

Signed at Washington, DC, this 14th day of April, 1997.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. L-10280, et al.]

#### Proposed Exemptions; Operating Engineers Local 150 Apprenticeship Fund (the Fund)

**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 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 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.

#### Operating Engineers Local 150 Apprenticeship Fund (the Fund), Located in Plainfield, Illinois

[Exemption Application No. L-10280]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32826, 32847, August 10, 1990). If the exemption is granted the restrictions of section 406(a) and 406(b)(1) and (2) shall not apply to the proposed sale (the Sale) of a certain parcel of improved real property (the Property) from the Fund to International Union of Operating Engineers, Local 150 (Local 150), a party in interest with respect to the Plan provided that the following conditions are met:

(1) The fair market value of the Property is established by a qualified and independent real estate appraiser;

(2) Local 150 pays the greater of \$180,000 or the current fair market value of the Property as of the date of the transaction;

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

(4) The Fund pays no fees or commissions related to the Sale.

#### Summary of Facts and Representations

1. The Fund is a welfare plan which is an apprenticeship and training plan with approximately 600 apprentices and 5,494 journeymen. The Fund was established on June 1, 1967. As of December 31, 1995, the fair market value of the Fund's assets was \$6,492,242. The Fund sponsors include the Local 150 and other employer associations.

2. The Fund acquired the Property as part of a merger with the Operating Engineers Local 537 Apprenticeship and Re-training Fund on or about October 28, 1992. During this time, the Operating Engineers Local 537 terminated and transferred all of its assets to the Fund. The Property is located in Rock Island, Illinois and consists of an office building on approximately 53 acres of land. The applicant represents that the Property has been leased by the Fund to Local 150 pursuant to Prohibited Transaction Class Exemption 76-1 (41 FR 1270, March 26, 1976).<sup>1</sup> Since 1992, the Fund has received net income from the Property in the amount of \$33,461.

3. In March 1993, the Property was appraised at a value of \$180,000 by Baecke Appraisers, a qualified independent real estate appraisal firm. The value of the Property was determined by using the market value approach which is defined in the appraisal as the most probable price a property should bring on requisite to a fair sale, the buyer and seller each acting prudently and assuming the price is not affected by undue stimulus. In April 15, 1996, Mr. Robert Baecke of Baecke Appraisers, updated the appraisal and recertified the value of the Property to be \$180,000. Mr. Baecke researched sales of comparable properties in the Property's market area that have occurred since the time of the original appraisal. His analysis consisted of research of data from the multiple listing service, county records, exterior inspections of the properties and conversations with individuals

<sup>1</sup> The Department is making no determination with respect to whether or not the Lease met the conditions of PTE 76-1.

involved in the transactions. Additionally, Mr. Baecke analyzed the valuation approaches used in the original appraisal, taking into consideration all current data. Mr. Baecke concluded that the Property's appraised value remains \$180,000. In this regard, Mr. Baecke represented that the value of the Property at time the Fund acquired the Property was \$180,000. The Fund will pay no commissions or fees associated with the Sale.

4. The Fund proposes to sell the Property to Local 150. The Trustees of the Fund have determined that the Fund no longer needs the Property, and wish to sell the Property. Local 150 has offered to purchase the Property for cash at the appraised value of \$180,000.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (1) The Sale is a one-time transaction for cash, and no commissions will be paid upon the Sale; (2) the Fund will be receiving at least fair market value for the Property as determined by an independent qualified real estate appraiser; and (3) the Fund pays no commissions or fees associated with the Sale.

For Further Information Contact: Allison Padams of the Department, telephone (202)219-8971. (This is not a toll-free number.)

**Joint Apprenticeship Committee of Plumbers Local No. 27 (the Plan), Located in Pittsburgh, Pennsylvania**

[Application No. L-10366]

**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 C.F.R. Part 2570, Subpart B (55 F.R. 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 shall not apply to the proposed sale by the Plan of certain improved real property located in Allegheny County, Pennsylvania (the Property) to the Local Union No. 27 (the Plumbers Local) of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, a party in interest with respect to the Plan; provided that the following conditions are met:

(A) The Plan does not incur any expenses or suffer any loss with respect to the transaction; and

(B) The Plan receives a cash purchase price for the Property of no less than the

greater of (1) the Plan's cost basis in the Property as of the date of the sale, or (2) the fair market value of the Property as of the date of the sale, as determined by an independent, qualified appraiser, and in no event less than \$265,597.

**Summary of Facts and Representations**

*Introduction*

The Plan's operations are conducted in the Pipe Trades Training Center (the Property), which is owned by the Plan. The Trustees of the Plan have determined that it is no longer economically feasible for the Plan to maintain and operate its own facility, and that the Plan can be operated more efficiently as a tenant in the Property. The Trustees propose to sell the Property to the Union, the members of which are participants in the Plan, and to arrange for the Plan to lease space in the Property from the Union. An exemption is requested to allow the sale transaction under the terms and conditions described herein.

1. The Plan is an apprenticeship training plan providing educational and occupational training for apprentices and journeymen plumbers who are members of the Union. The Plan was created and is maintained pursuant to collective bargaining agreements between the Union and the Mechanical Contractors Association of Western Pennsylvania (the Association), which represents employers of plumbers who are members of the Union. The Plan is administered by a board of six trustees (the Trustees), three of whom are representatives of the Union and three of whom are representatives of the Association and other employers in signed agreements with the Union. As of October 1, 1996, approximately 610 members of the Union were participants in the Plan, which had total assets of approximately \$360,080 as of December 31, 1995.

2. Among the assets of the Plan is the Property, a parcel of improved real property located at 104 Montour West Industrial Park in North Fayette Township near Pittsburgh in Allegheny County, Pennsylvania. The Property consists of 1.29 acres of land improved with a one-story structure (the Building) occupied by the Plan and operated by the Trustees as the Pipe Trades Training Center and ancillary office facility. The Building, which is constructed of cement block on reinforced concrete slab, has a total interior area of 6,948 square feet, consisting of 984 square feet of office space (the Office Space) and the remainder utilized as classrooms, shop, computer, and file room areas. The Office Space is occupied by the

Union, which has leased the Office Space from the Plan since 1987 (the Union Lease). The Trustees and the Union represent that the Union Lease satisfies the requirements of Prohibited Transaction Class Exemption 76-1 (PTE 76-1, 41, FR 12740, March 26, 1976) and Prohibited Transaction Class Exemption 77-10 (PTE 77-10, 42 FR 33918, July 1, 1977), relating to, among other things, a lease of office space by a multiemployer plan to a participating employee organization.<sup>2</sup>

3. The Property is described legally as lot 113R of the Montour West Industrial Park (the Industrial Park) as recorded with the Recorder's Office of Allegheny County, and it consists of a parcel originally described in the county legal records as lot 113 and one third of an adjacent parcel originally described as lot 112. The Trustees represent that the Plan purchased the original lot 113 from an unrelated party on August 22, 1974, and on December 17, 1975 the Plan sold a one-half interest in original lot 113 to the Joint Apprenticeship Committee of Steamfitters Local Union No. 449 (the Steamfitters Plan), an apprenticeship training plan providing benefits to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 449 (the Steamfitters Local). Thereafter, the original lot 112 was acquired jointly by the Plan and the Steamfitters Plan from an unrelated party on December 29, 1991. Although the Plumbers Local and the Steamfitters Local are components of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, the Trustees represent that the Steamfitters Local and the Steamfitters Plan are not parties in interest with respect to the Plan, within the meaning of section 3(14) of the Act, and that the trustees of each plan are independent of and unrelated to each other. The Trustees explain that in many jurisdictions plumbers and steamfitters are members of the same local union, with referrals for work based on a determination of whether water or steam pipes are involved. In the Pittsburgh/Western Pennsylvania area, however, the Trustees maintain that there was historically substantial employment in the steel mills and factories for steamfitters, and consequently, two separate local unions

<sup>2</sup>The Department expresses no opinion as to whether the Union Lease satisfied the conditions of PTE 76-1 or PTE 77-10, or whether such lease of office space by the Plan to the Union was exempt from the prohibitions of section 406 of the Act.

emerged, one representing steamfitters and one representing plumbers. Because the training for apprentices in each local union is similar, and because each local union had similar needs in a training facility, the trustees of the apprenticeship plans of each local union agreed to share the same training facility for their apprenticeship programs. In this context, the two plans jointly owned the original lot 113, on which the Building is situated, and the adjacent original lot 112, an unimproved lot utilized for parking space.

In 1987, the trustees of the Steamfitters Plan determined to commence arrangements for a movement of the operations of that plan to a separate training facility in Pittsburgh. The trustees of the Steamfitters Plan then transferred that plan's one-half interest in lots 113 and 112 to the Plan, by deed dated January 9, 1987. (The Steamfitters Plan continued to utilize facilities on the Property as a tenant until that plan acquired its own building in 1993.) Subsequently, on June 1990, the legal records for the Industrial Park were revised to provide that two thirds of lot 112 was redesignated as lot 111R and the remaining one third of lot 112 was combined with lot 113 and redesignated as lot 113R. The Trustees sold lot 111R to an unrelated party in 1990, and lot 113R remains the legal designation of the Property. According to Daniel F. Smith, IFA (Smith), a professional independent real estate appraiser in Pittsburgh, Pennsylvania, the Property had a fair market value of \$246,000 as of June 13, 1996. The Plan's actual cost basis in the Property is \$265,597, as determined as of May 14, 1996 by the certified public accounting firm of R.S. Cumberledge & Associates (Cumberledge) in Pittsburgh, Pennsylvania.

4. The Trustees represent that it is not economically feasible for the Plan to continue maintaining the Property while continuing to provide a quality training program for the Union's members. The Trustees state that recent financial statements indicate a declining balance of reserves in the assets of the Plan, which is operating at a deficit due to increasing Building maintenance and related expenses. The Trustees represent that employer contributions to the Plan and rents paid by the Union to the Plan are not sufficient to cover escalating costs of maintaining the Property, even though such employer contributions have increased pursuant to collective bargaining and the Trustees represent that the rentals paid by the Union are in excess of the Building's fair market

rental value as indicated by Smith's appraisal. The Trustees are concerned that the Plan's continued ownership of the Property will threaten the availability of funds for instructor salaries, equipment, and training program operations. The Trustees represent that they have determined that the Plan would be able to operate its training program more economically as a tenant, rather than an owner, in the Property.

5. Accordingly, the Trustees and representatives of the Union propose that the Union purchase the Property from the Plan and are requesting an exemption for such transaction under the terms and conditions described herein. The Union will pay the Plan a cash purchase price for the Property in the amount of no less than the greater of (a) the Plan's cost basis in the Property as of the date of the sale, or (b) the Property's fair market value as of the sale date as determined by Smith in an update of his appraisal of June 13, 1996, and in no event less than \$265,597, which was the Plan's cost basis in the Property as determined by Cumberledge as of May 14, 1996. The Plan will incur no costs related to the transaction.

6. Commencing with the Union's purchase of the Property, it is proposed that the Plan will continue to utilize the Property as its training facility by leasing from the Union the same space in the Property which the Plan has utilized prior to the purchase transaction. The Union and the Trustees represent that this lease of space in the Property from the Union (the Plan Lease) will meet the requirements of Prohibited Transaction Class Exemption 78-6 (PTE 78-6, 43 FR 23024, May 30, 1978), relating to, among other things, a lease of real property by an employee organization to a related apprenticeship training plan.<sup>3</sup> In addition to other requirements, the conditions of PTE 78-6 require the Plan Lease to be on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and the Plan Lease must be appropriate and helpful in carrying out the purposes for which the plan is established or maintained. The Trustees represent that the Plan Lease will satisfy these and all other conditions of PTE 78-6 and that the Plan Lease will enable the Plan to terminate the lease arrangement with sixty days written notice to the Union. The Trustees represent that if the exemption is granted, the Plan Lease will be executed between the Plan and

<sup>3</sup> In this proposed exemption the Department expresses no opinion as to whether the Plan Lease will meet the requirements of PTE 78-6.

the Union immediately after the sale transaction is consummated and the Plan's use of the Property will continue uninterrupted.

7. In summary, the applicants represent that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (1) The transaction will be a one-time transaction for cash; (2) The Plan will receive a purchase price for the Property which is no less than the greater of the Plan's cost basis in the Property or the Property's fair market value as of the date of the transaction; (3) The Plan will incur no expenses with respect to the transaction; and (4) The transaction will enable the Plan to reduce its total expenses and to operate more efficiently.

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

**Howes Leather Company, Inc.  
Employee Stock Ownership Plan (the  
Plan), Located in Curwensville,  
Pennsylvania**

[Application No. D-10385]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed sale by the Plan of an individual life insurance policy (the Policy) to the Howes Leather Company, Inc. (the Employer), the sponsor of the Plan; provided that the following conditions are satisfied:

(A) All terms and conditions of the transaction are at least as favorable to the Plan as those which the Plan could obtain in arm's-length transactions with unrelated parties;

(B) The Plan receives a purchase price for the Policy of no less than the greater of (1) the fair market value of the Policy as of the sale date, or (2) Policy's cash surrender value (as described below) as of the sale date;

(C) The Plan does not incur any expenses or suffer any loss with respect to the transaction; and

(D) In the event the Employer recovers with respect to the Policy a total amount in excess of the purchase price paid to the Plan for the Policy, such excess

amount shall be distributed prorata among the participants of the Plan.

### Summary of Facts and Representations

1. The Plan is a defined contribution employee stock ownership plan with 32 participants and total assets of approximately \$465,168 as of February 16, 1996. The Plan is sponsored by the Employer, Howes Leather Company, Inc., a Delaware corporation engaged in the business of leather processing in the city of Curwensville, Pennsylvania. The trustees of the Plan are James M. Fitzgibbons and Barry I. Getto, each of whom is an officer, director and shareholder of the Employer. The Plan invests primarily in common stock of the Employer, which constituted approximately 92 percent of the Plan's assets as of February 16, 1996.

2. The Employer represents that the Plan has been terminated and that distribution of Plan assets was completed in April 1996. Although the Plan is an individual-account employee stock ownership plan, at the time of the Plan's termination date there remained in the Plan one general asset in which all Plan participants held undivided pro-rata interests: the Policy. The Policy is an individual life insurance policy issued by the Fidelity Mutual Life Insurance Company (the Insurer) on the life of Harry J. Widney, a former participant in the Plan who had terminated participation in the Plan and received full payment of Plan benefits many years prior to the Plan termination. The Employer represents that Mr. Widney had been a shareholder of the Employer and that the Plan had acquired the Policy to provide the Plan with assets to purchase Employer stock from his estate in the event of his death. When Mr. Widney left the Employer's business and terminated his participation in the Plan during the Plan year commencing July 1, 1982, his account balance in the Plan was distributed to him in the form of Employer stock. The Employer represents that Mr. Widney was offered the Policy but refused to accept it. As a result, the Policy was retained as a general asset of the Plan.

With an original face value of \$50,000 and paid-up additions totaling \$7,998, the Policy has a total face value of \$57,998. The Employer represents that upon termination of the Plan, the Trustees were unable to liquidate the Policy, by surrendering it for its cash surrender value, because the Insurer is in rehabilitation proceedings (the Rehabilitation) which have rendered the Policy frozen and inaccessible. The Employer represents that it is uncertain when the Rehabilitation will be resolved

to enable the cash surrender of the Policy by the Plan and that, due to the current status of the Insurer, the ability of the Insurer to pay the full value of the Policy is in question.

3. The Employer represents that upon termination of the Plan, the Trustees undertook to make prompt distributions to all Plan participants of their respective benefits from the Plan, and that they did not wish to delay distribution until resolution of the Rehabilitation. Accordingly, in order to enable the Plan to proceed with complete distributions, the Employer represents that it made an interest-free loan to the Plan (the Loan) in the amount of cash which the Plan would have realized from a cash surrender of the Policy on the Termination Date. The Loan proceeds were distributed pro rata among all participants in the Plan as of the Termination Date. The Loan was in the amount of \$34,044.77, which was the cash surrender value of the Policy upon the termination of the Plan as determined by the Insurer. The Employer represents that the Loan satisfied the requirements of Prohibited Transaction Class Exemption 80-26 (PTE 80-26, 45 FR 35040, May 23, 1980), relating to interest-free loans to a plan for, among other things, the payment of benefits.<sup>4</sup> The Policy remains an asset in the Plan's trust even though distribution to Plan participants has been completed.

4. In order to complete the liquidation of the Plan, the Employer now proposes to purchase the Policy from the Plan so that the last remaining Plan asset may be liquidated and the Plan's trust may be dissolved, and the Employer is requesting an exemption for such transaction under the terms and conditions described herein. The Employer proposes to purchase the Policy from the Plan for a purchase price in the amount of the Loan, and to consummate the purchase transaction by means of canceling the Loan in exchange for the Policy. Accordingly, the purchase price for the Policy will be \$34,044.77, the Policy's cash surrender value as of the date of Plan termination, which was the same amount of cash which the Plan would have realized from a cash surrender of the Policy if the Rehabilitation proceedings had not prevented the cash surrender of the Policy upon the Plan termination. The Plan will not incur any expenses with respect to the transaction.

5. Upon cancellation of the Loan, the Policy will be transferred to the

Employer, and thereafter the Employer will be entitled to amounts due the holder of the Policy under its terms and conditions. The Employer represents that due to the Rehabilitation and the financial condition of the Insurer, it is questionable whether the Employer will ever recover the cash surrender value of the Policy, and it is unlikely the Employer will ever recover any amounts in excess of the amount the Employer is paying the Plan for the Policy. Nonetheless, the Employer has agreed that in the event it receives total proceeds from the Policy in excess of the amounts paid the Plan as purchase price for the Policy, such additional amounts will be distributed pro rata among Plan participants with active accounts in the Plan as of the date of the Plan termination.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) The transaction will enable the completed termination of the Plan and dissolution of the Plan trust; (b) The Plan will not incur any expenses with respect to the transaction; (c) The purchase price of the Policy will be its cash surrender value as of the date of Plan termination as determined by the Insurer; (d) The transaction will include the Employer's cancellation of the Plan's obligations under the Loan; and (e) Any proceeds from the Policy received by the Employer in excess of the purchase price will be distributed among the Plan's participants with active accounts as of the Termination Date.

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

### **The Roquette America, Inc. Pension Plan for Salaried Employees (the Plan), Located in Keokuk, Iowa**

[Application No. D-10390]

### **Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to (1) the proposed loan to the Plan by Aon Consulting, Inc. (Aon Consulting), in connection with certain excess

<sup>4</sup>The Department expresses no opinion as to whether the Loan satisfied the conditions of class exemption PTE 80-26.

distributions (the Overpayments) that Aon Consulting inadvertently caused to be made under the Plan, and (2) the potential repayment of the loan by the Plan to Aon Consulting.

This proposed exemption is subject to the following conditions:

(1) The Plan pays no interest nor incurs any other expense relating to the loan;

(2) The loan amount covers the Overpayments, plus lost opportunity costs attributable to the Overpayments;

(3) Any repayment of the loan is restricted solely to the amount, if any, recovered by the Plan with respect to the Overpayments in litigation or otherwise; and

(4) A qualified, independent fiduciary for the Plan has reviewed the terms and conditions of the loan on behalf of the Plan and determined that such terms and conditions are in the best interests of and appropriate for the Plan.

#### Summary of Facts and Representations

1. The Plan is a defined benefit pension plan sponsored by Roquette America, Inc. (the Employer). The Employer, a Delaware corporation, is engaged in the production of corn sweeteners for use in foods. As of December 29, 1995, the Plan had total assets of approximately \$14,203,379.29. As of July 18, 1996, the Plan had approximately 334 participants and beneficiaries. The trustee of the Plan is the Northern Trust Company (Northern Trust).

2. Aon Consulting, a Pennsylvania corporation, performs actuarial and recordkeeping services for the Plan and other services for the Employer. In 1994, Aon Consulting actuaries miscalculated the value of the accrued benefits of two Plan participants (the Participants), both former officers of the Employer, and, as a consequence, caused the Plan to overpay the Participants upon the termination of their employment. One Participant's lump sum payment was calculated at \$412,719.32 instead of \$238,843.17 (overstated by \$173,876.15). The other Participant's lump sum payment was calculated at \$222,722.31 instead of \$127,419.26 (overstated by \$95,303.05). The applicant represents that the Plan's benefit formula was one of extraordinary complexity and that the errors were not noticed before the inflated benefit payments were made to the Participants on March 18, 1994.

Aon Consulting discovered the errors in May, 1994, and reported them to Northern Trust in June, 1994. In August, 1994, the Employer informed each of the Participants of the errors by registered mail and requested

immediate return of the Overpayments. Separately, each Participant has refused.

Repeated subsequent requests, both in writing and by telephone, for return of the Overpayments have yielded no result.

3. Aon Consulting proposes to make the Plan whole by making an interest-free loan to the Plan for \$269,179, the amount of the Overpayments, plus lost opportunity costs attributable to the Overpayments. Among other reasons, because the loan is to be secured by the possible recovery of the Overpayments by the Plan, the loan is outside the scope of relief provided by Prohibited Transaction Class Exemption 80-26 (PTCE 80-26, 45 FR 28545, April 29, 1980).<sup>5</sup>

The loan amount will include an additional \$50,640 to make up for the Plan's lost opportunity costs for the period from March 18, 1994, the date of occurrence of the Overpayments, to December 31, 1995, for a subtotal of \$319,819.<sup>6</sup> The loan amount will also include an amount yet to be determined to provide the Plan with a rate of investment return on the \$319,819, for the period from January 1, 1996 to the effective date of this exemption.<sup>7</sup> The loan will be evidenced by a promissory note and the loan proceeds paid to the Plan within 30 days of publication in the **Federal Register** of the notice of the grant of this exemption.

The loan will be repaid only to the extent of any amount recovered by the Plan with respect to the Overpayments. Northern Trust will continue to cooperate with Aon Consulting in pursuing recovery of the Overpayments, including, if necessary, the commencement of litigation against the Participants and their respective heirs, estates, executors, administrators, or other personal representatives, in the name of the Plan. Aon Consulting will fund all activities relating to recovery of the Overpayments. In consideration for the loan, the Employer, Northern Trust, and the Plan will release Aon

<sup>5</sup> PTCE 80-26 provides an exemption, under certain conditions, from section 406(a)(1) (B) and (D) and section 406(b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1) (B) and (D) of the Code, for interest-free loans by a party in interest or disqualified person to an employee benefit plan.

<sup>6</sup> The Department notes the applicant's representation that the figure of \$50,640 is based upon an assumed 18.8% return, which was the Plan's actual investment experience for the period from March 18, 1994 to December 31, 1995.

<sup>7</sup> The Department notes the applicant's representation that the Plan's lost opportunity costs for the period from January 1, 1996 to the effective date of this exemption will be calculated based upon an assumed rate of return which is equal to the Plan's actual investment experience for that period.

Consulting from any further claims that they may have arising from the Overpayments. The costs of this exemption application will be borne by Aon Consulting.

5. The interests of the Plan with respect to the loan are represented by Northern Trust, acting as an independent fiduciary for the Plan. In a letter from Richard W. Long, Trust Officer, dated March 17, 1997, Northern Trust represents that it is unrelated to and independent of both Aon Consulting and the Employer. Northern Trust further represents that it has extensive experience as a fiduciary under the Act, that it is knowledgeable as to the subject transactions, and that it has reviewed the terms and conditions of the loan on behalf of the Plan and determined that such terms and conditions are in the best interests of and appropriate for the Plan. Specifically, Northern Trust notes that the Plan is guaranteed to be made whole by Aon Consulting by virtue of the interest-free loan (which covers the full amount of the Overpayments, plus interest), and is thus able to avoid the legal costs and uncertainties associated with recouping the Overpayments through alternate means. The potential repayment obligation on the part of the Plan serves the legitimate purpose of preventing a "double recovery" by the Plan.

6. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (1) The Plan will pay no interest nor incur any other expense relating to the loan; (2) the loan will enable the Plan to immediately recover the amount of the Overpayments, including appropriate interest; (3) any repayment of the loan will be restricted solely to the amount, if any, recovered by the Plan with respect to the Overpayments in litigation or otherwise; and (4) Northern Trust, acting as an independent fiduciary for the Plan, has reviewed the terms and conditions of the loan on behalf of the Plan and determined that such terms and conditions are in the best interests of and appropriate for the Plan.

#### Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons, and all employee organizations in which any Plan participant is a member, by mail or by posting in the Employer's offices within 30 days of the date of publication of this notice of pendency in the **Federal Register**. Such notice shall include a copy of this notice of

pendency as published in the **Federal Register** and shall inform interested persons of their right to comment and/or request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 60 days of the date of publication of this notice in the **Federal Register**.

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

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

[Application No. D-10430]

**Proposed Exemption**

*I. Transactions*

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

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

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

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

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.<sup>8</sup>

B. Effective February 12, 1997, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

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

(i) the plan is not an Excluded Plan;  
(ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

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

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.<sup>9</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. Effective February 12, 1997, 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:

<sup>9</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.

(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>10</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. Effective February 12, 1997, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

*II. General Conditions*

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

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

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

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's

<sup>10</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.

<sup>8</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).

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 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 NISI or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this 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);<sup>11</sup>

(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) NISI;

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

(3) any member of an underwriting syndicate or selling group of which NISI 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

<sup>11</sup> It is the Department's view that the definition of "trust" contained in III.B. includes a two-tier structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues securities that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

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.

W. *NISI* means Norwest Investment Services, Inc. and its affiliates.

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

#### Summary of Facts and Representations

1. NISI is the wholly-owned, separately capitalized investment banking subsidiary of Norwest Corporation (Norwest), a diversified financial services company which was incorporated in Delaware and registered under the Bank Holding Company Act of 1956, as amended. On September 30, 1996 Norwest's consolidated assets were approximately \$78 billion. The principal executive offices of Norwest are located in Minneapolis, Minnesota. As of September 30, 1996, Norwest had subsidiary banks located in 16 states. In addition, non-bank subsidiaries of Norwest offer insurance, securities brokerage services, investment banking and venture capital investment, and mortgage banking and consumer finance.



Norwest Mortgage, Inc., an indirect wholly-owned subsidiary of Norwest headquartered in Des Moines, Iowa, is one of the largest mortgage banking originators in the United States, with offices in all 50 states. Norwest Financial Services, Inc. (NFI) and its subsidiaries engage in consumer finance activities in each of the 50 states, the Caribbean and Central America and Canada. NFI is also an indirect wholly-owned subsidiary of Norwest. Subsidiaries of NFI also engage in data processing activities for other consumer finance companies.

Norwest Bank Minnesota, N.A. (the Bank), a separate wholly-owned subsidiary of Norwest, is engaged in banking and related activities and is the largest bank in the banking group. At September 30, 1996, the Bank had total assets of \$17.1 billion. The principal executive offices of the Bank are located in Minneapolis, Minnesota. The banking group also includes ten other commercial banks and one federal savings bank, located in 10 states, exceeded \$2 billion dollars in total assets as of September 30, 1996.

NISI was incorporated in 1984. It maintains its principal place of business in Minneapolis, Minnesota, and has branches in Arizona, Colorado, Iowa, Illinois, Indiana, Montana, North Dakota, Nebraska, New Mexico, South Dakota, Texas, Washington, Wisconsin and Wyoming, as well as the Twin Cities Metropolitan Area.

NISI is a member of the National Association of Securities Dealers and a primary dealer in U.S. Treasury securities. NISI underwrites and deals in corporate debt securities, municipal securities, high-yield securities and asset-backed securities, provides private placement and corporate finance advisory services, including merger and acquisition advisory services, publishes research on a wide range of securities and issuers, and engages in syndication, arranging and trading of bank loans.

NISI has experience in asset securitizations. NISI's participation in securitization transactions includes the underwriting of public offerings and serving as private placement agent or commercial paper conduit agent/dealer for transactions backed by retail auto receivables and bank and retail credit cards receivables.

NISI represents that in 1989 it received Federal Reserve Board authorization to underwrite and deal in commercial paper, municipal revenue bonds, residential mortgage-related securities and consumer receivable-related securities. This order is currently subject to the condition that NISI does not derive more than 10% of

its total gross revenues from such activities. In addition, NISI's affiliates have the power to sell interests in their own assets in the form of asset-backed securities.

#### *Trust Assets*

2. NISI 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>12</sup> (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.<sup>13</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>14</sup>

<sup>12</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. NISI requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, NISI has stated that it may still avail itself of the exemptive relief provided by PTE 83-1.

<sup>13</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>14</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).

#### **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.<sup>15</sup>

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. NISI, 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 NISI on a firm commitment basis. In addition, NISI anticipates that it may privately place certificates on both a firm commitment and an agency basis. NISI 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

<sup>15</sup> It is the view of the Department that section III.B.(4) includes within the definition of the term "trust" rights under any yield supplement or similar arrangement which obligates the sponsor or master servicer, or another party specified in the relevant pooling and servicing agreement, to supplement the interest rates otherwise payable on the obligations described in section III.B.(1), in accordance with the terms of a yield supplement arrangement described in the pooling and servicing agreement, provided that such arrangements do not involve swap agreement or other notional principal contracts.

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. NISI 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>16</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 distributed, all senior certificateholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.<sup>17</sup>

6. The trust will be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing 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 home owner or automobile purchaser, or leases property to a lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their 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 or other corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

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 NISI, the trust sponsor or the servicer. NISI 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

<sup>16</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.

<sup>17</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.

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 NISI. In other cases, however, affiliates of NISI 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>18</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

<sup>18</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.

be required to pay the administrative expenses of servicing the trust, including in some cases the trustee's fee, out of its servicing compensation.

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

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 overcollateralization) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

#### *Provision of Credit Support*

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 NISI in connection with the offering of any certificates, but NISI 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 NISI may find it desirable in the future to enter into such commitments for the purchase of certificates.

*Secondary Market Transactions*

25. It is NISI's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter. NISI anticipates that it will make a market in certificates, although it will have no obligation to do so.

*Retroactive Relief*

26. NISI represents that it has not assumed that retroactive relief would be granted prior to the date of its application, and therefore has not engaged in transactions related to mortgage-backed and asset-backed securities based on such an assumption. However, NISI requests the exemptive relief granted to be retroactive to February 12, 1997, the date of its application, and would like to rely on such retroactive relief for transactions entered into prior to the date exemptive relief may be granted.

*Summary*

27. 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 NISI 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) NISI 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>19</sup>

<sup>19</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

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

NISI 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>20</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>21</sup> Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, NISI 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. NISI 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, NISI 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 have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

<sup>20</sup>In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which NISI 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>21</sup>The applicant represents that where a trust sponsor is an affiliate of NISI, 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 NISI is not a fiduciary with respect to plan assets to be invested in certificates.

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 14th day of April, 1997.

**Ivan Strasfeld,**

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

[FR Doc. 97-9974 Filed 4-16-97; 8:45 am]

BILLING CODE 4510-29-P

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 97-16]

#### United States Trust Company of New York and Affiliated Companies (US Trust)

AGENCY: Department of Labor.

ACTION: Notice of Technical Correction.

On March 5, 1997, the Department of Labor (the Department) published in the **Federal Register** (62 FR 10080) an individual exemption which permits: (1) Effective as of May 31, 1996, the in-kind transfer to any diversified open-end investment company (the Fund or Funds) registered under the Investment Company Act of 1940 to which US Trust serves as investment adviser and may provide other services (i.e. "Secondary Services" as defined in therein), of the assets of various employee benefit plans (the Plans) that are either held in certain collective investment funds (CIFs) maintained by US Trust or otherwise held by US Trust as trustee, investment manager, or in any other capacity as fiduciary on behalf of the Plans, in exchange for shares of such Funds; and (2) effective as of June 30, 1996, the receipt of fees by US Trust from the Funds for acting as the investment adviser for the Funds as well as for acting as the custodian, transfer agent, sub-administrator or for providing other "Secondary Services" to the Funds in connection with the investment in the Funds by Plans for which US Trust acts as a fiduciary, other than Plans established and maintained by US Trust for the benefit of its employees and their beneficiaries.

In the March 5th **Federal Register** publication, there was an error in the numerical sequence of the exemptions published on that date. In this regard, the subject exemption was erroneously designated as "\* \* \* Prohibited Transaction Exemption 97-17", rather than Prohibited Transaction Exemption 97-16 as intended by the Department.

Therefore, the Department hereby corrects such error by designating the

exemption as Prohibited Transaction Exemption 97-16.

FOR FURTHER INFORMATION CONTACT: Mr. E. F. Williams, of the Department, at (202) 219-8194.

Signed at Washington, DC, this 14th day of April, 1997.

**Ivan L. Strasfeld,**

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

[FR Doc. 97-9976 Filed 4-16-97; 8:45 am]

BILLING CODE 4510-29-P

## NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

### Sunshine Act Meeting

#### TIME, DATE, AND PLACE:

- NCLIS Meeting 7 May 1997, 10:00 a.m.-5:00 p.m. 1110 Vermont Avenue, NW., Suite 810, Washington, DC.

- Joint NCLIS Meeting with National Museum Services Board 8 May 1997, 9:00 a.m.-4:00 p.m. Old Post Office Building, Room M-09, 1100 Pennsylvania Avenue, NW., Washington, DC.

- NCLIS Meeting 9 May 1997, 9:00 a.m.-1:30 p.m. 1110 Vermont Avenue, NW., Suite 810, Washington, DC.

#### MATTERS TO BE DISCUSSED ON 7 MAY AND 9 MAY 1997:

- Reports from NCLIS Commissioners on meetings of library, information or other related groups.

- Annual ethics training.

- Update on NCLIS project to assess standards for the creation, dissemination, and permanent accessibility of electronic government information products.

- Update on NCLIS/ALA 1997 survey of public libraries and the Internet.

- Library Services and Technology Act (LSTA): Review of LSTA transition to the Institute of Museum and Library Services (IMLS), discussion of draft regulations for National Leadership Grants and Contracts, NCLIS process for advising IMLS, LSTA coordination with other federal programs.

- NCLIS programs, plans, and actions—FY 1997-98.

- White House Conference on Library and Information Services Taskforce (WHCLIST).

- Library Statistics Program.

- Other matters.

To request further information or to make special arrangements for physically challenged persons, contact Barbara Whiteleather (202-606-9200) no later than one week in advance of the meeting.