DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 96-93; Exemption Application No. D-10240, et al.]

Grant of Individual Exemptions; Beall Corporation 401(k) Profit Sharing Plan (the Plan), et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

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

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

Statutory Findings

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

(a) The exemptions are administratively feasible; 
(b) They are in the interests of the plans and their participants and beneficiaries; and
(c) They are protective of the rights of the participants and beneficiaries of the plans.

Beall Corporation 401(k) Profit Sharing Plan (the Plan), Located in Portland, OR

[Prohibited Transaction Exemption 96-93; Exemption Application No. D-10240]

Exemption

The restrictions of sections 406(a) and 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 sections 4975(c)(1)(A) through (E) 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.

B. Effective October 8, 1996, 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 an obligor with respect to 5 percent or less of the fair market value of obligations or

First Chicago NBD Corporation (FCNBD) Located in Chicago, Illinois

[Prohibited Transaction Exemption 96-94; Exemption Application No. D-10361]

Exemption

I. Transactions

A. Effective October 8, 1996, 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.

B. Effective October 8, 1996, 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 an obligor with respect to 5 percent or less of the fair market value of obligations or
receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

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

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

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity. 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 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. Effective October 8, 1996, 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 to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of furnishing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(C), (C), (D) or (E) of the Act or section 4975(c)(2)(F), (G) or (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 Structured Rating Group (S&P’s), Moody’s Investors Service, Inc. (Moody’s), Duff & Phelps Credit Rating Co. (D&P) or Fitch Investors Service, L.P. (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 servicer 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 transfer of such assets the servicer’s reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is described 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 provisions of subsection II.A.(6) above are 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 transfers 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—
which issues securities that are sold to plans.

described above, are transferred to a second trust structure under which certificates issued by the first trust were subordinated to the rights and interests in other investment pools that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

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:

(a) Each underwriter;
(b) Each insurer;
(c) The sponsor;
(d) The trustee;
(e) Each servicer;
(f) 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
(g) Any affiliate of a person described in (1)–(6) above.

M. Affiliate of another person includes:

(a) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with another person;
(b) 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
(c) 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

Since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

(1) FCNBD;
(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with FCNBD;
(3) Any member of an underwriting syndicate or selling group of which FCNBD 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 receivables contained in the trust, but is not a party to the pooling and servicing agreement.

G. Servicer means any entity which services receivables 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.
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 not 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 terms include 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 2550.408-c-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.

W. FNBD means First Chicago NBD Corporation and its affiliates.

The Department notes that this exemption is included within the meaning of the term “Underwriter Exemption” as it is defined in Section 47(b) of the Trust Indenture Act (15 U.S.C. 77d(b)) of the Trust Indenture Act of 1939.

The Department has considered the entire record, including the comments submitted by the applicant, and has determined to grant the exemption as amended in response to the applicant’s comments.

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

Zions Bancorporation and Affiliated Companies (Zions), Located in Salt Lake City, Utah

[Prohibited Transaction Exemption 96-95; Exemption Application No. L-10338]

Exemption

The restrictions of sections 406(a) and (b) of the Act shall not apply to the reinsurance of risks and the receipt of premiums therefrom by Zions Life Insurance Company (ZLIC) in connection with an insurance contract sold by American Bankers Life Insurance Company to provide group life and accidental death and dismemberment insurance to employees of Zions (the Plan), provided the following conditions are met:

(a) ZLIC—
(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with Zions that is described in section 3(14)(E) or (G) of the Act,
(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as defined in section 3(10) of the Act,
(3) Has obtained a Certificate of Authority from the Insurance Commissioner of its domiciliary state which has neither been revoked nor suspended, and
(4) (A) Has undergone an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction; or
(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, Arizona) by the Insurance Commissioner of the State of Arizona within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred.

(b) The Plan pays no more than adequate consideration for the insurance contracts;
(c) No commissions are paid with respect to the direct sale of such contracts or the reinsurance thereof; and
(d) For each taxable year of ZLIC, the gross premiums and annuity considerations received in that taxable year by ZLIC for life and health insurance or annuity contracts for all

Writen Comments:
The Department received one written comment, which was submitted by the applicant to make two corrections or clarifications with respect to the proposed exemption. The first correction pointed out name changes for D&P and Fitch, two of the rating agencies which will be rating the certificates. The appropriate name changes have been made in the operative language. The applicant also stated that representation 6 of the proposed exemption should be modified. The representation had indicated that “For tax reasons, the trust must be maintained as an essentially passive entity.” The applicant noted that recent tax changes have liberalized or eliminated the requirement that the trust be maintained as an essentially passive entity, but FNBD has agreed to represent that any trust issuing securities will be the case if the trust consisted of motor vehicle installment loan contracts.
employee benefit plans (and their employers) with respect to which ZLIC is a party in interest by reason of a relationship to such employer described in section 3(14)(E) or (G) of the Act does not exceed 50% of the gross premiums and annuity considerations received for all lines of insurance (whether direct insurance or reinsurance) in that taxable year by ZLIC. For purposes of this condition (d):

(1) the term “gross premiums and annuity considerations received” means as to the numerator the total of premiums and annuity considerations received, both for the subject reinsurance transactions as well as for any direct sale or other reinsurance of life insurance, health insurance or annuity contracts to such plans (and their employers) by ZLIC. This total is to be reduced (in both the numerator and the denominator of the fraction) by experience refunds paid or credited in that taxable year by ZLIC.

(2) all premium and annuity considerations written by ZLIC for plans which it alone maintains are to be excluded from both the numerator and the denominator of the fraction.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the notice of proposed exemption published on November 6, 1996 at 61 FR 57477.

FOR FURTHER INFORMATION CONTACT: Gary H. 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 or disqualified person from certain other provisions to which the exemptions 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) These exemptions are subject to (1) and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is 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, D.C., this 24th day of December, 1996.

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

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[Application No. D--10253, et al.]

Proposed Exemptions; The Retirement Plan for Salaried and Certain Hourly Employees of Keebler Company (the Plan)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendancy before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restriction 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 may 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 7713, 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.