interest in meeting its guarantee on the maturity of the BMA Synthetic GIC. In this regard, BMA states that it bears the risk that the assets in the Contractholder Custodial Account will be inadequate to provide the amount guaranteed on maturity. According to BMA, to systematically pick and choose those assets with the view of purchasing desirable assets from a Plan's Contractholder Custodial Account would seriously affect the predictability of the cash flows available to meet subsequent guarantees. BMA further states that the risk is minimized if the Contractholder Custodial Account retains assets that are expected to appreciate. Because all assets purchased with the initial deposit and held in the Contractholder Custodial Account will be highly-rated and liquid, so long as transactions between BMA and the Contractholder Custodial Account are effected at market prices, BMA does not believe cherry-picking would be possible.

BMA also represents that the Contractholder Custodial Account's need to sell securities to BMA may not involve large sums of money and the market for such securities may not be efficient. Therefore, transactions between the Contractholder Custodial Account and BMA will permit such Account to effect needed transactions in small portions at the market price generally available only for transactions involving larger amounts. At contract maturity, all securities held by the Contractholder Custodial Account will be transferred to BMA. BMA will then have the opportunity to recombine the small portions of securities held in various portfolios into larger amounts.

Finally, BMA states that the Plan will have complete records of the Contractholder Custodial Account. If the independent Plan fiduciary discovers that BMA has engaged in abusive conduct, the BMA Synthetic GIC may be discontinued.



Account will have a recognized market value. Although certain securities may be regularly traded on an exchange, other investments will be securities for which an active secondary market exists and for which market quotations are readily available. BMA expects that a significant portion of the assets in a Contractholder Custodial Account will consist of high-quality, mortgage-backed securities and similar securities for which market quotations are readily available.

21. With BMA's Synthetic GIC, the only instances that a market value determination needs to be made with respect to a Contractholder Custodial Account are (a) for periodic (i.e., not more than quarterly) reports prepared by the Custodian, in which case the Custodian makes the market value determination; (b) whenever BMA purchases a security from the Contractholder Custodial Account prior to the maturity date; and (c) if there are illiquid assets to honor benefit payments, in the event of an Advance, a Scheduled Withdrawal or, with the exception of the non-benefit responsive BMA Synthetic GIC, an Unscheduled Withdrawal. However, in no event, will BMA or its affiliates value any of the securities held in a Plan's Contractholder Custodial Account.

For the preparation of custodial reports, the Custodian will determine fair market value by using well-established independent pricing services such as Merrill Lynch or similar organizations acceptable to BMA that have resources to provide fair, reasonable and defensible market values for securities in the Contractholder Custodial Accounts. For purposes of determining the fair market value of a security that is acquired by BMA from the Contractholder Custodial Account prior to the Maturity Date or in the event there are illiquid assets, BMA will base the fair market value of the security on the most recent sales price on the date of valuation (the Valuation Date) or, if no sales took place on the Valuation Date, a price that reflects the average of the bids of at least two major independent dealers for publicly-traded securities. For debt instruments that are not publicly-traded, BMA will base the fair market value of such securities on the average of the bids of at least two major dealers, or, if two bids cannot be obtained, then the fair market value will be determined by an independent appraisal made by an independent appraiser selected by either the Custodian or a Plan sponsor or fiduciary that is not affiliated with BMA or any of its affiliates. Where bids are required for either securities or debt instruments,

if the bids of two major dealers vary by more than "one point" (i.e., one percent of par value), a third dealer's bid will be obtained by BMA and the fair market value will be the average of the three bids.

22. A Plan may discontinue its BMA Synthetic GIC Contract at any time, provided 30 days' advance written notice is given to BMA. However, BMA may discontinue a BMA Synthetic GIC arrangement with a Plan only if certain events enumerated in the BMA Synthetic GIC Contract occur and as long as BMA gives the Plan 30 day's prior written notice. For example, Section 8.03 of BMA's sample Synthetic GIC Contract states, in part, that BMA may discontinue a BMA Synthetic GIC Contract if—

(a) The Plan fails to give BMA written notice of any change or amendment to the Plan within 30 days of the date such change or amendment is adopted and such change materially and adversely impacts on BMA's financial experience under the BMA Synthetic GIC Contract.

(b) In the judgment of BMA, any change or amendment to the Plan necessitates the amendment of the BMA Synthetic GIC Contract, and, upon the written request of BMA, the Plan fails to consent to such amendment within 30 days of such request.

(c) The Plan is partially or completely terminated.

(d) The Plan fails to be tax-qualified in accordance with the Code.

(e) The Plan requests BMA to purchase annuities which would exceed the balance in the Contractholder Custodial Account.

23. If a BMA Synthetic GIC Contract is discontinued prior to the Maturity Date, BMA will be entitled to receive a Market Value Adjustment Charge which will be deducted from the Contract Value Record. The Market Value Adjustment Charge is intended to allow BMA to recover its direct costs and unreimbursable expenses incurred in managing the BMA Synthetic GIC over a maximum three year period. The Market Value Adjustment Charge will equal the sum of (1)+ (2), where—

(1) Is the excess, if any, of the Contract Value Record over the fair market value of the assets in the Contractholder Custodial Account at the determination date (i.e., the distribution date), but not less than 0; and

(2) Is (a) + (b), where—

(a) Is the amount of any outstanding Advances to make benefit payments, and

(b) Is the amount equal to  $[(F * CVR)] * N$ , where—

F = The Market Value Expense Charge, expressed as an annual percentage

rate, payable to BMA as agreed upon by BMA and the Plan and specified in the BMA Synthetic GIC Contract;

CVR = The amount of the Contract Value Record on the determination date; and

N = The number of days in the period from the determination date through the third anniversary of the effective date of the Contract, or the Maturity Date, if earlier, divided by 365. This variable also reflects the recovery of BMA's unreimbursable expenses over a maximum three year period and does not represent a penalty.

Whenever a withdrawal from the Contract is less than the value of the Contract Value Record and is subject to the Market Value Adjustment Charge, such Charge will be based upon the aforementioned formula. However, the Charge will be multiplied by a ratio, the numerator of which will reflect the amount of the withdrawal and the denominator, the amount of the Contract Value Record at the determination date.

The Plan will preinstruct the Custodian to transfer, to BMA, the balance of all assets that are held in the Contractholder Custodial Account as of the date of the discontinuance, whether in the form of securities or otherwise, and without the sale of such securities. Simultaneously with such transfer of assets, BMA will pay the Plan, by wire transfer, an amount equal to the adjusted Contract Value Record at the time of such discontinuance.

24. Interest and other income payments made by issuers of securities (i.e., Plan Interest Proceeds) held in the Contractholder Custodial Account will be transferred to BMA as they are paid to the Custodian during the term of the BMA Synthetic GIC. BMA represents that Plan Interest Proceeds are generally too small to be reinvested efficiently in any one Contractholder Custodial Account. Therefore, BMA explains that it will be able to invest the stream of income derived from the Plan Interest Proceeds in its general account. BMA further represents that in exchange for its guarantees to pay benefits and interest on the Interest Payment Dates, the Plan fiduciary is acknowledging that the Plan Interest Proceeds cease to be plan assets upon their transfer to BMA and, thus, become the sole and exclusive property of BMA.

25. Because it is anticipated that a large portion of the securities held in the Contractholder Custodial Account will be high credit quality mortgage-backed and asset-backed securities,



BMA notes that such securities generally experience partial principal repayment on a regular basis. Therefore, BMA's Synthetic GIC will offer a Plan either of two investment options—(a) the opportunity to require that BMA reinvest all of the prepayments received by the Custodian and bear the reinvestment risks on such cashflows; or (b) the opportunity to allow BMA to negotiate with the Plan a BMA Synthetic GIC that will pay a higher guaranteed interest rate to such Plan, but which requires that the Plan receive some of the prepayments as they are paid to the Custodian.<sup>16</sup> In other words, some of the reinvestment risks from the prepayment of cashflows will not be borne by BMA. These options will be available to the Plan fiduciary prior to the inception of the BMA Synthetic GIC Contract.

26. Other than the Market Value Adjustment Charge described above, BMA does not anticipate charging any fees under the BMA Synthetic GIC inasmuch as its "compensation" will be based upon the anticipated difference between the market value of securities in the Contractholder Custodial Account and its guarantee of principal. However, the BMA Synthetic GIC Contract provides that a Contract Expense Charge may be imposed if it is individually negotiated with the Plan fiduciary. BMA states that the purpose of this provision is to allow the Plan to net a higher interest rate by paying a portion of BMA's expenses.<sup>17</sup> According to BMA, the Contract Expense Charge will not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

27. BMA will keep full and complete records and books of account reflecting all transactions of each Contractholder Custodial Account and will make them available on an annual basis for audit by independent certified public accountants selected by and responsible to the Plan. In addition, BMA will furnish annual reports of the operations of the Contractholder Custodial Account containing a list of the investments of

such Account to an independent Plan fiduciary.

28. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The decision to enter into a BMA Synthetic GIC will be made on behalf of a participating Plan, in writing, by a fiduciary of such Plan who is independent of BMA.

(b) Each Plan or plan asset look-through vehicle investing in a BMA Synthetic GIC will have assets that are in excess of \$50 million.

(c) Prior to and subsequent to the execution of a BMA Synthetic GIC, the Plan fiduciary, and if applicable, the Plan participant, will receive written disclosures concerning the BMA Synthetic GIC, including a description of all applicable fees and charges, as well as ongoing disclosures with respect to such investment.

(d) BMA will maintain, for a period of six years from the date of each BMA Synthetic GIC transaction, books and records of such transactions that will be subject to annual audit by independent, certified public accountants who are selected by and responsible solely to the relevant Plan.

#### *Notice to Interested Persons*

BMA represents that because those potentially interested participants and beneficiaries cannot be identified at this time, 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**.

Therefore, comments and requests for a hearing must be received no later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### **South Central New York District Council of Carpenters Pension Fund (the Fund) Johnson City, New York**

[Application No. D-10755]

#### *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 (2) of the Act and the sanctions resulting from the application of section

4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: The sale (the Sale) of improved real property (the Property) to the Fund by the Local 281 Carpenters Property Corporation (the Corporation), a party in interest with respect to the Fund, provided the following conditions are met:

(a) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(b) The Fund purchases the Property for cash from the Corporation for the lesser of \$250,000 or the fair market value of the Property as of the date of the Sale;

(c) The Sale is monitored and approved by an independent fiduciary acting on behalf of the Fund;

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

(e) The Fund pays no fees or commissions in connection with the Sale.

#### *Summary of Facts and Representations*

1. The United Brotherhood of Carpenters and Joiners of America, Local 281 and Local 532 (the Union) is a union located in the Village of Johnson City, Broome County, New York. The Union represents carpenters who are employed throughout the state of New York. The Fund is a defined benefit pension plan established by the Union for the provision of retirement benefits to Union members. The Fund had 847 participants and approximately \$29,600,175 in assets as of January 1, 1998.

2. The Corporation is a holding company established by the Union on April 18, 1974 for the holding and management of investment property. The Corporation purchased the Property on April 29, 1974 for \$95,000 from the Baptist Bible Seminary, an unrelated party. The Property is located at 335 Main Street, in the Village of Johnson City, Broome County, New York. The Property is comprised of a two-story building having approximately 4,800 square feet in rentable space and is situated on approximately 2.3 acres. The applicant represents that the Fund currently rents office space, occupying 300 square feet, in the Property, on a month-to-month basis pursuant to Section 228 of New York State's Real Property Law.<sup>18</sup> The lease has been in force in excess of twenty-five years and the rental rate has not increased for the last thirteen years. The applicant further

<sup>16</sup> Under this option, if prepayments are paid to the Plan, the Contract Value Record will be reduced by the amount of the payment. However, the amount of prepayments will be limited to a maximum percentage of the principal balance of the security.

<sup>17</sup> For example, BMA states that the interest rate it is able to offer under the BMA Synthetic GIC will be affected by its investments. At the Plan's request, BMA explains that it would be willing to pass on some of these expenses to the Plan, and in exchange, it would offer a higher rate of interest. BMA further states that it would only charge such fees if the Plan fiduciary negotiating the BMA Synthetic GIC requests this provision in order to obtain a higher interest rate.

<sup>18</sup> In this regard, the applicant represents that a month-to-month tenancy may be terminated by providing written notice of at least 30 days.

represents that the rental rate was determined by D'Arcangelo & Co., LLP Certified Public Accountants, in excess of thirteen years ago, by allocating the Property's operating expenses in proportion to the square footage utilized by each tenant. This resulted in a monthly rental rate of \$1 per square foot. Accordingly, the Fund has been charged a monthly rate of \$300 for at least the past thirteen years.

In addition, the applicant represents that the Fund is represented by both employer and union trustees. In the latter part of 1997 through the present, George Hamarich was a union trustee of the Fund and a trustee of the Corporation.<sup>19</sup>

3. The Property was appraised (the Appraisal) on June 18, 1998 by Mr. John Miller (Mr. Miller) of the Central New York Appraisal Group (the Appraisal Group). The applicants represent that Mr. Miller and the Appraisal Group are independent of the Fund and the Union. Mr. Miller, an appraiser certified in the State of New York, used the sales comparison approach and compared the Property to five properties which were similar to the Property and which were also the subject of recent sales. Based on these comparisons, Mr. Miller concluded the value of the Property to be \$250,000, as of June 2, 1998, as if the site was vacant and ready for redevelopment (the Appraised Value).

4. The applicant proposes the sale of the Property from the Union to the Fund for \$250,000 (*i.e.*, the Sale). The applicant represents that proposed Sale was analyzed by Mr. John P. Jeanneret (Mr. Jeanneret) of J. P. Jeanneret

Associates, an investment and consulting company located in Syracuse, New York. Mr. Jeanneret represents that he is an investment adviser registered with the Securities and Exchange Commission and is knowledgeable in matters concerning real estate and qualified employee benefit plans. Mr. Jeanneret additionally represents that he is the Fund's investment consultant and fiduciary and is knowledgeable in matters concerning the Fund's investment objectives and guidelines. Mr. Jeanneret represents that he has analyzed the proposed Sale and has determined that the proposed Sale is appropriate for the Fund and is in the best interest of the Fund's participants and beneficiaries.

The applicant additionally represents that the Fund has engaged the services of Mr. Thomas M. Barnell (Mr. Barnell) of Farrell, Martin, & Barnell LLP, located in Baldwinsville, New York, to act as independent fiduciary on behalf of the Fund for purposes of the proposed Sale. Mr. Barnell represents that he is independent of the Union and the Fund and has over 25 years of experience in matters concerning real estate transactions. Mr. Barnell additionally represents that he acknowledges his duties to the Fund and its participants and beneficiaries.

Mr. Barnell represents that he has personally inspected the Property and has analyzed the Appraisal and the terms of the Sale. Mr. Barnell represents that, based on his analysis, the Appraised Value of the Property is accurate. Mr. Barnell additionally represents that the terms of the Sale fully protect the interests of the Fund. The applicant represents that Mr. Barnell will represent the Fund to ensure that the Sale is in the best interests of the Fund and its participants and beneficiaries.

5. The applicant represents that the Sale, if granted, is administratively feasible in that it will be a one-time transaction for cash in which the Fund will pay no fees or commissions. The applicant also represents that the proposed Sale is in the best interest of the Fund since the Fund currently rents space in the Property and intends to continue utilizing the Property as its offices for the foreseeable future. The applicant further represents that the Fund presently has no intention of demolishing the structure which exists on the Property and re-selling the unimproved Property.<sup>20</sup> In addition, the

applicants represent that a sale of the Property to a third-party may disrupt the Fund's operations. Finally, the applicants represent that the proposed Sale is protective of the Fund since the Property will comprise approximately one percent (1%) of the Fund's assets and an independent fiduciary acting on behalf of the Fund has represented that the proposed Sale meets the Fund's investment objectives.

6. In summary, the applicant represents that the subject transactions satisfy the statutory criteria contained in section 408(a) of the Act for the following reasons:

(a) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(b) The Fund purchases the Property from the Corporation for the lesser of \$250,000 or the fair market value of the Property as of the date of the Sale;

(c) The Sale is monitored and approved by an independent fiduciary acting on behalf of the Fund;

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

(e) The Fund pays no fees or commissions in connection with the Sale.

**NOTICE TO INTERESTED PERSONS:** Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

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

that a fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Accordingly, the fiduciaries of the Fund must act "prudently" with respect to the decision to purchase the Property, as well as to any possible future development of the Property (including where relevant, the determination as to whether to develop the Property, the types of improvements that are appropriate and the Plan's ability to finance any such improvements). The granting of this exemption should not be viewed as an endorsement by the Department of the Fund's subsequent use of such Property. Finally, we note that, if the decision by the fiduciaries to purchase and subsequently develop the Property is not prudent, the fiduciaries would be liable for any loss resulting from such breach even though the purchase of the Property was the subject of an administrative exemption.

<sup>19</sup> The Corporation is a party in interest with respect to the Fund under section 3(14)(G) of the Act as \* \* \* "a corporation \* \* \* of which (or in which) 50% or more of \* \* \* is owned directly or indirectly, or held by \* \* \* an employee organization any of whose members are covered by the (Fund). As a result, the lease is prohibited by section 406(a)(1)(A) of the Act which prohibits the \* \* \* leasing \* \* \* of any property between the (Fund) and a party in interest \* \* \* " However, section 408(b)(2) of the Act provides a statutory exemption, so long as the conditions therein are met, for \* \* \* "reasonable arrangements with a party in interest for office space \* \* \* necessary for the \* \* \* operation of the (Fund), if no more than reasonable compensation is paid therefor." Under regulation 29 CFR 2550.408(b)(2)(e)(1), an act described under section 406(b) of the Act constitutes a separate transaction which is not exempt under 408(b)(2) of the Act. Specifically section 406(b)(2) of the Act states that "(a) fiduciary with respect to a (Fund) shall not \* \* \* (2)(i) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interest is adverse to the interest of the plan or the interests of its participants or beneficiaries \* \* \* " As a result, the representation of the Fund and the Corporation by Mr. Hamarich, during the leasing, would constitute a violation of section 406(b)(2) of the Act. The Department is not proposing exemptive relief herein for the above described violation of the Act.

<sup>20</sup> In this regard, the Department notes that the Act's standards of fiduciary conduct will apply to the purchase and any possible future development of the Property. Section 404(a)(1) of the Act requires

**S & S Partnership, Inc. Profit Sharing Plan (the Plan) Located in Stony Brook, New York**

[Application No. D-10807]

*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 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 loan (the Loan) totaling \$200,000 by the Plan to Hiramco Realty Corporation (Hiramco), a disqualified person with respect to the Plan, provided that the following conditions are met:

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

(b) The Loan does not exceed 20% of the assets of the Plan, throughout the duration of the Loan;

(c) The Loan is secured by a first mortgage on certain real property (the Property) which has been appraised by a qualified independent appraiser to have a fair market value not less than 150% of the principal amount of the Loan;

(d) The fair market value of the collateral remains at least equal to 150% of the outstanding principal balance plus accrued but not unpaid interest, throughout the duration of the Loan;

(e) Mr. Steven C. Fuchs and his wife, Margaret Fuchs (the Fuchs) are the only Plan participants to be affected by the Loan transaction;<sup>21</sup> and

(f) should any employee of the Plan Sponsor become eligible for plan participation, the new plan participant will be enrolled in another qualified retirement plan or Hiramco may elect to pay the entire balance on the Loan.

*Summary of Facts and Representations*

1. S & S Partnership, Inc. (the Partnership), the Plan's sponsor, is a partnership located in Stony Brook, New York. The Plan is a defined contribution profit sharing plan, with Mr. Steven C. Fuchs and his wife, Margaret Fuchs (the Fuchs) as its sole participants and trustees. As of

December 31, 1998, the Plan had total assets of approximately \$1,230,238.

2. Hiramco is a corporation in the real estate management business, of which 50% ownership interests remain with Mr. Fuchs and J.A. Green Development Corporation, respectively. Hiramco wishes to borrow \$200,000 from the Plan, which represents approximately 16% of the current fair market value of the assets of the Plan. The Loan will be amortized over a 10 year period, with equal monthly payments of principal and interest over the 10 year term. The interest rate for the Loan will be 10% per annum. The total monthly payments for the Loan will be \$2,643.02 per month. Mr. Daniel J. Liberty, Senior Vice President of KeyBank (the Bank) of Melville, New York, has represented in a letter dated October 8, 1999, that the terms and conditions of the mortgage are within the current conditions for commercial mortgages provided by the financial services industry. The Bank is independent of the Plan and Plan Sponsor.

3. The applicant represents that Hiramco has a sufficient cash flow stream to meet the monthly payments under the terms of the Loan. The applicant further represents that Hiramco currently leases the Property to a prime tenant, the United States Post Office.

4. The Loan will be secured by a first mortgage on the Property, which is located at 117 North Paul's Path, Coram, New York. The Property has been appraised by Mr. Richard C. Clarke, a real estate appraiser in Stony Brook, New York, to have a fair market value of \$650,000 as of July 28, 1999. The applicant represents that the Plan's security interest will be perfected in the manner required by applicable law in New York by recording with the appropriate government officials. Furthermore, the applicant represents that the Property securing the Loan will be insured against casualty loss in an amount not less than the amount of the outstanding principal of the Loan (plus accrued but unpaid interest), and the Plan will be named beneficiary of the policy.

5. The applicant represents that should the fair market value of the Property decline below 150% of the balance of the Loan, the Plan Sponsor will provide additional collateral to maintain the 150% threshold or pay the entire balance on the Loan.

6. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria of section 4975(c)(2) of the Code because: (a) The Loan represents approximately 16% of the assets of the Plan; (b) the terms of

the Loan will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party, as demonstrated by the letter from the Bank; (c) the Loan will be secured by a first mortgage on the Property, which has been determined by a qualified, independent appraiser to have a fair market value of not less than 150% of the total principal amount of the Loan that it will secure; (d) the Fuchs are the only participants in the Plan to be affected by the transaction, and they desire that the transaction be consummated.

**NOTICE TO INTERESTED PERSONS:** Because the applicants are the only participants in the Plan, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

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

**First American Capital Management, Inc. (FACM) Located in Newport Beach, California**

(Exemption Application No. D-10819)

*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).

**Section I—Definitions and Special Rules**

The following definitions and special rules will apply to this proposed exemption:

(a) The term "person" includes the person and affiliates of the person.

(b) An "affiliate" of a person includes the following:

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

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

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

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term "control" means the power to exercise a controlling influence over the management or

<sup>21</sup> Since the Fuchs are the sole owners of the Plan sponsor and the only participants in the Plan, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

policies of a person other than an individual.

(c) An "affiliate of FACM" includes Pacific American Securities, LLC, (PAS) and any other broker-dealer registered under the Securities Exchange Act of 1934 with respect to which FACM has at least a 40 percent minority ownership interest and which is subject to regulations similar to those to which PAS is subject (such entities referred to collectively herein as "FACM").

(d) An "agency cross transaction" is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(e) The term "covered transaction" means an action described in section II(a), (b), or (c) of this proposed exemption.

(f) The phrase "effecting or executing a securities transaction" means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(g) A Plan fiduciary is independent of a person only if the fiduciary has no relationship to or interest in such person that might affect the exercise of such fiduciary's best judgment as a fiduciary.

(h) The term "profit" includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(i) The term "securities transaction" means the purchase or sale of securities.

(j) The term "nondiscretionary trustee" of a Plan means a trustee or custodian whose power and duties with respect to any assets of the Plan are limited to (1) the provision of nondiscretionary trust services to the Plan, and (2) duties imposed on the trustee by any provision or provisions of the Act or the Code. The term "nondiscretionary trust services" means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this proposed exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype Plan, the power to amend such Plan.

#### Section II—Covered Transactions

If each condition of Section III of this proposed exemption is either satisfied or non-applicable under Section IV, the

restrictions of section 406(b) of the Act and the sanctions resulting from the application of sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) or (F) of the Code, shall not apply to—

(a) First American Capital Management (FACM) using its authority to cause an employee benefit plan (a "Plan") to pay a fee to PAS, or another affiliate of FACM, for effecting or executing securities transactions as an agent for the Plan, but only to the extent that such transactions are not excessive under the circumstances, in either amount or frequency;

(b) FACM acting through PAS, or another affiliate of FACM, as an agent in an agency cross transaction for both a Plan with respect to which FACM is a fiduciary and one or more other parties to the transaction; or

(c) The receipt by FACM, through its affiliates, of reasonable compensation for effecting or executing an agency cross transaction in which a Plan is a party from one or more other parties to the transaction.

#### Section III—Conditions

Except to the extent otherwise provided in Section IV of this proposed exemption, Section II of this proposed exemption applies only if the following conditions are satisfied:

(a) The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee) or an administrator of the Plan, or an employer any of whose employees are covered by the Plan.

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each Plan whose assets are involved in the transaction, which Plan fiduciary is independent of FACM.

(c) The authorization referred to in paragraph (b) of this section is terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (b) of this section with instructions on the use of the form must be supplied to the authorizing fiduciary no less than annually. The instructions for such form must include the following information:

(1) the authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice from the authorizing fiduciary or other Plan official having authority to terminate the authorization; and

(2) failure to return the form will result in the continued authorization of

FACM to engage in the covered transactions on behalf of the Plan.

(d) Within three (3) months before an authorization is made, the authorizing fiduciary is furnished with any reasonably available information that FACM reasonably believes to be necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption (if granted), the form for termination of authorization described in Section II(c), a description of FACM's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

(e) FACM furnishes the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten (10) business days of the securities transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10; or

(2) At least once every three (3) months, and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the Plan pursuant to subparagraph (e)(1) of this Section during the three-month period covered by the report;

(B) The total of all securities transaction-related charges incurred by the Plan during such period in connection with such covered transactions; and

(C) The amount of the securities transaction-related charges retained by FACM and the amount of such charges paid to other persons for execution or other services.

For purposes of this paragraph (e), the words "incurred by the Plan" shall be construed to mean "incurred by the pooled fund" when FACM engages in covered transactions on behalf of a pooled fund in which the Plan participates.

(f) The authorizing fiduciary is furnished with a summary of the information required under paragraph (e)(1) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the Plan during the period in connection with covered securities transactions;

(2) The amount of the securities transaction-related charges retained by

FACM and the amount of these charges paid to other persons for execution or other services;

(3) A description of FACM's brokerage placement practices, if such practices have materially changed during the period covered by the summary;

(4) (i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in discharging its duty of prudence. The requirements of this subparagraph (f)(4)(i) will be met if the "annualized portfolio turnover ratio," calculated in the manner described in subparagraph (f)(4)(ii), is contained in the summary;

(ii) The "annualized portfolio turnover ratio" shall be calculated as a percentage of the Plan assets consisting of securities or cash over which FACM had discretionary investment authority, or with respect to which FACM rendered, or had any responsibility to render, investment advice (the "portfolio") at any time or times ("management period(s)") during the period covered by the report. First, the "portfolio turnover ratio" (not annualized) is obtained by dividing (A) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (B) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator.

The "annualized portfolio turnover ratio" is then derived by multiplying the "portfolio turnover ratio" by an annualizing factor. The annualizing factor is obtained by dividing (C) the number twelve (12) by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

(iii) The information described in this paragraph (f)(4) is not required to be furnished in any case where FACM has not exercised discretionary authority over trading in the Plan's account during the period covered by the report.

For purposes of this paragraph (f), the words "incurred by the Plan" shall be construed to mean "incurred by the pooled fund" when FACM engages in

covered transactions on behalf of a pooled fund in which the Plan participates.

(g) If an agency cross transaction to which Section IV(b) does not apply is involved, the following conditions must also be satisfied:

(1) The information required under Sections III(d) or IV(d)(1)(B) of this proposed exemption includes a statement to the effect that, with respect to agency cross transactions, FACM will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under Section III(f) of this proposed exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by FACM in connection with those transactions during the period;

(3) FACM has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both;

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

#### **Section IV—Exceptions From Conditions**

(a) Certain plans not covering employees. Section III does not apply to covered transactions to the extent they are engaged in on behalf of individual retirement accounts (IRAs) meeting the conditions of 29 CFR 2510.3-2(d), or Plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3-3.

(b) Certain agency cross transactions. Section III of this proposed exemption does not apply in the case of an agency cross transaction, provided that FACM:

(1) does not render investment advice to any Plan for a fee within the meaning of section 3(21)(A)(ii) of the Act with respect to the transaction;

(2) is not otherwise a fiduciary who has investment discretion with respect to any Plan assets involved in the transaction (see 29 CFR 2510.3-21(d)); and

(3) does not have the authority to engage, retain or discharge any person

who is, or is proposed to be, a fiduciary regarding any such Plan assets.

(c) Recapture of profits. Section III(a) of this proposed exemption does not apply in any case where FACM returns or credits to the Plan all profits earned by FACM in connection with the securities transactions associated with the covered transaction.

(d) Special rule for pooled funds. If FACM engages in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one Plan (a Pooled Fund):

(1) Sections III(b), (c), and (d) do not apply if—

(A) The arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (d)(1), of a plan fiduciary with respect to each Plan whose assets are invested in the Pooled Fund who is independent of FACM. The requirement that the authorizing fiduciary be independent of FACM shall not apply in the case of a Plan covering only employees of FACM, if the requirements of Sections IV(d)(2)(A) and (B) are met.

(B) The authorizing fiduciary is furnished with any reasonably available information that FACM believes to be necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of FACM's brokerage placement practices, and, where requested, any reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to FACM objecting to the implementation of, material change in, or continuation of, the arrangement, the Plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the Pooled Fund, without penalty to the Plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing Plans and to the non-withdrawing Plans. In the case of a Plan that elects to withdraw under this subparagraph (d)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a Plan electing to withdraw.

(D) In the case of a Plan whose assets are proposed to be invested in the Pooled Fund subsequent to the implementation of the arrangement and

that has not authorized the arrangement in the manner described in subparagraphs (d)(1)(B) and (C) of this section, the Plan's investment in the Pooled Fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (d)(1)(A).

(2) Section III(a) of this proposed exemption, to the extent that it prohibits FACM from being the employer of employees covered by a plan investing in a pool managed by FACM, does not apply if—

(A) FACM is an "investment manager" as defined in section 3(38) of the Act, and

(B) Either (i) FACM returns or credits to the Pooled Fund all profits earned by FACM in connection with all covered transactions engaged in by FACM on behalf of the Pooled Fund, or (ii) the Pooled Fund satisfies the requirements of subparagraph (d)(3) of this section.

(3) A Pooled Fund satisfies the requirements of paragraph (d) of this section for a fiscal year of the Fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the Pooled Fund during the fiscal year by any Plan covering employees of FACM, the aggregate fair market value of the interests in such Fund of all Plans covering employees of FACM does not exceed twenty (20) percent of the fair market value of the total assets of the Fund; and

(B) The aggregate brokerage commissions received by FACM, in connection with covered transactions engaged in by FACM on behalf of all Pooled Funds in which a Plan covering employees of FACM participates, do not exceed five (5) percent of the total brokerage commissions received by FACM from all sources in such fiscal year.

**EFFECTIVE DATE:** This proposed exemption, if granted, will be effective for transactions described herein occurring on or after the date this proposed exemption is published in the **Federal Register**.

#### *Summary of Facts and Representations*

1. The applicant, First American Capital Management (FACM), is located in Newport Beach, California. FACM is registered as an investment adviser with the U.S. Securities and Exchange Commission (SEC), pursuant to the Investment Advisers Act of 1940. As of December 31, 1998, FACM had approximately \$1.36 billion in assets under management and \$581,000 in stockholders' equity.

FACM owns forty-two (42) percent of the outstanding equity of Pacific

American Securities, LLC (PAS).<sup>22</sup> PAS is registered with, and regulated by, the SEC as a broker-dealer pursuant to the requirements of the Securities Exchange Act of 1934. PAS is a member of the National Association of Securities Dealers (NASD).

All references herein to "FACM" will include "PAS" and any other broker-dealer for which FACM may have at least a 40 percent minority ownership interest and which is subject to regulations similar to those to which PAS is subject.

FACM requests an individual exemption to permit:

(i) FACM to use its authority to cause an employee benefit plan (a "Plan") to pay a fee to PAS, or another affiliate of FACM (as defined herein), for effecting or executing securities transactions as agent for that Plan; or

(ii) FACM, through PAS or another affiliate of FACM (as defined herein), to act as an agent in an agency cross transaction for both a Plan with respect to which FACM is a fiduciary and one or more other parties to the transaction; or

(iii) the receipt by FACM, through its affiliates, of reasonable compensation for effecting and executing an agency cross transaction to which a Plan is a party from one or more other parties to the transaction.

Each transaction described above will meet the applicable requirements of Prohibited Transaction Class Exemption 86-128 (PTCE 86-128, 51 FR 41686, November 18, 1986), with the principal exception that the agent for the Plan effecting or executing the securities transactions (including any agency cross transactions) will not be an "affiliate" of FACM within the meaning of that term as it is used in Part I of PTCE 86-128.

For purposes of this proposed exemption, Section I(c) herein defines the phrase "affiliate of FACM" to include PAS and any other broker-dealer with respect to which FACM has at least a 40 percent minority ownership interest and which is subject to regulations similar to those to which PAS is subject (such entities referred to collectively as "FACM"). Thus, this exemption (if granted) would apply to securities transactions executed by PAS, as a broker-dealer "affiliated" with FACM, the investment manager for a Plan which causes the execution of such transactions to be made by PAS, in situations where PTCE 86-128 would not apply because that exemption

requires that the plan fiduciary have a controlling interest in the broker-dealer executing the covered transactions.

2. FACM represents that the use by a Plan fiduciary of its authority to cause a Plan to pay a fee to an affiliate of such fiduciary as an agent of such Plan for effecting or executing securities transactions, and an affiliate acting as agent in agency cross transactions for both a Plan and one or more other parties to such transactions and receiving reasonable compensation from one or more other such parties, are common practices. FACM states that such arrangements can provide Plans with the opportunity to decrease the costs of engaging in securities transactions and pose little or no risk to the Plans. For example, an affiliate of a Plan fiduciary may be able to better effect or execute securities transactions with a lower commission charged to the Plan than if such orders were placed with another brokerage firm. Thus, FACM represents that Plans for which it acts as a fiduciary will be better able to maximize the returns, and lower the commission costs, on their portfolios if the requested exemption is granted.

3. PTCE 86-128 provides an exemption for a Plan fiduciary to cause a Plan to pay a fee to an "affiliate" of that person (as defined therein) for effecting or executing securities transactions as an agent to the Plan, and to act as an agent in an agency cross transaction for both a Plan and one or more other parties to the transaction and to receive a fee from such other parties, if certain conditions are met. The applicant states that the Department, in granting PTCE 86-128, recognized the benefits to Plans of permitting Plan fiduciaries to obtain certain brokerage services from affiliates of such fiduciaries. However, PTCE 86-128 defines an "affiliate" of a person to include, among others, any person directly or indirectly controlling, controlled by, or under common control with such person. Therefore, as noted above, the applicant represents that the securities transactions for which an individual exemption is requested may fall outside the scope of relief provided by PTCE 86-128 because FACM holds only a minority ownership interest in PAS and may not be considered an "affiliate" within the meaning of the definition contained in PTCE 86-128. However, the applicant is concerned that FACM's minority ownership of PAS may give rise to a prohibited transaction if FACM were to engage in any of the transactions described in Section II of this proposed exemption.

4. FACM requests this proposed exemption to permit it to engage in the

<sup>22</sup> In this regard, the applicant states that there is a controlling equity ownership interest in PAS that is held by an individual who is otherwise unrelated to FACM.

transactions described herein, each of which will meet the applicable conditions of PTCE 86-128, except that PAS would be an entity to which FACM holds a non-controlling, minority ownership interest. In this regard, neither FACM nor PAS will be a trustee (other than a nondiscretionary trustee) or an administrator of the Plan, or an employer any of whose employees are covered by the Plan, except in a case where FACM returns or credits to the Plan all profits earned by FACM in connection with the securities transactions associated with the covered transaction.

5. Except in certain limited circumstances, all covered transactions will be performed under a written authorization executed in advance by a fiduciary of each Plan whose assets are involved in the transaction, which Plan fiduciary is independent of FACM, PAS, and their affiliates.

If FACM engages in a covered transaction on behalf of a Pooled Fund, the arrangement under which the covered transaction is performed will be subject to the prior and continuing authorization of a plan fiduciary, with respect to each Plan whose assets are invested in the Pooled Fund, who is independent of FACM. However, the requirement that the authorizing fiduciary be independent of FACM shall not apply in the case of a Plan covering only employees of FACM (a FACM Plan), if certain requirements are met. In this regard, FACM must be an "investment manager," as defined in section 3(38) of the Act, for the FACM Plan, and must either (i) Return or credit to the Pooled Fund all profits earned by FACM in connection with all covered transactions engaged in by FACM on behalf of the Pooled Fund, or (ii) satisfy certain additional requirements with respect to the Fund. Such additional requirements state that a Pooled Fund with assets of a FACM Plan may take advantage of the relief provided herein for covered transactions for a fiscal year of the Fund if:

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the Pooled Fund during the fiscal year by any FACM Plan, the aggregate fair market value of the interests in such Fund of all FACM Plans does not exceed twenty (20) percent of the fair market value of the total assets of the Fund; and

(B) the aggregate brokerage commissions received by FACM, in connection with covered transactions engaged in by FACM on behalf of all Pooled Funds in which a FACM Plan participates, do not exceed five (5) percent of the total brokerage

commissions received by FACM from all sources in such fiscal year.

6. With respect to any Pooled Fund, the authorizing Plan fiduciary will be furnished with any reasonably available information that FACM believes to be necessary to determine whether an authorization to engage in the covered transactions should be given or continued. This information must be furnished not less than 30 days prior to implementation of the arrangement, or any material change to such arrangement. Such information must include (but not be limited to) a description of FACM's brokerage placement practices, and any reasonably available information regarding the matter upon the request of the authorizing Plan fiduciary at any time.

In the event an authorizing Plan fiduciary submits a notice in writing to FACM objecting to the implementation of, a material change in, or continuation of, the arrangement, the Plan on whose behalf the objection was tendered will be given the opportunity to terminate its investment in the Pooled Fund, without penalty to the Plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing Plans and to the non-withdrawing Plans. In the case of a Plan that elects to withdraw, the withdrawal will be effected prior to the implementation of, or material change in, the arrangement. However, an existing arrangement need not be discontinued by reason of a Plan electing to withdraw.

In the case of a Plan whose assets are proposed to be invested in the Pooled Fund subsequent to the implementation of the arrangement, and such Plan has not previously authorized the arrangement, the Plan's investment in the Pooled Fund will be subject to the prior written authorization of an authorizing Plan fiduciary who is independent of FACM and its affiliates.

7. All authorizations for covered transactions will be terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice of termination. A form expressly providing an election to terminate the authorization (Termination Form), with instructions on the use of the form, must be supplied to the authorizing fiduciary no less than annually. The instructions for the Termination Form must include the following information:

(1) The authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by FACM of written notice from the authorizing fiduciary or other Plan official having authority to terminate the authorization; and

(2) failure to return the form will result in the continued authorization of FACM to engage in the covered transactions on behalf of the Plan.

Within three (3) months before an authorization is made, the authorizing Plan fiduciary will be furnished with any reasonably available information that FACM believes to be necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption (if granted), the Termination Form, a description of FACM's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

In addition, FACM will furnish the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten (10) business days of the securities transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10; or

(2) At least once every three (3) months, and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the Plan during the three-month period covered by the report;

(B) The total of all securities transaction-related charges incurred by the Plan during such period in connection with such covered transactions; and

(C) The amount of the securities transaction-related charges retained by FACM and the amount of such charges paid to other persons for execution or other services.

For this purposes, the words "incurred by the Plan" shall be construed to mean "incurred by the Pooled Fund" when FACM engages in covered transactions on behalf of a Pooled Fund in which the Plan participates.

8. The authorizing Plan fiduciary will be furnished with a summary of the information described in Paragraph 7 above at least once per year. This summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the Plan during the period in connection with covered securities transactions;

(2) The amount of the securities transaction-related charges retained by FACM and the amount of these charges



paid to other persons for execution or other services;

(3) A description of FACM's brokerage placement practices, if such practices have materially changed during the period covered by the summary;

(4) (i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in discharging its duty of prudence. These requirements will be met if the "annualized portfolio turnover ratio," calculated in the manner described below, is contained in the summary;

(ii) The "annualized portfolio turnover ratio" shall be calculated as a percentage of the Plan assets consisting of securities or cash over which FACM had discretionary investment authority, or with respect to which FACM rendered, or had any responsibility to render, investment advice (the "portfolio") at any time or times ("management period(s)") during the period covered by the report. First, the "portfolio turnover ratio" (not annualized) must be obtained by dividing (A) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (B) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average will be calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less will be excluded from both the numerator and the denominator.

The "annualized portfolio turnover ratio" will be derived by multiplying the "portfolio turnover ratio" by an annualizing factor. The annualizing factor will be obtained by dividing (C) the number twelve (12) by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

The information described above will not be required in any case where FACM or an affiliate has not exercised discretionary authority over trading in the Plan's account during the period covered by the report.

For purposes of the above description of information to be included in any summary report, the words "incurred by the Plan" shall be construed to mean "incurred by the Pooled Fund" when FACM engages in covered transactions

on behalf of a Pooled Fund in which the Plan participates.

9. If the covered transaction is an agency cross transaction, certain additional conditions must also be satisfied, unless the person effecting or executing the transaction:

(i) Does not render investment advice to any Plan for a fee within the meaning of section 3(21)(A)(ii) of the Act with respect to the transaction;

(ii) Is not otherwise a fiduciary who has investment discretion with respect to any Plan assets involved in the transaction (see 29 CFR 2510.3-21(d)); and

(iii) Does not have the authority to engage, retain or discharge any person who is, or is proposed to be, a fiduciary regarding any such Plan assets.

These additional conditions require that the information submitted to an authorizing Plan fiduciary include a statement to the effect that, with respect to any agency cross transactions, FACM will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions. In addition, the summary information furnished to authorizing Plan fiduciaries at least once per year must include a statement identifying the total number of agency cross transactions during the period covered by the summary, and the total amount of all commissions or other remuneration received or to be received from all sources by PAS in connection with those transactions during the period.

With respect to any agency cross transaction, FACM may have the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to a covered transaction, but not both.<sup>23</sup> Any agency cross transaction must be a purchase or sale for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available. The agency cross

<sup>23</sup> The Department notes that no relief is being provided in this proposed exemption for agency cross transactions beyond that already provided in PTCE 86-128, under the conditions required therein.

The Department notes further that cross-trading transactions could result in violations of one or more provisions of Part 4 of Title I of the Act. Section 406(b)(2) provides that a fiduciary may not act in any transaction involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Where an investment manager has investment discretion with respect to both sides of a cross-trade of securities and at least one side is an employee benefit plan account, the Department has previously taken the position that a violation of section 406(b)(2) of the Act would occur (see *Reich v. Strong Capital Management Inc.*, No. 96-C-0669, USDC E.D. Wis. (June 6, 1996).

transaction must be executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

10. In summary, the applicant represents that the proposed transactions will meet the statutory criteria of section 408(a) of the Act because, among other things:

(a) The Plans will be able to maximize their returns from engaging in securities transactions by improving the execution of such transactions, and paying lower brokerage commissions, by using broker-dealers affiliated with FACM, the Plans' investment manager; and

(b) The Plans will engage in the covered transactions under terms and conditions which are virtually identical to those required for transactions covered by PTCE 86-128.

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

#### General Information

The attention of interested persons is directed to the following:

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

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

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

is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 14th day of December, 1999.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 99-47;  
Exemption Application No. D-10688, et al.]

### Grant of Individual Exemptions; Bankers Trust Co., (BTC), et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) 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).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any

interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

### Bankers Trust Company (BTC) Located in New York, New York

[Prohibited Transaction Exemption 99-47;  
Exemption Application Nos. D-10688 through D-10691]

### Exemption

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 the execution by certain employee benefit plans (the Plans) investing in Transwestern Office Partners II, L.P. (the LP) of a partner agreement and estoppel (the Estoppel) under which the Plans agree to honor capital calls made to the Plans by BTC as the representative of certain lenders (the Lenders) that will fund a so-called "credit facility" providing credit to the LP in connection with the Plans' capital commitments to the LP where the LP has granted to BTC security interests in the capital commitments, and where the Lenders are parties in interest with respect to the Plans; provided that (a) the grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (b)

the decisions on behalf of each Plan to invest in the LP and to execute such grants and agreements 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.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on September 24, 1999 at 64 FR 51794.

**WRITTEN COMMENTS:** The Department received one written comment, which was submitted by the applicant to correct a typographical error that appeared in the Notice. The applicant notes that the first sentence of paragraph 6 of the Summary of Facts and Representations (the Summary) should read as follows: "BTC will become agent for a group of Lenders providing a \$37 million revolving Credit Facility to the LP." [emphasis added] The Department notes this correction to the information contained in the Summary.

No other comments were received from interested persons. Accordingly, the Department has determined to grant the exemption as proposed.

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

### Information Systems Development, Inc. Employees Profit Sharing Plan (the Plan) Located in Cincinnati, Ohio

[Prohibited Transaction Exemption 99-48;  
Exemption Application No. D-10787]

### Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale by the Plan of certain illiquid limited partnership interests (collectively; the