

*Number of Respondents:* 25.  
*Estimated Time Per Respondent:* 3 minutes.

*Total Burden Hours:* 2.

*Description:* Section 203(b)(1) of the Migrant and Seasonal Agricultural Worker Protection Act requires any person owning or controlling any facility or real property to be occupied by migrant agricultural workers to obtain a certificate of occupancy. Form WH-520 is the form used when the Department of Labor Wage and Hour Division inspects and approves such housing.

*Agency:* Employment Standards Administration.

*Title:* Comparability of Current Work to Coal Mine Employment; Coal Mine Employment Affidavit; Affidavit of Deceased Miner's Condition.

*OMB Number:* 1215-0056.

*Agency Number:* CM-913; CM-918 CM-1093.

*Frequency:* On occasion.

*Affected Public:* Individuals or households.

Form	Number of respondents	Estimated time per respondent	Sub-total burden hours
CM-913 .....	3,600	30 min. ....	1,800
CM-918 .....	100	10 min. ....	17
CM-1093 ....	100	20 min. ....	33
Total Burden Hours.	.....	.....	1,850

*Description:* These forms are used to gather information which is reviewed by the Division of Coal Mine Workers' Compensation to determine eligibility of individuals applying for benefits under the Black Lung Benefits Act. The CM-913 is completed by beneficiaries and claimants and compares non-coal mine work to coal mine work. The CM-918 is completed by persons with knowledge of the miner's coal mine work. The CM-1093 is completed by persons with knowledge of the deceased miners medical condition, when medical evidence is insufficient.

Theresa M. O'Malley,

*Acting Departmental Clearance Officer.*

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**Pension and Welfare Benefits Administration**

[Application No. D-09904, et al.]

**Proposed Exemptions; Aultman Retirement Savings Plan (the Plan)**

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

**ACTION:** Notice of Proposed Exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

**Written Comments and Hearing Requests**

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**Notice to Interested Persons**

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

Aultman Retirement Savings Plan (the Plan), Located in Canton, Ohio

[Application No. D-09904]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed guarantee (the Guarantee) by Aultman Health Services Association (the Employer), the sponsor of the Plan, of amounts due the Plan with respect to four guaranteed investment contracts issued by Confederation Life (Confederation Life), including the Employer's potential cash advances to the Plan (the Advances) pursuant to the Guarantee and the potential repayment of the Advances (the Repayments); provided that the following conditions are satisfied:

(A) All terms of the transactions are no less favorable to the Plan than those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The Plan does not incur any expenses or pay any interest with respect to the transactions;

(C) The Repayments, if any, are restricted to (1) excess Advances made by the Employer, and (2) GIC Proceeds, defined as all amounts actually received

by the Plan with respect to the GICs from Confederation Life, any conservator, trustee or person performing similar functions with respect to Confederation Life or acting as surety or insurer with respect to Confederation Life, and/or any state guaranty fund or other entity paying the obligations of Confederation Life with respect to the GICs;

(D) The Repayments will be made only after the Plan has recovered, through the Advances plus GIC Proceeds, the amount guaranteed by the Employer with respect to the GICs; and

(E) To the extent the Advances exceed GIC Proceeds, repayment of the difference will be waived.

#### Summary of Facts and Representations

**Introduction:** The Plan's assets currently include four guaranteed investment contracts (the GICs) issued by Confederation Life Insurance Company (Confederation). Confederation has been placed in receivership and, consequently, payments and withdrawals with respect to the GICs are prohibited. The Plan sponsor, Aultman Health Services Association (the Employer), proposes to guarantee that in the eventual resolution of the receivership the Plan will recover fully its investments in the GICs, including interest guaranteed under the GICs through their maturity dates and interest after the maturity dates at a rate described below. The exemption proposed herein would enable this guarantee under the terms and conditions described below.

1. The Plan is a defined contribution money purchase pension plan which provides for individual participant accounts (the Accounts), with 3,496 participants and approximately \$42 million in assets as of June 30, 1994. The Plan is sponsored by the Employer, a nonprofit Ohio corporation engaged in the ownership and operation of Aultman Hospital in Canton, Ohio. The trustee of the Plan is the Society National Bank (the Trustee) in Canton, Ohio.

2. Under the terms of the Plan, participants direct individually the investment of their Accounts among several investment options offered by the Trustee, including one option which provides a return based on two items: (a) individual guaranteed investment contracts purchased by the Plan from insurance companies (the GIC Fund); and (b) Plan investments in the EB MaGic Fund (the EB Fund), a large collective investment fund maintained by the Trustee. The Plan is the sole investor in the individual contracts in the GIC Fund, which includes the GICs

issued by Confederation Life, a Canadian life insurance company doing business in the United States through subsidiaries. The GICs were purchased by the Trustee as a general Plan asset before the Plan documents provided for individually-directed investment of the Accounts.

The GICs are identified as follows: (A) Contract no. 61931 purchased on January 5, 1990, principal amount \$500,000; (B) Contract no. 61985 purchased on January 16, 1990, principal amount \$1 million; (C) Contract no. 62754 purchased on April 28, 1993, principal amount \$1 million; and (D) Contract no. 62773 purchased on August 3, 1993, principal amount \$1 million. Each GIC is a non-benefit-responsive contract earning interest, payable annually (the Annual Payments), at a rate specified by its terms (the Contract Rates) over 60 months, at the end of which principal and accrued, unpaid interest are due on a specified date (the Maturity Date) in a final maturity payment (the Maturity Payment). The Employer represents that through 1994, all Annual Payments due under the GICs had been paid.

3. On August 11, 1994 (the Receivership Date), Confederation Life was placed in receivership (the Receivership) pursuant to rehabilitation proceedings by the State of Michigan.<sup>1</sup> Consequently, Confederation Life's assets and operations were frozen, and payments on all its guaranteed investment contracts, including the GICs held by the Plan, were suspended effective as of the Receivership Date. Maturity Payments on two of the GICs were due January 5 and January 16, 1995, but such payments were not made. The Employer represents that it is not known whether, when, or under what terms the Plan will receive any further Annual Payments and Maturity Payments due under the GICs, and further represents that the Plan is exposed to risk of loss on its investment in the GICs.

In order to protect the Accounts from any loss on the Plan's investment in the GICs, the Employer proposes to guarantee that the Plan will recover all amounts due under the GICs, plus post-maturity interest at a rate described below, and in its discretion to make advances to the Plan pursuant to this guarantee. The Employer requests an

<sup>1</sup> The Department notes that the decisions to acquire and hold the GICs are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this proposed exemption, the Department is not proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GICs.

exemption for these transactions under the terms and conditions described herein.

4. The Guarantee: The Employer's proposed guarantee, including the potential advances and repayments of the advances, will be embodied in a written agreement between the Trustee and the Employer (the Agreement). Under the Agreement, the Employer undertakes a guarantee (the Guarantee) that the Plan will recover with respect to each GIC an amount referred to in the Agreement as the GIC's "Current Value", defined as follows: (a) The principal amount invested in the GIC, plus (b) interest thereon through the Maturity Date at the Contract Rate during any period for which the GIC's terms provide for interest at the Contract Rate, plus (c) interest after the Maturity Date (herein referred to as Post-Maturity Interest) at a daily rate of interest equal to one three-hundred-sixty-fifth ( $1/365$ ) of the lesser of (i) the "Index" interest rate that was quoted in the Wall Street Journal on the GIC's issue date for the purchase of a new five-year guaranteed investment contract from an insurance company rated AAA by Standard and Poor's or by Duff & Phelps, or (ii) the GIC's Contract Rate; less (d) GIC Proceeds, defined as all amounts received by the Plan with respect to the GIC from Confederation Life, any conservator, trustee or person performing similar functions with respect to Confederation Life acting as surety or insurer with respect to Confederation Life, and/or any state guaranty fund or other entity otherwise paying the obligations of Confederation Life with respect to the GIC.

Accordingly, when each Maturity Payment becomes due under each GIC, the Employer becomes obligated to pay the Plan (not necessarily on each GIC's Maturity Date, but in no event later than December 31, 2001, as explained below) the difference between the amount of such Maturity Payment then due and the amount of GIC Proceeds, if any, actually received by the Plan with respect to such payment due (the Payment Obligation). After the Maturity Date of each GIC, the amount of any Payment Obligation then assumed by the Employer under the Agreement also includes interest, effective on the Maturity Date prospectively through the date of the Employer's final payment of the Payment Obligation, at the rates for Post-Maturity Interest set forth in the Agreement as described above. The Agreement requires the Trustee to notify the Employer of the amount of the Payment Obligation upon the Plan's failure to receive in full any Maturity Payment. As described below, the

Employer's payment of amounts due the Plan as Payment Obligation under the Agreement will be made from time to time at the discretion of the Employer, and the total Payment Obligation must be paid to the Plan upon final resolution of the Receivership but no later than December 31, 2001.

5. Advances: The Agreement enables (but does not obligate) the Employer at any time to reduce the balance of amounts the Employer owes the Plan under the Guarantee by making "restorative payments" of cash to the Plan. These "restorative payments" (the Advances) are treated under the Agreement as interest-free advances of amounts guaranteed by the Employer under the Agreement. The Employer represents that although the Agreement allows Advances at any time, it expects to fulfill its Guarantee obligations upon eventual resolution of the Receivership, as discussed below, and that interim Advances are anticipated only in the event the Plan encounters unforeseen liquidity problems.

6. Repayments and Final Resolution: Prior to final resolution of the Receivership, any Advances made by the Employer will be repaid immediately to the Employer (the Repayments) if and whenever the total GIC Proceeds plus unrepaid Advances exceeds the GICs' Current Value. A final Repayment will be made to the Employer upon final resolution of the Receivership, if the sum of GIC Proceeds plus unrepaid Advances exceeds the Current Value, in the amount of such excess. The Employer will receive no interest on the amounts repaid under the Agreement.

Upon final resolution of the Receivership, but in no event later than December 31, 2001, if the GICs' Current Value exceeds the sum of total GIC Proceeds plus any Advances by the Employer, then the Employer must make a final Advance in the amount of the difference.

Execution of the Agreement is contingent upon (a) final grant of the exemption proposed herein and (b) execution of a "closing agreement" between the Employer, the Trustee and the Internal Revenue Service pursuant to Revenue Procedure 92-16.

7. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The transactions will protect the Plan against all risk of loss with respect to its investments in the GICs; (2) The Plan will recover all principal invested in the GICs plus all interest due under the GICs' terms; (3) The Plan will not pay any or incur any

expenses with respect to the Advances or the Guarantee; (4) Repayment of the Advances will be limited to GIC Proceeds and excess Advances; and (6) Repayment of the Advances will be waived with respect to the amount by which the Advances exceed the amount the Plan receives from GIC proceeds.

**FOR FURTHER INFORMATION CONTACT:**

Ronald Willett of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Jack, Lyon & Jones, P.A. Profit Sharing Plan (the Plan), Located in Little Rock, AR

[Application No. D-10071]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the (1) proposed purchase by the Plan of certain improved real property (the Property) from Jack, Lyon & Jones, P.A., (the Employer), a party in interest with respect to the Plan; (2) the subsequent leasing (the Lease) of the Property by the Plan to the Employer; and (3) the potential future repurchase of the Property by the Employer from the Plan pursuant to the terms of an option agreement (the Option Agreement).

This proposed exemption is conditioned on the following requirements:

(a) The interests of the Plan with respect to the purchase of the Property, the execution and maintenance of the Lease and the potential repurchase of the Property by the Employer will be represented by First Commercial Trust Company (FCTC) of Little Rock, Arkansas, which will serve as the independent fiduciary.

(b) FCTC does not and will not derive more than one percent of its gross business revenues from the Employer and/or its principals for each fiscal year that it serves as the independent fiduciary for the Plan with respect to the transactions described herein.

(c) FCTC will evaluate the transactions, determine that such transactions are in the best interests of the Plan, and monitor and enforce compliance with the terms and

conditions of the transactions and the exemption, at all times.

(d) The acquisition price for the Property will be paid by the Plan in cash and will be based upon the fair market value of the Property as determined by a qualified, independent appraiser.

(e) The fair market value of the Property will not exceed 25 percent of the assets of the Plan.

(f) The terms of the Lease will remain at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(g) The fair market rental amount will be redetermined every three years that the Lease is in effect by a qualified, independent appraiser who has been selected by FCTC and, FCTC will then make appropriate adjustments to such rent.

(h) The Employer will be obligated for all real estate taxes, utility costs, fees and insurance premiums that are incidental to the Lease.

(i) The Option Agreement will enable the Plan to sell the Property to the Employer in the event that FCTC determines that it is not in the best interest of the Plan to retain the Property.

(j) The Option Agreement will provide that the Employer repurchase the Property from the Plan for cash in an amount which is not less than the greater of (i) the Plan's acquisition cost for the Property or (ii) the fair market value of the Property as determined by a qualified, independent appraiser who has been selected by FCTC.

(k) The Plan will pay no real estate fees, commissions or other expenses in connection with the acquisition of the Property, the administration of the Lease or the repurchase of the Property by the Employer under the Option Agreement.

*Summary of Facts and Representations*

1. The Plan is a defined contribution plan that was established by the Employer on August 1, 1986. As of March 21, 1995, the Plan had 27 participants. As of March 31, 1995, the Plan had total assets of approximately \$837,746. FCTC serves as the Plan trustee as well as the decisionmaker with respect to Plan investments. The Employer, a professional corporation engaged in the practice of law, maintains its principal place of business at 425 West Capitol Avenue, Little Rock, Arkansas.

2. Among the assets of the Employer is a parcel of improved real property which is located at 350 Ardsley Place, Nashville, Tennessee. The Property consists of a 3 bedroom condominium

end unit. The Employer purchased the Property for \$169,900 from Paul J. Reynard, an unrelated party, on September 30, 1994. Since the date of purchase, the Employer has used the Property as a working office and living quarters for visiting attorneys who share time between the Employer's Nashville and Little Rock offices. The Property is not located in close proximity to other real property that is owned by the Employer or its principals.

At present, the Property is encumbered by a mortgage note in the original principal amount of \$169,900. The note was executed between the Employer and Worthen Bank of Arkansas (Worthen), an unrelated party, on September 29, 1994. The note carries interest at 8 1/2 percent per annum and initially required 5 interest only payments beginning October 31, 1994 and continuing at monthly intervals thereafter. Although a final payment of the unpaid principal balance plus accrued interest was to be due and payable on November 2, 1995, it is represented that the note has been extended by the parties under the prior terms and conditions.

3. The Property has been appraised by Mitzi L. Ayers, SRA and Shirley Adkins, MAI, qualified, independent appraisers who are affiliated with the appraisal firm of Adkins & Associates, located in Nashville, Tennessee. Using comparable market values as a basis for their analysis, the appraisers placed the fair market value of the Property at \$170,000 as of January 24, 1995. Again using the sales comparison approach to valuation, the appraisers also placed the fair market rental value of the Property at \$1,600 per month as of January 24, 1995.

4. Because it has assets available for reinvestment, the Plan proposes to purchase the Property from the Employer for cash at its appraised value of \$170,000.<sup>2</sup> The Property will then represent approximately 21 percent of the Plan's assets. Contemporaneously with its purchase of the Property, the Plan will commence leasing the Property to the Employer under the terms of a written lease. The Lease also provides for the Employer's potential repurchase of the Property from the Plan. The Plan will not be required to pay any real estate fees or commissions in connection with its acquisition of the Property, the administration of the Lease or with respect to the future reacquisition of the Property by the

Employer. Accordingly, the employer requests an administrative exemption from the Department under the terms and conditions described herein.

5. The interests of the Plan with respect to the proposed transactions will be represented by FCTC, as the independent fiduciary. Specifically, Mr. Albert M. Crawford, a Certified Employee Benefits Specialist for FCTC, will undertake the duties that are required of the independent fiduciary. Other than serving as the Plan's existing trustee, FCTC represents that it is not related in any way to the Employer or its principals through any common ownership, debt relationship, business dealings or family relationships, nor does it derive (or will it derive) more than one percent of its gross business revenues from the Employer and/or its principals for each fiscal year that it serves as the independent fiduciary for the Plan with respect to the transactions described herein. In addition, FCTC states that it has extensive experience as a fiduciary under the Act and that it acknowledges and accepts the duties, responsibilities and liabilities in acting as a fiduciary with respect to the Plan.

6. The proposed Lease will have a term of 15 years. It may be renewed by the Employer for three, successive five year periods provided the Employer notifies the Plan of its intent to renew 60 days prior to the expiration of the Lease term and it obtains FCTC's approval with respect to each such extension. The Lease provides that the Employer pay the Plan an initial monthly rental of \$1,600 per month. In addition, the Employer is required to pay for all utilities that are associated with the Property, condominium fees, real estate taxes, insurance premiums and maintenance and repairs to the premises.

During every three years that the Lease is in effect, the Property will be reappraised, at the expense of the Employer, by a qualified, independent appraiser who has been selected by FCTC. FCTC will then adjust the rental for the Property. In the event that the adjusted rental amount is less than the rental paid by the Employer during the previous three year period, the Employer will pay the Plan the prior rental amount.

7. The Lease also contains a provision which authorizes FCTC to require the Employer to purchase the Property from the Plan under the terms of an Option Agreement. Any purchase of the Property pursuant to the Option Agreement will be for a cash amount that is not less than the greater of (a) The Plan's original acquisition price for the Property or (b) the fair market value of

the Property as determined by a qualified, independent appraiser who has been selected by FCTC. FCTC may exercise the option only after it has determined that it is in the best interests of the Plan and its participants and beneficiaries. Notice of the exercise of the option must be presented to the Employer in writing before its expiration. (Expiration of the Option will occur upon the sale or transfer of the Property by the Plan.) Upon the presentment of notice, the Employer will have 60 business days to consummate the repurchase of the Property. The Option Agreement further requires that the Plan will not be responsible for any real estate fees, commissions or other expenses that are incurred in connection with Employer's repurchase of the Property.

8. FCTC believes that the proposed transactions are in the best interest of the Plan and its participants and beneficiaries for the following reasons: (a) the proposed purchase of the Property by the Plan and the leaseback to the Employer will guarantee participants an annual investment rate of return of approximately 11.92 percent or greater; (b) the terms of the Lease are comparable to the ones currently being negotiated in the Nashville area for similar properties; and (c) the Employer must, if requested, repurchase the Property under the Option Agreement for a price which may be at, or in excess of, the fair market value. In addition, FCTC considers the Employer creditworthy and able to meet any obligations it may have in the future to repurchase the Property.

In addition to these reasons, FCTC believes that the diversification of the Plan's investment portfolio in the Property would be beneficial to its participants and beneficiaries. FCTC notes that the Plan's investments in real property for the year ending 1994 would amount to less than 25 percent of the Plan's assets. As additional contributions and earnings are made to the Plan, the Property will represent a smaller percentage of the total Plan assets. Consequently, FCTC believes the decision to invest Plan assets in the Property is a prudent one.

Finally, FCTC represents that it has examined the Plan document, the investment portfolio for the Plan as well as the most recent Forms 5500 and allocations. In light of this examination, FCTC does not believe the liquidity of the Plan will be adversely affected if the proposed transactions are consummated. FCTC also asserts that the proposed transactions will promote the diversification of the Plan's assets

<sup>2</sup>It is represented that simultaneously with the Plan's purchase of the Property, the Employer will use the sale proceeds to pay off its indebtedness to Worthen.

and enable the Plan to achieve its investment objectives.

Aside from the duties that are described above, FCTC has agreed to monitor the proposed transactions throughout their duration on behalf of the Plan and take appropriate actions that are deemed necessary and proper to safeguard the interests of the Plan and its participants and beneficiaries. FCTC will also monitor the terms and conditions of the exemption, at all times.

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

(a) The interests of the Plan with respect to the purchase of the Property, the execution and maintenance of the Lease and the potential repurchase of the Property by the Employer will, at all times, be represented by FCTC.

(b) FCTC, which has evaluated the terms of the transactions and determined that the such transactions will be in the best interests of the Plan, will monitor and enforce compliance with the terms and conditions of the transactions and the exemption, at all times.

(c) The acquisition price for the Property will be paid by the Plan in cash and will be based upon the fair market value of the Property as determined by a qualified, independent appraiser.

(d) The fair market value of the Property will not exceed 25 percent of the assets of the Plan.

(e) The terms of the Lease will remain at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(f) The fair market rental amount will be redetermined every three years that the Lease is in effect by a qualified, independent appraiser who has been selected by FCTC and, FCTC will then make appropriate adjustments to such rent.

(g) The Employer will be obligated for all real estate taxes, utility costs, fees and insurance premiums that are incidental to the Lease.

(h) The Option Agreement will enable the Plan to sell the Property to the Employer in the event that FCTC determines that it is not in the best interest of the Plan to retain the Property.

(i) The Option Agreement will provide that the Employer repurchase the Property from the Plan for cash in an amount which is not less than the greater of (i) the Plan's acquisition price for the Property or (ii) the fair market value of the Property as determined by

a qualified, independent appraiser who has been selected by FCTC.

(j) The Plan will pay no real estate fees, commissions or other expenses in connection with the acquisition of the Property, the administration of the Lease or the repurchase of the Property by the Employer under the Option Agreement.

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

Associated Claims Management 401(k) Plan (the Plan), Located in Walnut Creek, CA

[Application No. D-10121]

#### *Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale of a group annuity contract (the GAC) issued by Mutual Benefit Life Insurance Company (Mutual Benefit) by the Plan to Foundation Health Corporation (FHC), a party in interest with respect to the Plan, provided that the following conditions are satisfied: (a) The sale is a one-time transaction for cash; (b) the Plan suffers no loss nor incurs any expense in connection with the sale; (c) the purchase price is no less than the fair market value of the GAC as of the date of the sale; and (d) any payments under the GAC to FHC, or its successors, after the date of the sale in excess of FHC's purchase price are paid to the Plan.

#### *Summary of Facts and Representations*

1. The Plan is a 401(k) plan maintained by Associated Claims Management, Inc. (ACMI), a wholly-owned subsidiary of FHC. FHC, a Delaware corporation headquartered in Rancho Cordova, California, is a holding company that administers managed health care services, as well as offering life and disability insurance, through its subsidiaries. ACMI administers insurance claims and is located in Walnut Creek, California. As of September 15, 1995, the Plan had 109 participants who remain invested in the GAC and total assets of approximately \$474,995. The trustees of the Plan are

Laurie Stover, Director of Corporate Compensation and Benefits at FHC, and Danny O. Smithson, Senior Vice President of FHC.

2. Among the assets of the Plan is the GAC, No. GA-07773, which was acquired from Mutual Benefit on May 2, 1990 and was intended to serve as one of the investment options offered to Plan participants. The GAC is a variant on the insurance product known in the trade as an "annual window group annuity contract." Under the GAC, two certificates were issued to the Plan. The first certificate, effective January 1, 1990, provided for an interest rate of 7.65% and a maturity date of December 31, 1994 (the 1990 Certificate). The second certificate, effective January 1, 1991, provided for an interest rate of 8.10% and a maturity date of December 31, 1995 (the 1991 Certificate).

The GAC was designed to operate in the following manner. For each calendar year during the life of the GAC, Mutual Benefit would issue a certificate to the Plan setting the guaranteed rate of interest payable on funds deposited pursuant to the GAC certificate. For each certificate, the Plan could elect a maturity date of two, three, or four years from the first of the year. Mutual Benefit would establish a separate subfund with respect to each certificate such that the GAC, over a period of time, would be composed of a series of annual subfunds earning various rates of interest. The GAC could be discontinued by the Plan at any time. However, the funds deposited pursuant to the GAC certificates would continue to earn interest until the certificates' respective maturity dates.

3. On July 16, 1991, Mutual Benefit was placed into rehabilitation proceedings by the New Jersey Commissioner of Insurance (the Commissioner).<sup>3</sup> As a result, the assets of the Plan invested in the GAC were frozen, with the exception of certain hardship withdrawals. In 1994, the terms of the GAC were redefined under a rehabilitation plan approved by the Commissioner, and all liabilities and obligations of Mutual Benefit with respect to the GAC were assumed by the MBL Life Assurance Corporation (MBLLAC), a New Jersey stock life insurance company located in Newark, New Jersey. The Plan opted to remain invested in the GAC according to the

<sup>3</sup> The Department notes that the decision to acquire and hold the GAC are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this proposed exemption, the Department is not proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GAC.

terms of the rehabilitation plan, which provides that withdrawals are not permitted to participants without penalty until December 31, 1999, except in the event of hardship or upon retirement after attaining age 59½.

Under the restructured GAC, the interest due on the 1990 and 1991 Certificates is calculated as follows. From the GAC's inception in January 1, 1990 to December 31, 1991, interest is credited at the guaranteed rates set forth in the 1990 and 1991 Certificates, 7.65% and 8.10%, respectively. From January 1, 1992 onward, interest is credited at a rate pursuant to an insurance industry enhancement, or so-called "wrapper," 4% for 1992, 3.5% for 1993, 3.5% for 1994, and 3.55% for 1995. The wrapper is funded by a consortium of insurance companies (the Consortium), led by the Prudential Insurance Company of America and Metropolitan Life Insurance Company, and provides a rate of interest for insurance products that have been frozen due to the rehabilitative conservatorship of Mutual Benefit. Beginning with calendar year 1995, the interest rate set forth is based on the actual investment performance of a separate account allocated by the Consortium to the GAC. The applicant represents that it is still uncertain whether MBLLAC will be able to redeem the GAC at 100% of its accumulated value by December 31, 1999, as provided by the rehabilitation plan.

4. In order to protect the Plan participants and beneficiaries from any further risk of investment loss associated with the GAC, the applicant proposes to purchase the GAC from the Plan for an amount equal to the account balance of the GAC as determined by MBLLAC as of the date of the sale. As of September 1, 1995, the GAC had an account balance of \$143,091. This figure represents the principal amounts deposited pursuant to the 1990 and 1991 Certificates, less withdrawals, plus (i) the interest that accrued under the 1990 and 1991 Certificates from January 1, 1990 to December 31, 1991, and (ii) the interest that accrued under the wrapper from January 1, 1992 to September 1, 1995. The purchase price will be adjusted to reflect any additional interest earned from September 1, 1995 to the date of the sale. The sale will be a one-time transaction for cash, and the Plan will incur no expenses in connection with the sale.

The applicant represents that the proposed transaction is in the interests of the Plan because it will enable the Plan to avoid any risk associated with continued holding of the GAC and to redirect assets to investments with a

more attractive risk-return ratio. In addition, the proposed transaction will enable participants to obtain distributions, loans, and withdrawals attributable to GAC funds that have been frozen since 1991.

4. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (a) The sale will be a one-time transaction for cash; (b) the Plan will suffer no loss nor incur any expense in connection with the sale; (c) the transaction will protect the Plan from any risk associated with continued holding of the GAC, as well as enabling participants to exercise all of their rights under the Plan to request distributions, loans, and withdrawals from the Plan; (d) the purchase price will be the account balance of the GAC as determined by MBLLAC as of the date of the sale; and (e) any payments under the GAC to FHC, or its successors, after the date of the sale in excess of FHC's purchase price will be paid to the Plan.

#### Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons by first-class mail, by overnight express delivery, or by posting the required information at ACMI's offices within 15 days of the date of publication of the notice of pendency in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and/or to request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 45 days of the date of publication of this notice in the Federal Register.

#### FOR FURTHER INFORMATION CONTACT:

Karin Weng of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

First Union Corporation (First Union), Located in Charlotte, NC

[Application No. D-10165]

#### Proposed Exemption

##### I. Transactions

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

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an

employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

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

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

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.<sup>4</sup>

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

<sup>4</sup>Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3-21(c).

certificates representing an interest in a trust containing assets sold or serviced by the same entity.<sup>5</sup> 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.<sup>6</sup>

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

<sup>5</sup> 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.

<sup>6</sup> 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.

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 at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Inc. (D & P) or Fitch Investors Service, Inc. (Fitch);

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

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

(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.

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 a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) That is issued by and is an obligation of a trust; with respect to certificates defined in (1) and (2) above for which First Union 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) Either—

(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);

(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);

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

(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);

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

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

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

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

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

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) The investment pool consists only of assets of the type 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 S&P's, Moody's, D & P, or Fitch 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) First Union;

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

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

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

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

F. "Subservicer" means an entity which, under the supervision of and on behalf of the master servicer, services 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;

(6) Any obligor with respect to obligations or receivables included in

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

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

M. "Affiliate" of another person includes:

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

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

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

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

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

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

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

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

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

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

(3) At the time of the delivery, all conditions of this 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 holds a security interest in the lease;

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

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

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

#### Summary of Facts and Representations

1. First Union is a North Carolina-based, multi-bank holding company registered under the Bank Holding Company Act of 1956, as amended, and the rules and regulations thereunder. First Union was incorporated on December 22, 1967. First Union provides a wide range of commercial and retail banking and trust services. First Union<sup>7</sup> also provides various other

financial services, including mortgage banking, home equity lending, leasing, investment banking, insurance and securities brokerage services, through other subsidiaries. First Union Capital Markets Corp. (CMC), formerly First Union Securities, Inc., is a wholly-owned subsidiary of First Union and a broker-dealer registered with the Securities and Exchange Commission.<sup>8</sup>

Through its subsidiaries and affiliates (including CMC), First Union is a financial services organization servicing the financial needs of individuals, businesses, governments and financial institutions. As to the capital markets, CMC and certain of its bank affiliates, principally First Union National Bank of North Carolina, engage in a variety of activities that facilitate the flow of capital from investors to CMC's and such Bank's middle market customers. In particular, CMC engages in securities transactions as both principal and agent and provides underwriting, research and other financial services. CMC is actively involved in the issuance and trading of high yield corporate debt, investment grade fixed-income securities (including mortgage and asset-backed securities), U.S. government securities and municipal securities.

First Union represents that CMC has the legal authority to underwrite asset-backed securities. By order dated July 31, 1989, the Board of Governors of the Federal Reserve (the Board) granted CMC the power to underwrite and deal in residential mortgage-related and consumer-receivable related securities. By order dated May 30, 1995, the Board granted CMC the power to underwrite and deal in all types of debt securities, including securities issued by a trust, partnership or limited liability company or other vehicle secured by or representing interests in debt obligations (such as asset-backed securities not covered by the July 31, 1989 order). In each case, CMC's power to so underwrite and deal is subject to a framework of structural and operating limitations set forth in the applicable order, including a condition that it does not derive more than a certain

Capital Markets Corp., the direct and indirect national bank association subsidiaries of First Union Corporation, and their respective subsidiaries and affiliates, except where the context otherwise requires.

<sup>8</sup> There are two other SEC-registered broker-dealers in the First Union family: First Union Brokerage Services, Inc., a North Carolina corporation (FUBS), and Lieber & Co., a New York general partnership (Lieber). Neither FUBS nor Lieber currently engages, nor is it currently contemplated that either will engage, in the underwriting or private placement of asset- or mortgage-backed securities.

percentage of its gross revenues from such activities. In addition, each of First Union's national bank association subsidiaries has the power to underwrite asset-backed securities representing interests in assets originated or acquired by such national bank association subsidiary.

#### Trust Assets

12. First Union seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts;<sup>9</sup> (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.<sup>10</sup>

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.<sup>11</sup>

<sup>9</sup> The Department notes that PTE 83-1 [48 FR 895, January 7, 1983], a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. First Union requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, First Union has stated that it may still avail itself of the exemptive relief provided by PTE 83-1.

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

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

<sup>7</sup> For purposes of this exemption, "First Union" shall include First Union Corporation, First Union

### Trust Structure

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

On or prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. First Union, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. All of the public offerings of certificates presently contemplated are to be underwritten by First Union on a firm commitment basis. In addition, First Union anticipates that it may privately place certificates on both a firm commitment and an agency basis. First Union may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders will be entitled to receive monthly, quarterly or semi-annual installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

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

Furthermore, in those cases where distributions are made semi-annually, the servicer will furnish a report on the operation of the trust to the trustee on a monthly basis. At or about the time this report is delivered to the trustee, it will be made available to certificateholders and delivered to or made available to each rating agency that has rated the certificates.

5. Some of the certificates will be multi-class certificates. First Union requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.<sup>12</sup>

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

<sup>12</sup> It is the Department's understanding that where a plan invests in REMIC "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

distributed, all senior certificateholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.<sup>13</sup>

6. 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.

### Parties to Transactions

7. 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 the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their 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 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.

8. The *sponsor* will be one of three entities: (i) A special-purpose 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

<sup>13</sup> If a trust issues subordinated certificates, holders of such subordinated certificates may not share in the amount distributed on a pro rata basis with the senior certificateholders. The Department notes that the exemption does not provide relief for plan investment in such subordinated certificates.

to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

9. 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 First Union, the trust sponsor or the servicer. First Union represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which will be paid by the servicer or sponsor. 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.

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

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

flag" will be included in all records relating to the sold receivables, including the master file, archives, tape extracts and printouts.

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

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

The underwriter 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 First Union. In some cases the underwriter will be unrelated to First Union. In other cases, however, First Union may originate or service receivables included in a trust, or may sponsor a trust.

#### *Certificate Price, Pass-Through Rate and Fees*

11. 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.

12. 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.<sup>14</sup> This rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate 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.

13. 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"

<sup>14</sup> 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.

may be aggregated with other servicing fees, and is either paid out of the interest income received on the receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

14. 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.

15. 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.

16. 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*

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

The purchase price of a receivable is specified in the pooling and servicing agreement and will be at least equal to: (1) The unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer; or (2) the greater of (a) the amount in (1) or (b) the fair market value of such obligations in the case of a REMIC, or the fair market value of the receivables in the case of a trust that is not a REMIC.

#### *Certificate Ratings*

18. The certificates will have received one of the three highest ratings available from either S&P's, Moody's, D&P or Fitch. Insurance or other credit support (such as surety bonds, letters of credit, guarantees, or the creation of a class of certificates with subordinated cash flow) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

#### *Provision of Credit Support*

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e. act as an insurer). In these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (a) out of late payments by the obligors, (b) from the credit support provider (which may be the master servicer or an affiliate thereof) or, (c) in the case of a trust that issues subordinated certificates, from

amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. When the servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism. In some cases, however, the master servicer may not be obligated to advance funds but instead would be called upon to provide funds to cover defaulted payments to the full extent of its obligations as insurer. Moreover, a master servicer typically can recover advances either from the provider of credit support or from future payments on the affected assets.

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

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

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

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

after which delinquent obligations ordinarily will be considered uncollectible;

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

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

#### *Disclosure*

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

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

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

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

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

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets 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; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

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

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

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

21. 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.

22. 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, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on Form 8-K to report material developments concerning the trust and the certificates. 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.

23. 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, 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.

#### *Forward Delivery Commitments*

24. To date, no forward delivery commitments have been entered into by First Union in connection with the offering of any certificates, but First Union may contemplate entering into such commitments. The utility of forward delivery commitments has been

recognized with respect to offering similar certificates backed by pools of residential mortgages, and First Union may find it desirable in the future to enter into such commitments for the purchase of certificates.

#### *Secondary Market Transactions*

25. It is First Union's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter. First Union anticipates that it will make a market in certificates.

#### *Summary*

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

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

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's, D&P or Fitch. Credit support will be obtained to the extent necessary to attain the desired rating;

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

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

(e) First Union anticipates that it will make a secondary market in certificates.

#### *Discussion of Proposed Exemption*

##### *I. Differences between Proposed Exemption and Class Exemption PTE 83-1*

The exemptive relief proposed herein is similar to that provided in PTE 81-7 [46 FR 7520, January 23, 1981], Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83-1 [48 FR 895, January 7, 1983].

PTE 83-1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such

certificates, provided that the conditions set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 406(b)(1) and (b)(2) of the Act for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83-1 provides conditional exemptive relief from section 406 (a) and (b) of the Act for transactions in connection with the servicing and operation of the mortgage trust.

Under PTE 83-1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83-1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's, D&P or Fitch (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

##### *II. Ratings of Certificates*

After consideration of the representations of the applicant and information provided by S&P's,

Moody's, D&P and Fitch, the Department has decided to condition exemptive relief upon the certificates having attained a rating in one of the three highest generic rating categories from S&P's, Moody's, D&P or Fitch. The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables while ensuring that the interests of plans investing in certificates are protected. The Department also believes that the ratings are indicative of the relative safety of investments in trusts containing secured receivables. The Department is conditioning the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year and having been sold to investors other than plans for at least one year.<sup>15</sup>

##### *III. Limited Section 406(b) and Section 407(a) Relief for Sales*

First Union represents that in some cases a trust sponsor, trustee, servicer, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.<sup>16</sup> In these cases, a direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.<sup>17</sup> Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to

<sup>15</sup> In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's, D&P, Fitch or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

<sup>16</sup> In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which First Union or any of its affiliates is either (a) the sole underwriter or manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent.

<sup>17</sup> The applicant represents that where a trust sponsor is an affiliate of First Union, sales to plans by the sponsor may be exempt under PTE 75-1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if First Union is not a fiduciary with respect to plan assets to be invested in certificates.

purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, First Union represents that a trust sponsor, servicer, trustee, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. First Union represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, First Union represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor under receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

After consideration of the issues involved, the Department has determined to provide the limited sections 406(b) and 407(a) relief as specified in the proposed exemption.

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

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

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a

prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC, this 2nd day of February, 1996.

Ivan Strasfeld,

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

[FR Doc. 96-3117 Filed 2-12-96; 8:45 am]

**BILLING CODE 4510-29-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 96-013]

### Notice of Prospective Patent License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of Prospective Patent License.

**SUMMARY:** NASA hereby gives notice that Imidyne Corporation, of 2425 Jamie Street, Merrick, New York 11566, has

requested an exclusive license to practice the inventions disclosed in NASA Case No. LAR-15,437-P, entitled "A FIRE RESISTANT, MOISTURE BARRIER MEMBRANE," for which U.S. Patent Application No. 60/008,765, was filed on December 15, 1995; NASA Case No. LAR-15,020-1, entitled "DIRECT PROCESS FOR PREPARING SEMI-CRYSTALLINE POLYIMIDES," for which U.S. Patent No. 5,464,928, was issued on November 7, 1995; and NASA Case No. LAR-14,163-1, entitled "NOVEL POLYIMIDE MOLDING POWDER, COATING, ADHESIVE AND MATRIX RESIN," for which U.S. Patent No. 5,147,966, was issued on September 15, 1992, to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Mr. George F. Helfrich, Patent Counsel, NASA Langley Research Center.

**DATES:** Responses to this Notice must be received by April 15, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mr. George F. Helfrich, Patent Counsel, NASA Langley Research Center, Mail Code 212, Hampton, VA 23681-0001; telephone (804) 864-3521.

Dated: April 1, 1996.

Edward A. Frankle,  
*General Counsel.*

[FR Doc. 96-3154 Filed 2-12-96; 8:45 am]

**BILLING CODE 7510-01-M**

[Notice 96-012]

### Notice of Prospective Patent License

**AGENCY:** National Aeronautics and Space Administration.

**SUMMARY:** NASA hereby gives notice that Vannevar New Media, Inc., of Houston, Texas 77058 has requested an exclusive license to practice the invention protected by U.S. Patent No. 5,181,259 entitled "General Method of Pattern Classification Using the Two Domain Theory," NASA Case No. MSC-21,737-1, which was issued on January 19, 1993, and is assigned to the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Mr. Hardie R. Barr, Patent Attorney, Johnson Space Center.

**DATES:** Responses to this Notice must be received by April 15, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mr. Hardie R. Barr, Patent Attorney, Johnson Space Center, Mail Code HA, Houston TX 77058-3696; telephone (713) 483-1003.