

Signed at Washington, D.C. this 16th day of May 1997.

Carl Poleskey,

Chief, Branch of Construction Wage Determinations.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Proposed Amendment to Prohibited Transaction Exemptions (PTEs) 90-30 Involving Bear, Stearns & Co. Inc., (D-10245) 90-32 Involving Prudential Securities Incorporated, (D-10246)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of a proposed amendment to the Underwriter Exemptions.¹

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to the

Underwriter Exemptions. The Underwriter Exemptions are individual exemptions that provide relief for the origination and operation of certain asset pool investment trusts and the acquisition, holding and disposition of certain asset backed pass-through certificates representing undivided interests in those investment trusts. The proposed amendment, if granted, would: (1) Modify the definition of "Trust" to include a pre-funding account (the Pre-Funding Account) and a capitalized interest account (the Capitalized Interest Account) as part of the corpus of the Trust; (2) provide retroactive relief for transactions involving asset pool investment trusts containing pre-funding accounts which have occurred on or after January 1, 1992; (3) include in the definition of "Certificate" a debt instrument that represents an interest in a Financial Asset Securitization Investment Trust (FASIT); and (4) make certain changes to the Underwriter Exemptions that would reflect the Department's current interpretation of the Underwriter Exemptions.

DATES: Written comments and requests for a hearing should be received by the Department on or before July 7, 1997.

EFFECTIVE DATE: If adopted, the proposed amendment to the Underwriter Exemptions would be effective for transactions occurring on or after January 1, 1992, except as otherwise provided in subsection II.A.(7) and section III.AA. of the proposed exemption.

ADDRESSES: All written comments and requests for a hearing (preferably at least three copies) should be sent to: Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Attn: Proposed Amendment to PTEs 90-30, 90-32, et al. The applications pertaining to the amendment proposed herein and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Administration, U. S. Department of Labor, Room N-5638, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Wendy McColough of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed exemption to amend PTEs 90-30, 55 FR 21461 (May 24, 1990) and 90-32, 55 FR 23147 (June 6, 1990), two of the Underwriter

Exemptions. The Underwriter Exemptions are a group of individual exemptions that provide substantially identical relief for the operation of certain asset pool investment trusts and the acquisition and holding by plans of certain asset-backed pass-through certificates representing interests in those trusts. These exemptions provide relief from certain of the restrictions of sections 406(a), 406(b) and 407(a) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of certain provisions of section 4975(c)(1) of the Code.

The proposed amendment was requested by application dated March 25, 1996, and as restated in a later submission dated February 26, 1997, on behalf of Bear, Stearns & Co. Inc.² and Prudential Security Inc.³ (the Applicants). In preparing the application, the Applicants received input from members of the PSA. The Bond Market Trade Association (formerly the Public Securities Association) (PSA).

The Department is proposing the amendment to these individual exemptions pursuant to 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).⁴ In addition, the Department is proposing to provide the same relief on its own motion pursuant to the authority described above for many of the other Underwriter Exemptions which have substantially similar terms and conditions.⁵ The Department is also proposing to provide the same relief to Ironwood Capital Partners Ltd. (D-10424) and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (D-10433), which received the

² PTE 90-30, 55 FR 21461 (May 24, 1990). Bear, Stearns & Co. Inc. (Bear, Stearns) is an international investment banking firm which engages in securities transactions as both a principal and agent and which provides a broad range of underwriting, research and financial services to its clients.

³ PTE 90-32, 55 FR 23147 (June 6, 1990). PTE 90-32 was granted to Prudential-Bache Securities, Inc. which subsequently changed its corporate name to Prudential Securities Incorporated (Prudential). Prudential is a full service securities broker-dealer and investment banking firm.

⁴ Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, 5 U.S.C. App. 1 [1995]) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. In the discussion of the exemption, references to section 406 and 408 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

⁵ In this regard, the entities who received the other Underwriter Exemptions were contacted concerning their participation in this amendment process.

¹ The term "Underwriter Exemptions" refers to the following individual Prohibited Transaction Exemptions (PTEs): PTE 89-88, 54 FR 42582 (October 17, 1989); PTE 89-89, 54 FR 42569 (October 17, 1989); PTE 89-90, 54 FR 42597 (October 17, 1989); PTE 90-22, 55 FR 20542 (May 17, 1990); PTE 90-23, 55 FR 20545 (May 17, 1990); PTE 90-24, 55 FR 20548 (May 17, 1990); PTE 90-28, 55 FR 21456 (May 24, 1990); PTE 90-29, 55 FR 21459 (May 24, 1990); PTE 90-30, 55 FR 21461 (May 24, 1990); PTE 90-31, 55 FR 23144 (June 6, 1990); PTE 90-32, 55 FR 23147 (June 6, 1990); PTE 90-33, 55 FR 23151 (June 6, 1990); PTE 90-36, 55 FR 25903 (June 25, 1990); PTE 90-39, 55 FR 27713 (July 5, 1990); PTE 90-59, 55 FR 36724 (September 6, 1990); PTE 90-83, 55 FR 50250 (December 5, 1990); PTE 90-84, 55 FR 50252 (December 5, 1990); PTE 90-88, 55 FR 52899 (December 24, 1990); PTE 91-14, 55 FR 48178 (February 22, 1991); PTE 91-22, 56 FR 03277 (April 18, 1991); PTE 91-23, 56 FR 15936 (April 18, 1991); PTE 91-30, 56 FR 22452 (May 15, 1991); PTE 91-62, 56 FR 51406 (October 11, 1991); PTE 93-31, 58 FR 28620 (May 5, 1993); PTE 93-32, 58 FR 28623 (May 14, 1993); PTE 94-29, 59 FR 14675 (March 29, 1994); PTE 94-64, 59 FR 42312 (August 17, 1994); PTE 94-70, 59 FR 50014 (September 30, 1994); PTE 94-73, 59 FR 51213 (October 7, 1994); PTE 94-84, 59 FR 65400 (December 19, 1994); PTE 95-26, 60 FR 17586 (April 6, 1995); PTE 95-59, 60 FR 35938 (July 12, 1995); PTE 95-89, 60 FR 49011 (September 21, 1995); PTE 96-11, 61 FR 3490 (January 31, 1996); PTE 96-22, 61 FR 14828 (April 3, 1996); PTE 96-84, 61 FR 58234 (November 13, 1996); PTE 96-92, 61 FR 66334 (December 17, 1996); PTE 96-94, 61 FR 68787 (December 30, 1996); PTE 97-05, 62 FR 1926 (January 14, 1997); and PTE 97-28, 62 FR (Norwest Investment Services).

In addition, the Department notes that it is also proposing individual exemptive relief for Ironwood Capital Partners Ltd., Final Authorization Number (FAN) 97-02E and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc., FAN 97-03E, which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62.

approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62.

Amendment to the Exemptions

The Applicants state that the proposed amendment is requested in order to modify the definition of Trust contained in the Underwriter Exemptions to include a Pre-Funding Account and a related Capitalized Interest Account, both consisting of cash or temporary investments made therewith (as further described herein). This would permit the Trust to acquire a portion (not to exceed the limitations set forth below) of its assets during an interim period (the Pre-Funding Period), following the closing date of the Trust under the pooling and servicing agreement or trust agreement pursuant to which the Trust is established (the Closing Date). Allowing a portion of the Trust's assets to be acquired during the Pre-Funding Period would be an alternative to requiring that all of the receivables to be held in the Trust be transferred or constitute a fixed pool of assets as of the Closing Date.⁶ The characteristics of the receivables to be acquired during the Pre-Funding Period will be substantially similar to the characteristics of the receivables conveyed to the Trust as of the Closing Date.

Additionally, the Applicants request that the proposed amendment include in the definition of "Certificate" a debt instrument that represents an interest in a FASIT provided that each of the applicable requirements of the Underwriter Exemptions are met. The Applicants also request that the Department update the Underwriter Exemptions to reflect: (1) those features which the Department has already approved in recently granted Underwriter Exemptions; (2) certain other technical corrections or clarifications; and (3) provisions authorizing yield supplement agreements or similar yield maintenance arrangements.⁷

⁶The Department is of the view that the term "Trust" under the Underwriter Exemptions would include a Trust: (a) the assets of which, although all specifically identified by the sponsor or originator as of the Closing Date, are not all transferred to the Trust on the Closing Date for administrative or other reasons but will be transferred to the Trust shortly after the Closing Date, or (b) with respect to which certificates are not purchased by plans until after the end of the Pre-Funding Period at which time all receivables are contained in the Trust.

⁷In a July 14, 1994 letter to Richard A. Gilbert, Esq. of Orrick, Herrington & Sutcliffe, the Department expressed the view that the definition of "Trust" in PTE 90-23, 55 FR 20545 (May 17,

The Underwriter Exemptions

The Underwriter Exemptions permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts:⁸ (1) single and multi-family residential or commercial mortgage investment trusts; (2) motor vehicle receivables investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.¹⁰ Residential and commercial mortgage investment trusts may include mortgages on ground leases of real property. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the terms of such mortgages.¹¹

Each Trust is established under a pooling and servicing agreement or an equivalent agreement among a sponsor, a servicer, and a trustee. Prior to the Closing Date under the pooling and servicing agreement, the sponsor and/or the servicer selects receivables from the classes of assets described in Section

1990) includes yield supplement agreements or similar yield maintenance arrangements which obligates the sponsor, master servicer or another party specified in the pooling and servicing agreement to supplement the interest rates otherwise payable on the obligations that are held in the Trust, provided that such arrangements do not involve swap agreements or other notional principal contracts.

⁸A given trust may include receivables of the type described below in one or more of the categories of trusts discussed herein.

⁹The Department notes that PTE 83-1 (48 FR 895, January 7, 1983), a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. The Underwriter Exemptions provide relief for single-family residential mortgages because the applicants preferred one exemption for all trusts of similar structure. However, the applicants have stated that they may still avail themselves of the exemptive relief provided by PTE 83-1.

¹⁰Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts may be plan assets.

¹¹Trust assets may also include obligations that are secured by leasehold interests on residential real property. See PTE 90-32 involving Prudential-Bache Securities, Inc. (55 FR 23147, at 23150, June 6, 1990).

III.B.(1)(a)-(f) of the Underwriter Exemptions to be included in a Trust, establishes the Trust and designates an independent entity as trustee for the Trust. Typically, on or prior to the Closing Date, the sponsor acquires legal title to all assets selected for the Trust. In some cases, legal title to some or all of such assets continue to be held by the originator of the receivables until the Closing Date. On the Closing Date, the sponsor and/or the originator conveys to the Trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the Trust assets.

Since the receivables to be held in the Trust were all transferred as of the Closing Date, no exemptive relief was requested under the Underwriter Exemptions for the Trust to hold any cash, or temporary investments made therewith, other than cash representing undistributed proceeds from payments of principal and interest by obligors under the receivables. However, in the past several years, the transactions relating to the funding of the Trust have changed.

Pre-Funding Accounts

The Applicants represent that while many transactions still occur as described in the applications for the Underwriter Exemptions and as summarized above, it is also common for other transactions to be structured using a Pre-Funding Account and/or a Capitalized Interest Account as described below. Pre-Funding Accounts allow the sponsor additional time after the Closing Date to assemble the files for receivables, complete quality control or other due-diligence procedures and deliver the necessary documents to the trustee. The sale of certificates prior to the origination of such receivables provides a mechanism for both the originator and/or sponsor and plans to protect against fluctuations in interest rates. Since many transaction costs are fixed regardless of the size of the receivables pool, the sale of additional receivables lowers the unit costs of the transaction, both for the originators and/or the sponsor and for plans (who otherwise might not be able to purchase the same volume of receivables on their own at a comparable unit price).

Pre-Funding Accounts allow originators and/or sponsors to reduce costs by permitting the sale of the existing receivables and delivery of additional receivables without the need to warehouse the existing receivables during the period that the additional receivables are being acquired. The Applicants state that all of these uses of Pre-Funding Accounts make

transactions more efficient, thereby reducing costs and producing better execution for both sponsors and/or originators and plan investors. Also, through the use of a Pre-Funding Account, sponsors and/or originators are able to sell, and plans are able to purchase, more securities at then current market rates than would be the case in the absence of the Pre-Funding Account.

The Applicants assumed that the use of a Pre-Funding Account was authorized under the original Underwriter Exemptions and transactions including Pre-Funding Accounts have occurred since January 1, 1992. The Applicants therefore request retroactive relief for transactions involving Trusts containing Pre-Funding Accounts. The Applicants state that transactions involving Pre-Funding Accounts which have occurred on or after January 1, 1992 but prior to the date of this proposed amendment, were entered into by the parties under a good faith belief that the Department had sanctioned such use.

The Applicants represent that they are unaware of any circumstances in which the use of pre-funding has harmed plan investors and there is no evidence of any failure of a sponsor to meet its representations as to the characteristics of the subsequently acquired receivables or of any down-grading of a certificate rating at the end of the Pre-Funding Period. PSA has canvassed its members who have been granted an Underwriter Exemption and have solicited this same information from four nationally recognized rating agencies referred to in the Underwriter Exemptions. No such underwriter or rating agency is aware of any transaction where the rating of the certificates has been down-graded at the end of the Pre-Funding Period solely as a consequence of use of a pre-funding mechanism.

The Pre-Funding Period for any Trust will be defined as the period beginning on the Closing Date and ending on the earliest to occur of (i) the date on which the amount on deposit in the Pre-Funding Account is less than a specified dollar amount, (ii) the date on which an event of default occurs under the related pooling and servicing agreement¹² or (iii) the date which is the later of three

months or ninety days after the Closing Date. If pre-funding is used, cash sufficient to purchase the receivables to be transferred after the Closing Date will be transferred to the Trust by the sponsor or originator on the Closing Date. During the Pre-Funding Period, such cash and temporary investments, if any, made therewith will be held in a Pre-Funding Account and used to purchase the additional receivables, the characteristics of which will be substantially similar to the characteristics of the receivables transferred to the Trust on the Closing Date. Certain specificity and monitoring requirements described below must be met and will be disclosed in the pooling and servicing agreement and/or the prospectus¹³ or private placement memorandum.

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

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

Generally, the receivables are transferred at par value, unless the interest rate payable on the receivables is not sufficient to service both the interest rates to be paid on the certificates and the transaction fees (i.e., servicing fees, trustee fees and fees to credit support providers). In such cases, the receivables are sold to the Trust at a discount, based on an objective, written, mechanical formula which is set forth in the pooling and servicing agreement and agreed upon in advance between the sponsor, the rating agency and any credit support provider or other insurer. The proceeds payable to the sponsor from the sale of the receivables transferred to the trust may also be reduced to the extent they are used to pay transaction costs (which typically include underwriting or placement agent fees and legal and accounting fees). In addition, in certain cases, the sponsor may be required by the rating agencies or credit support providers to set up trust reserve accounts to protect the certificateholders against credit losses.

The exemptive relief requested for Pre-Funding Accounts is limited to those Trusts where the percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered (the Pre-Funding Limit) does not exceed 25% for transactions occurring on or after the date the proposed amendment is published in the **Federal Register** and did not exceed 40% for transactions occurring on or after January 1, 1992, but prior to the date the proposed amendment is published in the **Federal Register**. The Pre-Funding Limit (which may be expressed as a ratio or as a stated percentage or a combination thereof) will be specified in the prospectus or the private placement memorandum.

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

¹² The minimum dollar amount is generally the dollar amount below which it becomes too uneconomical to administer the Pre-Funding Account. An event of default under the pooling and servicing agreement generally occurs when: (i) a breach of a covenant or a breach of a representation and warranty concerning the sponsor, the servicer or certain other parties occurs which is not cured; (ii) there occurs a failure to make required payments to certificateholders; or (iii) the servicer becomes insolvent.

¹³ References to the term "prospectus" herein shall include any related prospectus supplement thereto, pursuant to which certificates are offered to investors.

A dramatic change in interest rates on the receivables held in a Trust using a Pre-Funding Account would be handled as follows. If the receivables (other than those with adjustable or variable rates) had already been originated prior to the Closing Date, no action would be required as the fluctuations in market interest rates would not affect the receivables transferred to the Trust after the Closing Date. In contrast, if interest rates fall after the Closing Date, loans originated after the Closing Date will tend to be originated at lower rates, with the possible result that the receivables will not support the certificate pass-through rate. In such situations, the sponsor could sell the receivables into the Trust at a discount and more receivables will be used to fund the Trust in order to support the pass-through rate. In a situation where interest rates drop dramatically and the sponsor is unable to provide sufficient receivables at the requisite interest rates, the pool of receivables would be closed. In this latter event, under the terms of the pooling and servicing agreement, the certificateholders would receive a repayment of principal from the unused cash held in the Pre-Funding Account. In transactions where the certificate pass-through rates are variable or adjustable, the effects of market interest rate fluctuations are mitigated. In no event will fluctuations in interest rates payable on the receivables affect the pass-through rate for fixed rate certificates.

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

The Capitalized Interest Account

The Applicants state that in certain transactions where a Pre-Funding Account is used, the sponsor and/or originator may also transfer to the Trust additional cash on the Closing Date,

which is deposited in a Capitalized Interest Account and used during the Pre-Funding Period to compensate the certificateholders for any shortfall between the investment earnings on the Pre-Funding Account and the pass-through interest rate payable under the certificates.

The Capitalized Interest Account is needed in certain transactions since the certificates are supported by the receivables and the earnings on the Pre-Funding Account, and it is unlikely that the investment earnings on the Pre-Funding Account will equal the interest rates on the certificates (although such investment earnings will be available to pay interest on the certificates). The Capitalized Interest Account funds are paid out periodically to the certificateholders as needed on distribution dates to support the pass-through rate. In addition, a portion of such funds may be returned to the sponsor from time to time as the receivables are transferred into the Trust and the need for the Capitalized Interest Account diminishes. Any amounts held in the Capitalized Interest Account generally will be returned to the sponsor and/or originator either at the end of the Pre-Funding Period or periodically as receivables are transferred and the proportionate amount of funds in the Capitalized Interest Account can be reduced. Generally, the Capitalized Interest Account terminates no later than the end of the Pre-Funding Period. However, there may be some cases where the Capitalized Interest Account remains open until the first date distributions are made to certificateholders following the end of the Pre-Funding Period.

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

Pre-Funding Account and Capitalized Interest Account Payments and Investments

Pending the acquisition of additional receivables during the Pre-Funding Period, it is expected that amounts in the Pre-Funding Account and the Capitalized Interest Account will be invested in certain permitted investments or will be held uninvested.

Pursuant to the pooling and servicing agreement, all permitted investments must mature prior to the date the actual funds are needed. The permitted types of investments in the Pre-Funding Account and Capitalized Interest Account are investments which are either: (i) Direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States or (ii) have been rated (or the obligor has been rated) in one of the three highest generic rating categories by Standard and Poor's Structured Rating Group, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co. or Fitch Investors Service, L.P. (each a rating agency or collectively, the rating agencies), as set forth in the pooling and servicing agreement and as required by the rating agencies. The credit grade quality of the permitted investments is generally no lower than that of the certificates. The types of permitted investments will be described in the pooling and servicing agreement.

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

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

In order to ensure that there is sufficient specificity as to the representations and warranties of the sponsor regarding the characteristics of the receivables to be transferred after the Closing Date, the Applicants have represented that:

(i) All such receivables will meet the same terms and conditions for eligibility as those of the original receivables used to create the Trust corpus (as described in the prospectus or private placement memorandum and/or pooling and

servicing agreement for such certificates), which terms and conditions have been approved by a rating agency. However, the terms and conditions for determining the eligibility of a receivable may be changed if such changes receive prior approval either by a majority vote of the outstanding certificateholders or by a rating agency;¹⁴

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

(iii) The weighted average annual percentage interest rate (the average interest rate) for all of the obligations in the Trust at the end of the Pre-Funding Period will not be more than 100 basis points lower than the average interest rate for the obligations which were transferred to the Trust on the Closing Date;

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

In order to ensure that the characteristics of the receivables actually acquired during the Pre-Funding Period are substantially similar to receivables that were acquired as of the Closing Date, the Applicants represent that for transactions occurring on or after the date of publication of the proposed exemption, the characteristics of the additional obligations subsequently acquired will either be monitored by a credit support provider or other insurance provider which is independent of the sponsor or an

independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the rating agency, the underwriter and the trustees) stating whether or not the characteristics of the additional obligations acquired after the Closing Date conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the Closing Date.

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

FASITs

The Applicants request that exemptive relief apply to FASITs which are trusts, provided that each of the other applicable requirements of the Underwriter Exemption are met. FASITs are a new type of statutory entity created by the Small Business Job Protection Act of 1996 (SBA) through amendments to the Code effective on September 1, 1997.¹⁵ FASITs are designed to facilitate the securitization¹⁶ of debt obligations, such as credit card receivables, home equity loans, and auto loans, and thus allows certain features such as revolving pools of assets, trusts containing unsecured receivables and certain hedging types of investments. A FASIT is not a taxable entity and debt

instruments issued by such trusts, which might otherwise be recharacterized as equity, will be treated as debt in the hands of the holder for tax purposes.

The Applicants represent that the rationale set forth in the Department's statements regarding REMICs, which were published in the **Federal Register** with respect to several of the earlier Underwriter Exemptions also apply to FASITs. However, the Applicants note that the representation in the Underwriter Exemptions¹⁷ regarding the tax requirement that a Trust must be maintained as an essentially passive entity would not be true for all FASITs, as they are allowed under the Code to have revolving pools of permitted assets. The Applicants are only requesting exemptive relief for FASITs that are, in fact, passive in nature, which would preclude (in the absence of other exemptive relief) revolving asset pools. Thus, only FASITs with assets which were comprised of secured debt and which did not allow revolving pools of assets or hedging investments not specifically authorized by the Underwriter Exemptions would be permissible under the proposed amendment.

Parties to Transactions

The originator of a receivable is the entity that initially lends money to a borrower (obligor), such as a homeowner or automobile purchaser, or leases property to a lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a Trust sponsor.

Originators of receivables included in the Trust will be entities that originate receivables in the ordinary course of their business, including finance companies for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service

¹⁴ In some transactions, the insurer and/or credit support provider may have the right to veto the inclusion of receivables, even if such receivables otherwise satisfy the underwriting criteria. This right usually takes the form of a requirement that the sponsor obtain the consent of these parties before the receivables can be included in the Trust. The insurer and/or credit support provider may, therefore, reject certain receivables or require that the sponsor establish certain Trust reserve accounts as a condition of including these receivables. Virtually all Trusts which have insurers or other credit support providers are structured to give such veto rights to these parties. The percentage of Trusts that have insurers and/or credit support providers, and accordingly feature such veto rights, varies.

¹⁵ Section 1621 of the SBA adds sections 860H, 860I, 860J, 860K and 860L to the Internal Revenue Code of 1986.

¹⁶ Securitization is the process of converting one type of asset into another and generally involves the use of an entity separate from the underlying assets. In the case of securitization of debt instruments, the instruments created in the securitization typically have different maturities and characteristics than the debt instruments that are securitized.

¹⁷ For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a short time after the issuance of trust certificates (within 120 days, except in the case of obligations having an original term of 30 years, in which case the period will not exceed two years). Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

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

enterprise for whom such origination is an incidental part of its operations. Each Trust may contain assets of one or more originators. The originator of the receivables may also function as the Trust sponsor or servicer.

The sponsor will be one of three entities: (i) a special-purpose or other corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the Trust, designating the trustee, and assigning the receivables to the trust. The trustee of a Trust is the legal owner of the obligations in the Trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the Trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

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

The servicer of a Trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a Trust, the receivables may be "subserviced" by their respective originators and a single entity may "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers

and passes them through to certificateholders.

The underwriter will be a registered broker-dealer that acts as underwriter or placement agent with respect to the sale of the certificates. Public offerings of certificates are generally made on a firm commitment basis. Private placement of certificates may be made on a firm commitment or agency basis. It is anticipated that the lead and co-managing underwriters will make a market in certificates offered to the public.

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

Certificate Price, Pass-Through Rate and Fees

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

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

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

The pass-through rate for certificates is equal to the interest rate on receivables included in the Trust minus a specified servicing fee.¹⁸ This rate is

¹⁸ The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

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

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

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

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

Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the Trust are due. In some cases, the pooling and servicing agreement may

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

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

Purchase of Receivables by the Servicer

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

The purchase price of a receivable is specified in the pooling and servicing agreement and will be at least equal to either: (1) The unpaid principal balance

on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer; or (2) the greater of (a) the amount in (1) or (b) the fair market value of such obligations in the case of a REMIC, or the fair market value of the receivables in the case of a trust that is not a REMIC.

Certificate Ratings

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

Provision of Credit Support

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

If the master servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover delinquent payments, or otherwise fails in its duties, the trustee would be required and would be able to

enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the Trust estate, including rights under the credit support mechanism. Therefore, the trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

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

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

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

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

independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee; and

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

Disclosure

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

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates and the fact that principal amounts left in the Pre-Funding Account at the end of the Pre-Funding Period will be paid to certificateholders as a repayment of principal.

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

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

(d) A description of the receivables contained in the Trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects, and a description of any Pre-Funding Account used or Capitalized Interest Account used in connection with a Pre-Funding Account;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a

description of the seller's principal representations and warranties as to the Trust assets, including the terms and conditions for eligibility of any receivables transferred during the Pre-Funding Period and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; a description of permitted investments for any Pre-Funding Account or Capitalized Interest Account; identification of the servicing compensation and a description of any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

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

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

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

(k) A statement as to the duration of any Pre-Funding Period and the Pre-Funding Limit for the Trust.

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

In the case of a Trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some Trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many Trusts obtain, by application to the Securities and Exchange Commission,

relief from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such relief is obtained, these Trusts normally would continue to have the obligation to file current reports on Form 8-K to report material developments concerning the Trust and the certificates and copies of the statements sent to certificateholders. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a Trust will be filed to the extent required under the Securities Exchange Act of 1934.

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

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

Secondary Market Transactions

It is the Underwriter's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter, and it is the underwriter's intention to make a market for any certificates for which the Underwriter is a lead or co-managing underwriter. At times the Underwriter will facilitate sales by investors who purchase certificates if the Underwriter has acted as agent or principal in the original private placement of the certificates and if such investors request the Underwriter's assistance.

Summary

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

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

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

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

(d) All transactions for which the Underwriter seeks exemptive relief will be governed by the pooling and servicing agreement, the principal provisions of which are described in the prospectus or private placement memorandum and which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

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

(f) The Underwriter has made and anticipates that it will continue to make, a secondary market in certificates.

Notice to Interested Persons

The applicant represents that because those potentially interested participants

and beneficiaries cannot all be identified, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 45 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

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 section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and 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 require, among other things, a fiduciary to discharge his or her 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 requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption can be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interest of the plans and of their participants and beneficiaries and protective of the rights of participants and beneficiaries of the plans;

(3) The proposed amendment, 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 amendment, 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.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the proposed amendment to the address above, within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed amendment. Comments received will be available for public inspection with the referenced applications at the address set forth above.

Proposed Exemption

Under section 408(a) of ERISA 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), the Department proposes to amend the following individual Prohibited Transaction Exemptions (PTEs): PTE 89-88, 54 FR 42582 (October 17, 1989); PTE 89-89, 54 FR 42569 (October 17, 1989); PTE 89-90, 54 FR 42597 (October 17, 1989); PTE 90-22, 55 FR 20542 (May 17, 1990); PTE 90-23, 55 FR 20545 (May 17, 1990); PTE 90-24, 55 FR 20548 (May 17, 1990); PTE 90-28, 55 FR 21456 (May 24, 1990); PTE 90-29, 55 FR 21459 (May 24, 1990); PTE 90-30, 55 FR 21461 (May 24, 1990); PTE 90-31, 55 FR 23144 (June 6, 1990); PTE 90-32, 55 FR 23147 (June 6, 1990); PTE 90-33, 55 FR 23151 (June 6, 1990); PTE 90-36, 55 FR 25903 (June 25, 1990); PTE 90-39, 55 FR 27713 (July 5, 1990); PTE 90-59, 55 FR 36724 (September 6, 1990); PTE 90-83, 55 FR 50250 (December 5, 1990); PTE 90-84, 55 FR 50252 (December 5, 1990); PTE 90-88, 55 FR 52899 (December 24, 1990); PTE 91-14, 55 FR 48178 (February 22, 1991); PTE 91-22, 56 FR 03277 (April 18, 1991); PTE 91-23, 56 FR 15936 (April 18, 1991); PTE 91-30, 56 FR 22452 (May 15, 1991); PTE 91-62, 56 FR 51406 (October 11, 1991); PTE 93-31, 58 FR 28620 (May 5, 1993); PTE 93-32, 58 FR 28623 (May 14, 1993); PTE 94-29, 59 FR 14675 (March 29, 1994); PTE 94-64, 59 FR 42312 (August 17, 1994); PTE 94-70, 59 FR 50014 (September 30, 1994); PTE 94-73, 59 FR 51213 (October 7, 1994); PTE 94-84, 59 FR 65400 (December 19, 1994); PTE 95-26, 60 FR 17586 (April 6, 1995); PTE 95-59, 60 FR 35938 (July 12, 1995); PTE 95-89, 60 FR 49011 (September 21, 1995); PTE 96-11, 61 FR 3490 (January 31, 1996); PTE 96-22, 61 FR 14828 (April 3, 1996); PTE 96-84, 61 FR 58234 (November 13, 1996); PTE 96-92, 61 FR 66334 (December 17, 1996); PTE 96-94, 61 FR 68787 (December 30, 1996); PTE 97-05, 62 FR 1926 (January 14, 1997);

and PTE 97-, 62 FR (Norwest Investment Services)(collectively, the Underwriter Exemptions). In addition, the Department is considering granting exemptions to Ironwood Capital Partners Ltd (D-10424) and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (D-10433), which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62.

I. Transactions

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

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

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

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

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.¹⁹

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

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan

assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

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

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold serviced by the same entity.²⁰ For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

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

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

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

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

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus

or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.²¹

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

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

II. General Conditions

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

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

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

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

(4) The trustee is not an affiliate of any other member of the Restricted

¹⁹ Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) of the Act, and regulation 29 CFR 2510.3-21(c).

²⁰ For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

²¹ In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions. For purposes of this Amendment, references to "prospectus" include any related prospectus supplement thereto, pursuant to which certificates are offered to investors.

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

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

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

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

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

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

(c) The transfer of such additional obligations to the trust during the pre-funding period does not result in the certificates receiving a lower credit rating from a rating agency upon termination of the pre-funding period

than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

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

(e) Effective for transactions occurring on or after May 23, 1997, in order to ensure that the characteristics of the receivables actually acquired during the pre-funding period are substantially similar to those which were acquired as of the closing date, the characteristics of the additional obligations will either be monitored by a credit support provider or other insurance provider which is independent of the sponsor or an independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the rating agency, the underwriter and the trustees) stating whether or not the characteristics of the additional obligations conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the closing date;

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

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

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the

case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. "Certificate" means:

(1) A certificate—

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

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

(2) A certificate denominated as a debt instrument—

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

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

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

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

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

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

(c) Obligations that bear interest or are purchased at a discount and which are

secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interests on residential or commercial real property); and/or

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

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

(f) Fractional undivided interests in any of the obligations described in clauses (a)-(e) of this subsection B.(1); ²²

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

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

(b) Cash or investments made therewith which are credited to an account to provide payments to certificateholders pursuant to any yield supplement agreement or similar yield maintenance arrangement to supplement the interest rates otherwise payable on obligations described in subsection III.B.(1) held in the trust, provided that such arrangements do not involve swap agreements or other notional principal contracts; and/or ²³

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

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

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

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

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

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

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

C. "Underwriter" means: (1) An entity defined as an Underwriter in subsection III.C.(1) of each of the Underwriter Exemptions that are being amended by this proposed exemption. In addition, the term Underwriter includes Ironwood Capital Partners Ltd. and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (which received the approval of the Department to engage in transactions substantially similar to the transactions described in the

Underwriter Exemptions pursuant to PTE 96-62);

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

(3) Any member of an underwriting syndicate or selling group of which a person described in subsections III.C.(1) or (2) above is a manager or co-manager with respect to the certificates.

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

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

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

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

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

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

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

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

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

- (1) Each underwriter;
- (2) Each insurer;
- (3) The sponsor;
- (4) The trustee;
- (5) Each servicer;

²² It is the Department's view that the definition of "Trust" contained in subsection III.B. includes a two-tier trust structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues certificates that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

²³ The Department notes that the definition of "Trust" contained in Section III.B. includes cash or investments credited to an account to provide payments to certificateholders pursuant to a yield supplement agreement or similar yield maintenance arrangement to supplement the interest rates otherwise payable on obligations described in section B.(1) held in the trust, provided that such arrangements do not involve swap agreements or other notional principal contracts.

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. “Affiliate” of another person includes:

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

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

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

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

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

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

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

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

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

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

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

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

R. “Reasonable compensation” has the same meaning as that term is defined in 29 CFR 2550.408c–2.

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

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

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

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

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

T. “Qualified Equipment Note Secured By A Lease” means an equipment note:

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

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

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

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

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

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

(3) The trust’s interest in the leased motor vehicle is at least as protective of the trust’s rights as the trust would receive under a motor vehicle installment loan contract.

V. “Pooling and Servicing Agreement” means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, “Pooling and Servicing Agreement” also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. “Rating Agency” means Standard & Poor’s Structured Rating Group, Moody’s Investors Service, Inc., Duff & Phelps Credit Rating Co. or Fitch Investors Service, L.P.

X. “Capitalized Interest Account” means a trust account: (i) which is established to compensate certificateholders for shortfalls, if any, between investment earnings on the pre-funding account and the pass-through rate payable under the certificates; and

(ii) which meets the requirements of clause (c) of subsection III.B.(3).

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

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

AA. “Pre-Funding Limit” means a percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered which is less than or equal to: (i) 40 percent, effective for transactions occurring on or after January 1, 1992, but prior to May 23, 1997; and (ii) 25 percent, for transactions occurring on or after May 23, 1997.

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

IV. Modifications

For the Underwriter Exemptions provided to Residential Funding Corporation, Residential Funding Mortgage Securities, Inc., et. al. and GE Capital Mortgage Services, Inc. and GECC Capital Markets (the Applicants) (PTEs 94–29 and 94–73, respectively);

A. Section III.A. of this proposed amendment is modified to read as follows:

A. “Certificate” means:

(1) A certificate—

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

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

(c) With respect to which (i) one of the Applicants or any of its affiliates is the sponsor, and an entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is similar to this exemption is the sole underwriter or the manager or co-manager of the underwriting syndicate

or a selling or placement agent; or (ii) one of the Applicants or any of its affiliates is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent; or

(2) A certificate denominated as a debt instrument—

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

(b) That is issued by and is an obligation of a trust with respect to which (i) one of the Applicants or any of its affiliates is the sponsor, and an entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is similar to this exemption is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent or (ii) one of the Applicants or any of its affiliates is the sole underwriter or the manager or co-manager of the underwriting syndicate, or a selling or placement agent.

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

B. Section III.C. of this proposed amendment is modified to read as follows:

C. "Underwriter" means:

(1) An entity defined as an Underwriter in subsection III.C.(1) of each of the Underwriter Exemptions that are being amended by this proposed exemption. In addition, the term Underwriter includes Ironwood Capital Partners Ltd. and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62);

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

(3) Any member of an underwriting syndicate or selling group of which a person described in subsections III.C.(1) or (2) above is a manager or co-manager with respect to the certificates; or

(4) An entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is similar to this exemption.

EFFECTIVE DATE: This exemption will be effective for transactions occurring on or after January 1, 1992 except as otherwise provided in subsection II.A.(7) and section III.AA.

Signed at Washington, D.C., this 20th day of May, 1997.

Ivan L. Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 97-28; Exemption Application No. D-10430]

Grant of Individual Exemptions; Norwest Investment Services, Inc.

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, D.C. 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.

Norwest Investment Services, Inc. (NISI) Located in Minneapolis, Minnesota

[Prohibited Transaction Exemption 97-28; Exemption Application No. D-10430]

Exemption

I. Transactions

A. Effective February 12, 1997, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

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

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

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

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

¹ Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person