seven separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, DC this 30th day of March, 2000.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 00–8446 Filed 4–6–00; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10678, et al.]

Proposed Exemptions; H. Ray McPhail (Mr. McPhail) and the H. Ray McPhail Profit Sharing Plan (the Plan)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

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

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Attention: Application No. ______, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW, Washington, DC 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), 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.

H. Ray McPhail (Mr. McPhail) and the H. Ray McPhail Profit Sharing Plan (the Plan) Located in Atlanta, Georgia

[Exemption Application No. D–10678]

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 32826, 32847, August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale (the Sale) of four parcels of unimproved real property (the Property) and loan (the Loan) from the Plan to Mr. McPhail,[1] a disqualified person with respect to the Plan, provided that the following conditions are met:

(1) With respect to the Sale:

(A) The terms and conditions of the Sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(B) The Sale will occur at a price which includes the greater of $270,000 or the Property's fair market value as established by a qualified, independent appraiser;

(C) The Sale Price will also include a premium of $30,000 (the Assemblage Value) due to Mr. McPhail's ownership of unimproved real property located adjacent to the Property;

(D) The Plan will pay no fees or commissions with respect to the Sale; and

(E) Mr. McPhail will pay $60,000 or 20% of the Sale Price in cash with the balance paid for by the Loan; and

(2) With Respect to the Loan:

(A) The interest rate on the Loan (the Interest Rate) will be 7%, a rate set by the Macon Bank for a real estate loan having terms similar to the Loan;

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

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

(D) The outstanding balance of the Loan will never exceed 20% of the assets of the Plan throughout the duration of the Loan;

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

(3) Should any employee of the Plan Sponsor become eligible for Plan participation, the new participant will be enrolled in another qualified retirement plan or the Loan will be immediately repaid.

Summary of Facts and Representations

1. The H. Ray McPhail Company (the McPhail Co.) is a Georgia company engaged in the purchase and sale of real estate. The McPhail Co. is solely owned

[1] Since Mr. McPhail is the only participant in the Plan, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3–3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

by Mr. McPhail and is the sponsor of the Plan. The Plan is a defined contribution plan located in Atlanta, Georgia and having Mr. McPhail as its sole participant. The Plan had total assets of approximately $3,420,136 as of October 31, 1998.

2. The assets of the Plan include the Property. The Property comprises approximately 3.66 acres of unimproved real property located in Highlands, North Carolina. The Property is divided into four lots. Two of the lots are interior lots and the other two lots have frontage on Lake Sequoyah. The Property was acquired for $293,000 on November 23, 1994 from Elizabeth Nielson, an unrelated party.

3. Since its acquisition, the Property has not generated any income for the Plan. The Plan has, however, incurred certain expenses as a result of the Plan's ownership of the Property. In this regard, the applicant represents that the Plan has incurred a total of $3,169.33 in property taxes. In addition, the applicant represents that the Plan has incurred expenses in the amount of $1,685 for consulting fees resulting from the Plan's attempt to develop the Property.

4. The Property was appraised by Thomas Ringle (Mr. Ringle), an appraiser independent of the Plan and certified in the State of North Carolina. Mr. Ringle calculated the Property's fair market value (the Fair Market Value) using the sales comparison approach and compared the Property to similar unimproved properties located near the Property. Based on these comparisons, Mr. Ringle determined the Fair Market Value to be $270,000 as of June 9, 1998.

Mr. Ringle also calculated an additional value for the Property for purposes of the Sale (*i.e.,* the Assemblage Value). Mr. Ringle represents that the Assemblage Value is due to Mr. McPhail's ownership of unimproved real property located adjacent to the Property and reflects the higher value property owners are willing to pay for adjoining parcels of property. Based on his analysis of the Property, Mr. Ringle calculated that the Assemblage Value to be $30,000.

Mr. Ringle determined that the sales price of the Property for purposes of the Sale (the Sale Price) should be a sum equal to the Fair Market Value and the Assemblage Value. As a result, Mr. Ringle determined the Sale Price to be $300,000.

5. The applicant is proposing the sale of the Property from the Plan to Mr. McPhail for $300,000 (*i.e.,* the Sale). The applicant represents that Mr. McPhail proposes to pay 20% of the Sales Price in cash to the Plan as a down payment on the Property with the Plan loaning Mr. McPhail the remaining 80% balance (*i.e.,* the Loan). In this regard, the applicant represents that the Loan will be for 15 years at seven percent (7%) interest (*i.e.,* the Interest Rate). The Interest Rate represents an interest rate set by the Macon Savings Bank (Macon) located in Highlands, North Carolina, for a real estate loan having similar terms as the Loan. The applicant represents that Macon is an independent party with respect to the Plan.

As a result, Mr. McPhail proposes the following terms for the Sale: $60,000 in cash paid by Mr. McPhail to the Plan as a down payment on the Property; and $2,157.19 paid by Mr. McPhail to the Plan each month for 179 months. As security on the Loan, Mr. McPhail will pledge the Property and additional unimproved real property having a fair market value of $435,000 as of September 3, 1999, as determined by John Meadows of John Cleveland Realty, an independent real estate broker. The security interest securing the Loan will be a first security interest and will be perfected in accordance with North Carolina law. In addition, the property securing the Loan, will be insured against casualty loss for an amount which is not less than the Loan balance throughout the duration of the Loan. The Plan will be listed as a loss payee on the insurance policy.

6. The applicant represents that the proposed Sale is in the best interest of the Plan due to the high expense the Plan anticipates will be necessary for a sale of the Property to unrelated third parties. The applicant further represents that the Property was originally purchased by the Plan with the intent that the Plan would resell the Property to unrelated parties. The applicant notes that, subsequent to the purchase of the Property by the Plan, the Plan determined that the Property could not be sold to third parties without the expenditure of Plan assets on certain costly improvements, including the construction, grading and paving of a road.

The applicant additionally represents that the proposed Loan is protective of the Plan since the Loan will be secured with real property having a fair market value in excess of the Property and the Interest Rate is set according to current market rates for similar transactions.

Finally, the applicant represents that the Sale is administratively feasible since the proposed Sale will allow the Plan to liquidate its investment in the Property at a price which will maximize value to the Plan and is a one-time transaction in which the Plan will pay no fees or transaction costs.

7. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 4975(c)(2) of the Code because,

(1) With respect to the Sale:

(A) The terms and conditions of the Sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(B) The Sale will occur at a price which includes the greater of $270,000 or the Property's fair market value as established by a qualified, independent appraiser;

(C) The Sale Price will also include a premium of $30,000 (the Assemblage Value) due to Mr. McPhail's ownership of unimproved real property located adjacent to the Property;

(D) The Plan will pay no fees or commissions with respect to the Sale; and

(E) Mr. McPhail will pay $60,000 or 20% of the Sale Price in cash with the balance paid for by the Loan; and

(2) With Respect to the Loan:

(A) The interest rate on the Loan (the Interest Rate) will be 7%, a rate set by the Macon Bank for a real estate loan having terms similar to the Loan;

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

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

(D) The outstanding balance of the Loan will never exceed 20% of the assets of the Plan throughout the duration of the Loan;

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

(3) Should any employee of the Plan Sponsor become eligible for Plan participation, the new participant will be enrolled in another qualified retirement plan or the Loan will be immediately repaid.

For Further Information Contact: J. Martin Jara of the Department, telephone (202) 219–8883 (this is not a toll free number).

Triumph Capital Group, Inc., Located in Boston, MA

[Application No. D–10708]

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) 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, effective July 22, 1997, to the making, by an employee benefit plan subject to the Act (the Plan), of capital contributions to any private equity fund (the Triumph Fund) that is organized, sponsored and/or managed by Triumph Capital Group, Inc. and/or any of its affiliates (collectively, Triumph) pursuant to a contractual obligation by a Plan having an interest in the Triumph Fund.[2]

This proposed exemption is subject to the following conditions:

a. At the time the Plan undertakes the obligation to make such capital contributions (the Determination Date), the Triumph Fund is not a party in interest with respect to the Plan.

b. The decision to make a capital contribution to a Triumph Fund is made on behalf of the Plan by a Plan fiduciary which is independent of and unrelated to Triumph and the portfolio company whose interest is acquired by the Triumph Fund.

c. Triumph does not otherwise provide investment advice as a fiduciary to the Plan, within the meaning of the Department's regulations at 29 CFR 2510.3–21(c), with respect to such Plan's assets that are invested in the Triumph Fund.

d. At the Determination Date, the Plan has aggregate assets that are in excess of $50 million; provided, however, that in the case of:

(1) Two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are invested in a Triumph Fund through a group trust, an insurance company pooled separate account or any other form of entity the assets of which are "plan assets" under the Department's regulations at 29 CFR 2510.3–101 (the Plan Asset Regulation), the foregoing $50 million requirement shall be satisfied if such trust, separate account, or other entity has aggregate assets which are in excess of $50 million, provided further that the fiduciary responsible for making the investment decision on behalf of such group trust, insurance company pooled separate account, or other entity has—

i. Full investment responsibility[3] with respect to the plan assets invested therein; and

ii. Total assets under its management and control, exclusive of the assets invested in the Triumph Fund, which are in excess of $100 million, for Triumph Funds established after the date this notice of proposed exemption is published in the **Federal Register**.

(2) Two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are invested in a Triumph Fund through a master trust or any other entity the assets of which are "plan assets" under the Plan Asset Regulation, the $50 million requirement shall in any event be satisfied if such trust or other entity has aggregate assets which are in excess of $50 million, provided, further, that, in the case of a Triumph Fund established after the date the notice granting the exemption is published in the **Federal Register**, in addition to the $50 million requirement, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, then such fiduciary has total assets under its management and control, exclusive of the assets invested in the Triumph Fund, which are in excess of $100 million.

e. The Triumph Fund is a party in interest with respect to the Plan solely by reason of a relationship to a portfolio company which is a service provider to a Plan, as described in Section 3(14)(H) or (I) of the Act, including a fiduciary with respect to such Plan.

f. The capital commitment of the Plan (together with the capital commitments of any other Plans maintained by the same employer, controlled group of corporations or employee organization) with respect to the Triumph Fund, does not exceed 15 percent of the total capital commitments made by all investors with respect to such Triumph Fund, determined at the later of (i) the Determination Date, or (ii) the date on which the Triumph Fund first becomes a party in interest with respect to such Plan.

g. At the Determination Date the percentage of the Plan's assets committed to be invested in the Triumph Fund does not exceed 5 percent of the Plan's total assets.

h. At the Determination Date, a Plan's aggregate capital commitment to all Triumph Funds does not exceed 25 percent of the Plan's total assets.

i. The Plan receives the following initial and ongoing disclosures with respect to the Triumph Fund;

(1) A copy of the private placement memorandum applicable to the Triumph Fund or another comparable document containing substantially the same information;

(2) A copy of the limited partnership or other agreement establishing the Triumph Fund;

(3) A copy of the subscription agreement applicable to the Triumph Fund, if any;

(4) Copies of this proposed exemption and the final exemption, if granted, once such documents are published in the **Federal Register**; and

(5) Periodic, but no less frequently than annually, reports relating to the overall financial position and operational results of the Triumph Fund, including copies of the Triumph Fund's annual financial statements.

j. With respect to capital contributions made to a Triumph Fund by a Plan after the date this proposed exemption is granted, Triumph maintains or causes to be maintained, for a period of six (6) years from the date of the transaction, the records necessary to enable the persons described in paragraph (k) to determine whether the conditions of the exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred, if due to circumstances beyond the control of Triumph, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest, other than Triumph, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (k).

k. (1) Except as provided in paragraph (k)(2) and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (j) are unconditionally available at their customary location for examination during normal business hours by—

[2] As discussed herein, Triumph Funds are generally expected to be organized as venture capital operating companies that are managed by Triumph.

[3] For purposes of this exemption, the term "full investment responsibility" means that the fiduciary responsible for making the investment decision has and exercises discretionary management authority over all of the assets of the group trust or other plan assets entity.

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of a Plan which has an interest in the Triumph Fund and has the authority to acquire or dispose of the interest of the Plan in the Triumph Fund, or any duly authorized employee or representative of such fiduciary; and

(C) Any participant or beneficiary of any Plan which has an interest in the Triumph Fund, or duly authorized representative of such participant or beneficiary.

(2) None of the persons described in paragraph (k)(1)(B) and (k)(1)(C) shall be authorized to examine trade secrets of Triumph or commercial or financial information which is privileged or confidential.

Effective Date: If granted, this proposed exemption will be effective as of July 22, 1997.

Summary of Facts and Representations

1. Triumph Capital Group, Inc., is a Delaware corporation which, together with its affiliates (collectively referred to herein as ''Triumph'') has organized, sponsored and/or managed six (6) private equity (or high-yield debt) funds, involving total capital commitments of approximately one (1) billion dollars. The investors in the Triumph Funds are primarily sophisticated institutional investors, including employee benefit plans that are subject to the Act, private foundations, government plans, endowments and other tax exempt organizations, and a few wealthy individuals. The applicant represents that private equity funds, such as the Triumph Funds, allow Plans, particularly those having significant asset bases, to achieve greater diversification by asset class. As such, many of the investors in the existing Triumph Funds, and many potential investors in future Triumph Funds, will be Plan investors that are covered by the Act.

2. Each Triumph Fund in which any Plan invests is organized and operated so that the assets of such Triumph Fund will not be deemed to be ''plan assets'' under the Plan Asset Regulation. In most cases, this results from the fact that the Triumph Fund is operated in a manner which causes such Fund to qualify as a venture capital operating company.[4] In some cases, it may be the result of the fact that the equity participation in the Triumph Fund by benefit plan investors is not significant (*i.e.,* 75 percent or more of the equity interest in the entity is held by non-benefit plan investors).[5]

3. The Triumph Funds have typically been structured as limited partnerships with Triumph serving as general partner and, in some cases, having an interest as limited partner. (Triumph Funds organized in the future may be organized using different structures, such as limited liability companies.) The Triumph Funds are managed by Triumph which receives a pre-specified management fee as well as a pre-specified incentive allocation after investors have received distributions in excess of their capital contributions plus a pre-specified minimum rate of return. Because the Triumph Funds are generally expected to be organized as venture capital operating companies, the applicant represents that none of the Triumph Funds will hold ''plan assets'' and that the compensation paid to Triumph by the Triumph Funds will not be subject to the prohibitions under the Act.[6]

One of Triumph's more recent funds, Triumph Partners III, L.P., has aggregate capital commitments of approximately $595,550,000 from 49 individual and institutional investors. Of the institutional investors, 6 investors are Plans that are covered under the provisions of the Act. These Plans have made a total capital commitment to Triumph Partners III, L.P. of $170,300,000.

4. Triumph Funds typically involve multiple closings with investors making their investment commitments (and therefore having a Determination Date) over a six to nine month period. Because of this staging, Triumph proposes, for purposes of the 15% limit contained in condition (f) above, to test each Plan investor's capital commitment with respect to the Triumph Fund in relation to the total capital commitments made by all the investors with respect to such Triumph Fund, at the *later* of (a) the Determination Date, or (b) the date on which the Triumph Fund first becomes a party in interest with respect to such Plan investor.

Each investor in a Triumph Fund, including each Plan investor, enters into a binding commitment to make capital contributions to the Triumph Fund in an amount specified by the investor. However, the investors' capital commitments typically are not funded at the outset. Rather, the capital is drawn down over time as the Triumph Fund identifies and makes its venture capital and other investments. Generally, capital is called down in installments ranging from 2.5 percent to 10 percent of the total commitment. In most cases, all of the capital commitments will have been drawn down within 3 to 5 years of the establishment of the Triumph Fund.

5. The Triumph Funds' investments include a wide variety of portfolio companies.[7] Specifically, the Triumph Funds may acquire interests in portfolio companies which are involved, either directly or through subsidiaries, in various aspects of the financial services industry. Triumph believes that the flexibility to acquire such investments is necessary to enable the Triumph Funds to maximize investment opportunities and investment returns. In Triumph's view, business opportunities can arise in connection with start-up or later-stage companies (including spinoffs and management buy-outs of existing

[4] The Department's regulation at 29 CFR 2510.3–101(c) defines the term ''operating company'' as an entity that is primarily engaged, directly or through a majority-owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term ''operating company'' includes a ''venture capital operating company.''

29 CFR 2510.3–101(d) provides, in part, that an entity is a ''venture capital operating company'' if at least 50 percent of its assets are invested in venture capital investments, and the entity, in the ordinary course of its business, actually exercises management rights with respect to one or more operating companies in which it invests. 29 CFR 2510.3–101(d)(3) explains that a venture capital investment is an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights. The term ''management rights'' is defined under 29 CFR 2510.3–101(d)(3)(ii) to mean contractual rights directly between the investor and an operating company to substantially participate in, or substantially influence the conduct of, the management of the operating company.

[5] The Department's regulation at 2510.3–101(f)(1) states, in pertinent part, that equity participation in an entity by benefit plan investors is ''significant'' on any date, if immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors.

[6] The Department is providing no opinion with regard to whether a Triumph Fund is a venture capital operating company or whether the equity participation by Plans investing in a Triumph Fund is not significant. In addition, the Department is not expressing any views with respect to the compensation that is paid to Triumph by a Triumph Fund.

[7] According to the applicant, the term ''portfolio company'' refers to each of the operating companies in which a private equity fund has made an investment. Thus, for example, when a private equity fund, such as a Triumph Fund, makes an investment in a start-up, high tech company, that company becomes one of the private equity fund's portfolio companies and will remain so as long as the private equity fund retains its investment in that high tech company. Similarly, if a private equity fund acquires an interest in an investment management firm, the investment management firm will become a portfolio company of the private equity fund.

business operations) in virtually any type of business.

6. Triumph Funds may acquire interests in portfolio companies that are involved in providing money management services, brokerage services or other types of services which may be utilized by Plans and institutional investors. The portfolio company may be, or may become, a party in interest with respect to one or more Plans which hold an interest in the Triumph Fund when such portfolio company, or any subsidiary thereof, performs services for a Plan. The services may include fiduciary services (*e.g.,* management of assets of the Plan other than those invested in a Triumph Fund). In no event will the portfolio company or its subsidiary act in a fiduciary capacity with respect to the assets of the Plan that are invested in the Triumph Fund.

If the Triumph Fund owns, directly or indirectly, a 10 percent or more interest in a service provider to a Plan, Triumph notes that the Fund will become a party in interest with respect to such Plan under section 3(14)(H) or (I) of the Act.[8] Since a Triumph Fund frequently purchases a 10 percent or more interest in a portfolio company, Triumph represents that it is possible that a Triumph Fund could become a 10 percent or more owner of a service provider and a party in interest with respect to each Plan as to which the portfolio company (or one of its subsidiaries) is a service provider. Once a Triumph Fund becomes a party in interest with respect to a Plan, Triumph states that the Plan would be prohibited from engaging in any transaction with that Triumph Fund.

If a Triumph Fund were to become a party in interest with respect to a Plan, Triumph is concerned that a capital contribution made by the Plan subsequent to the Triumph Fund's becoming a party in interest would violate section 406(a)(1)(D) of the Act notwithstanding the fact that the capital contribution is being made pursuant to a pre-existing binding contractual commitment made by the Plan at a time when the Triumph Fund was not a party in interest. Therefore, to resolve these potential technical violations of the Act, Triumph has requested an administrative exemption from the Department.[9]

7. The requested exemption is subject to a number of conditions that will apply both retroactively and prospectively. First, the Triumph Fund's party in interest status will, in all cases, arise after the Determination Date, *i.e.,* after the Plan investor has made a binding commitment to invest in the Triumph Fund, including its commitment to make future capital contributions to the Triumph Fund. Second, the decision to undertake the obligation to make a binding commitment must be made on behalf of the Plan by a Plan fiduciary which is independent of and unrelated to Triumph and the portfolio company. Third, Triumph must not otherwise provide investment advice to the Plan, within the meaning of the Department's regulation at 29 CFR 2510.3–21(c) (defining when an investment adviser to a plan becomes a fiduciary by reason of the advice), with respect to such Plan's assets that are invested in the Triumph Fund. Fourth, at the Determination Date, the Plan must have aggregate assets that are in excess of $50 million, subject to special rules addressing investments in a Triumph Fund by entities holding the assets of multiple plans, such as group trusts and master trusts. Fifth, at the later of the Determination Date or the date on which the Triumph Fund first becomes a party in interest with respect to such Plan investor, the capital commitment of the Plan (together with the capital commitments of any other Plans maintained by the same employer, controlled group of corporations, or employee organization) with respect to the Triumph Fund, must not exceed 15 percent of the total capital commitments with respect to such Triumph Fund. Sixth, at the Determination Date, the percentage of the Plan's assets committed to be invested in the Triumph Fund must not exceed 5 percent of the Plan's total assets. Seventh, at the Determination Date, a Plan's aggregate capital commitment with respect to all Triumph Funds must not exceed 25 percent of such Plan's total assets.

8. The conditions of the proposed exemption also require that each Plan receive the following initial and ongoing written disclosures from Triumph: (a) A copy of the private placement memorandum applicable to the Triumph Fund or another comparable document containing substantially the same information; (b) a copy of the limited partnership or other agreement establishing the Triumph Fund; (c) a copy of the subscription agreement applicable to the Triumph Fund, if any; (d) copies of the proposed exemption and the final exemption, if granted, once such documents are published in the **Federal Register**; and (e) periodic, but no less frequently than annually, reports relating to the overall financial position and operational results of the Triumph Fund including copies of the Triumph Fund's annual financial statements. In addition, with respect to capital contributions made to a Triumph Fund by a Plan after the date this proposed exemption is granted, Triumph will maintain or cause to be maintained for a period of six (6) years from the date of each transaction, records of each Plan investing in a Triumph Fund and each portfolio company comprising a Triumph Fund. Such records will enable the Department and other persons to determine whether the terms and conditions of the exemption are being met.

9. If the exemption is not granted, Triumph represents that it and the Triumph Funds would be required to make one of several adjustments designed to avoid the prohibited transaction concern that is the subject of this request. However, Triumph states that it does not believe these adjustments would be in the best interest of existing or prospective Plan investors. In this regard, Triumph represents that it might attempt to avoid the problem by not acquiring any portfolio companies which are, directly or indirectly, service providers to any of a Triumph Fund's Plan investors. However, Triumph does not consider this alternative satisfactory because it would limit the Triumph Fund's potential range of investments and diminish the expected investment return of such Fund. Moreover, Triumph points out that a portfolio company which is not a service provider at the time of the Triumph Fund's investment might become a service provider at some time in the future. Under these circumstances, Triumph represents that it would be impractical to restrict the activities of all portfolio companies in which the Triumph Fund invests to assure that no such portfolio company would ever become a service provider to any Triumph Fund's Plan investors. According to Triumph, such restriction

[8] In this regard, it is noted that the corresponding section of the Code relating to ''disqualified persons'' (see section 4975(e)(2)(H) and (I)) does not contain a similar provision which would make the owner of 10 percent or more of a service provider a disqualified person with respect to a Plan. Nevertheless, because the service provider is a ''disqualified person'' under section 4975(e)(2)(B) of the Code, Triumph has requested that the exemption extend to both the Code and the Act in order to avoid any potential concerns regarding the possibility of indirect prohibited transactions.

[9] The Department is providing no opinion in this proposed exemption regarding whether, or to what extent, a Plan engaging in the subject transaction with a Triumph Fund would violate section 406(a) of the Act, once the Triumph Fund becomes a party in interest with respect to the Plan, under the circumstances described herein.

would be contrary to the best interest of the Triumph Funds and their investors, particularly, their Plan investors.

As another alternative, Triumph represents that it could limit the offering of interests in the Triumph Funds to those Plans which could take advantage of Prohibited Transaction Exemption (PTE) 84–14 (49 FR 9494 March 13, 1984), the Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers (QPAMs) or PTE 96–23 (61 FR 15975, April 10, 1996), the Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers (INHAMs).[10] However, Triumph believes that such an approach would be unduly restrictive and not in the best interest of the Plans since relatively few Plans could take advantage of PTE 96–23. In addition, in the absence of this proposed exemption, each Plan would be forced to hire a QPAM in order to meet the conditions of PTE 84–14, and incur an additional expense in order to invest in a Triumph Fund, if the Plan's named fiduciary would otherwise make that decision itself.

10. In summary, it is represented that the proposed transactions satisfy the statutory criteria of section 408(a) of the Act because: (a) The Triumph Fund's party in interest status with respect to the Plan will arise after the Plan has made its binding commitment to invest in the Triumph Fund, including its commitment to make future capital contributions to the Triumph Fund; (b) the decision by a Plan to make capital contributions to the Triumph Fund has been and will be made on behalf of the Plan by a Plan fiduciary which is independent of and unrelated to Triumph and the portfolio company that is acquired by the Triumph Fund; (c) Triumph will not otherwise provide investment advice to the Plan, within the meaning of 29 CFR 2510.3–21(c) of the Act, with respect to such Plan's assets that are invested in the Triumph Fund; (d) at the later of the Determination Date, or the date on which the Triumph Fund first becomes a party in interest with respect to such Plan investor, the capital commitment of the Plan (together with the capital commitment of any other related Plans maintained by the same employer, controlled group of corporations, or employee organization) will not exceed more than 15 percent of the total outstanding capital commitments made by all investors with respect to the Triumph Fund; (e) at the Determination Date, the percentage of the Plan's assets committed to be invested in the Triumph Fund has not and will not exceed 5 percent of the Plan's total assets, and the Plan's aggregate commitment to all Triumph Funds has not and will not exceed 25 percent of the Plan's total assets; (f) a Plan investing in a Triumph Fund has or will have, either alone or in combination with other plans, assets that are in excess of $50 million (as described under the conditions contained herein); and (g) Triumph has made or will make written disclosures to the Plan regarding the Triumph Fund, both at the time of the initial commitment to invest in such Fund as well as on an ongoing basis.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include fiduciaries of Plans whose assets are currently invested in a Triumph Fund. Accordingly, the Department has determined that the only practical form of providing notice to such Plan fiduciaries is the distribution, by Triumph, of a copy of the proposed exemption by first class mail within 15 days of the date of publication of the pendency notice in the **Federal Register**. The notice will include a copy of the notice of proposed exemption, as published in the **Federal Register**, as well as a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on the pending exemption. Comments with respect to the proposed exemption are due 45 days after the date of publication of the proposed exemption in the **Federal Register**.

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

The Fidelity Mutual Life Insurance Company (In Rehabilitation) (FML) Located in Radnor, PA

[Application No. D–10712]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[11]

Section I. Covered Transactions

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 receipt of certain stock (the Plan Stock) issued by Fidelity Insurance Group, Inc. (Group), a wholly owned subsidiary of FML, or (2) the receipt of plan credits (the Plan Credits), by or on behalf of a mutual member (the Mutual Member) of FML, which is an employee benefit plan (the Plan), other than the Employee Pension Plan of Fidelity Mutual Life Insurance Company (the FML Plan), in exchange for such Mutual Member's membership interest (the Membership Interest) in FML, in accordance with the terms of a plan of rehabilitation (the Third Amended Plan of Rehabilitation), approved by the Pennsylvania Commonwealth Court (the Court) and supervised by both the Court and a rehabilitator (the Rehabilitator) appointed by the Pennsylvania Insurance Commissioner (the Commissioner).

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

Section II. General Conditions

(a) The Third Amended Plan of Rehabilitation is approved by the Court, implemented in accordance with procedural and substantive safeguards that are imposed under Pennsylvania law and is subject to review and/or supervision by the Commissioner and the Rehabilitator. The Court determines whether the Third Amended Plan of Rehabilitation is fair and equitable to Mutual Members.

(b) Each Mutual Member has an opportunity to vote and comment on the Third Amended Plan of Rehabilitation at hearings held by the Court after full written disclosure is given to such Mutual Member by FML of the terms of the Plan.

(c) Participation by all Mutual Members in the Third Amended Plan of Rehabilitation, if approved by the Court, is mandatory, although Mutual Members may disclaim Plan Stock.

(d) Any determination by a Mutual Member which is a Plan to receive Plan Stock or Plan Credits is made by one or more independent fiduciaries of such

[10] PTE 84–14 permits various parties which are related to employee benefit plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by QPAMs (i.e., banks, savings and loan associations, insurance companies or investment advisers registered under the Investment Advisers Act of 1940), which are independent of the parties in interest involved in such transactions and meet certain specified financial standards. PTE 96–23 permits various transactions involving employee benefit plans whose assets are managed by INHAMs and parties in interest to such plans, who are service providers, or their affiliates (other than the INHAM and its affiliates).

[11] For purposes of this exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Plan and not by FML, Group or Fidelity Life Insurance Company (FLIC). Consequently, neither FML nor any of its affiliates will exercise investment discretion nor render ''investment advice'' within the meaning of 29 CFR 2510.3–21(c) with respect to an independent Plan fiduciary's decision to elect Plan Stock or Plan Credits.

(e) Twenty percent of the Plan Stock is allocated to a Mutual Member based upon voting rights and eighty percent is allocated to a Mutual Member on the basis of the contribution of the Mutual Member's insurance or annuity contract (the Contract) to the surplus of FML. The contribution to FML's surplus is the actuarial calculation of both the historical and expected future profit contribution of the Contracts that have contributed to the surplus (*i.e.,* the net earnings) of FML. The actuarial formulas are approved by the Court and the Commissioner.

(f) The value of Plan Stock or Plan Credits that will be received by a Mutual Member will reflect the aggregate price paid by an independent investor (the Investor) to Group for common Stock (the Common Stock) and for plan credit shares (the Plan Credit Shares) in convertible preferred stock (the Preferred Stock) issued by Group.

(g) All Mutual Members that are Plans participate in the transactions on the same basis as all other Mutual Members that are not Plans.

(h) No Mutual Member pays any brokerage commissions or fees in connection with the receipt of Plan Stock or Plan Credits.

(i) All of FML's obligations to contractholders (the Contractholders) of the company which are Mutual Members remain in force upon endorsement and transfer to FLIC and are not affected by the Third Amended Plan of Rehabilitation.

Section III. Definitions

For purposes of this proposed exemption:

(a) The term ''FML'' means the Fidelity Mutual Life Insurance Company (In Rehabilitation) and any affiliate of FML as defined in paragraph (c) of this Section III.

(b) The term ''FLIC'' means the Fidelity Life Insurance Company and any affiliate of FLIC as defined in paragraph (c) of this Section III.

(c) An ''affiliate'' of FML or FLIC includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with FML or FLIC; (For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.) or

(2) Any officer, director or partner in such person.

(c) The term ''Mutual Member'' means a Contractholder whose name appears on FML's records as an owner of an FML Contract on the Record Date of the Third Amended Plan of Rehabilitation.

(d) The term ''Investor'' means the person (*e.g.,* individual, corporation, partnership, joint venture, etc.) selected by the Rehabilitator and approved by the Court to be the purchaser under the Investment Agreement.

(e) The term ''Group Stock'' refers to shares of Group Common Stock and to Group Preferred Stock, which will have a cumulative, annual dividend equal to 7 percent of its liquidation value. The Preferred Stock will be Series A stock having a par value of $0.01 per share and a liquidation preference and a redemption value of $25 per share.

(f) The term ''Plan Stock'' means the 3 million shares of Group Common Stock and the 2.8 million of Group Preferred Stock that will be allocated to Mutual Members.

(g) The term ''Plan Credit'' means either (1) additional paid up insurance for a traditional life policy or (2) credits to the account values for Contracts that are not traditional (such as a flexible premium policy). Under FML's Third Amended Plan of Plan of Rehabilitation, Plan Credits are to be allocated to certain Mutual Members in lieu of Plan Stock.

(h) The term ''Plan Credit Shares'' includes those shares of Plan Stock (*i.e.,* the 15,000 to 180,000 shares of Group Common Stock) and any shares of Group Preferred Stock to be issued and sold by Group to the Investor to fund Plan Credits.

(i) The term ''Policyholder Stock'' means those shares of Group Common or Group Preferred Stock that will be issued and distributed to Mutual Members, consisting of Plan Stock plus any shares of Group Stock (in excess of Plan Stock) issued for purposes of correcting errors in the allocation of Plan Stock, less Plan Credit Shares and any disclaimed shares.

(j) The term ''Investor Stock'' means the 3.1 million shares of Group Common Stock (other than Plan Stock) and the Plan Credit Shares which, under the Third Amended Plan of Rehabilitation, are sold to the Investor pursuant to bid procedures and the Investment Agreement.

Summary of Facts and Representations

1. FML is a mutual life insurance company that was founded in 1878 and organized to conduct a life insurance business in Pennsylvania. FML maintains its principal place of business at 250 King of Prussia Road, Radnor, Pennsylvania. Prior to the rehabilitation proceedings that are described herein, FML was licensed to issue life insurance policies in 47 states and the District of Columbia.

Because FML has been organized as a mutual form of life insurance company, it has no stockholders. Instead, the owners of its Contracts (i.e., the Contractholders) have a dual legal relationship with FML. In this regard, the Contractholders are vested with rights in the company, such as such as the right to vote and the right to an allocable portion of the divisible surplus. In addition, the Contractholders have contractual rights under their Contracts with FML.

FML has approximately 3,997 Contracts that are related to qualified Plans. FML also sponsors the FML Plan, a defined benefit plan, which had 254 participants and total assets of $17,282,009 as of December 31, 1998.

2. FML owns all of the stock of Group, a Pennsylvania-domiciled stock corporation. Group, in turn, owns all of the stock of FLIC, also a Pennsylvania corporation. Group purchased the FLIC stock from an unrelated party on June 30, 1995. FLIC is a stock life insurance company duly licensed, chartered and domesticated in Pennsylvania and is qualified to conduct a life insurance business in substantially all jurisdictions where FML has business, except in New York and New Hampshire. FLIC has filed applications for licenses to conduct business in these states.

3. During late 1990, the Pennsylvania Insurance Department began monitoring FML's operations because of concern over FML's extensive real estate holdings, decline in surplus and unrealized capital losses. In response to an increase in Contract surrenders and loan requests for the period October 26 to November 5, 1992, the Pennsylvania Insurance Department and FML's Board of Directors petitioned the Court for an Order of Rehabilitation. As a result, FML was placed in rehabilitation by an order of the Court on November 6, 1992, pursuant to the Pennsylvania Insurance Department Act, as amended. Under the Order of Rehabilitation, a moratorium was imposed on cash distributions, Contract surrenders, withdrawals and policy loans, except in certain hardship situations. At the time of the rehabilitation, FML had assets with a book value of approximately $1.2 billion. Of this amount, a significant portion of FML's assets was comprised

of real estate and mortgages which were non-performing, illiquid and overvalued.

4. On June 30, 1994, the Rehabilitator filed the original Plan of Rehabilitation for The Fidelity Mutual Life Insurance Company (the Original Plan of Rehabilitation) with the Court. The Original Plan of Rehabilitation called for the transfer of FML insurance policies to ''Newco,'' the name designated for the stock life insurance company that was to be purchased by FML and Group. Under the Original Plan of Rehabilitation, all Contractholders of FML would be allocated one share of Group Stock, all Mutual Members would be made whole for any ''Impairment'' [12] through the allocation of Group Stock, and any remaining Group Stock would be allocated to creditors on a *pro rata* basis. Contractholders could opt out of the Original Plan of Rehabilitation, surrender their policies and receive the liquidation value of their cash surrender values plus one share of Group Stock. Contractholders remaining with Newco would also be subject to a continued moratorium charge (*i.e.,* a charge based upon the suspension, by the Court, of cash distributions, Contract surrenders, withdrawals and policy loans) of 16 percent during the first year and 8 percent during the second year if they surrendered their policies. Further, a trust was to be created under the Original Plan of Rehabilitation to hold the stock during the moratorium period and then dispose of such stock by distributing it to Contractholders and creditors. Finally, the Original Plan of Rehabilitation provided that an Investor could provide a capital infusion to Newco through Group that would be sufficient to meet risk-based capital requirements and that such Investor would receive unspecified securities of Group in return. Notice was sent to Contractholders and other interested persons of the filing of the Original Plan and objections were due by November 1, 1994.

5. After the filing of the Original Plan of Rehabilitation with the Court in June 1994, the Rehabilitator proceeded to work with an investment banker to solicit and select an Investor.[13] On January 12, 1995, the Rehabilitator filed an Amended Plan for the Rehabilitation of The Fidelity Mutual Life Insurance Company (the First Amended Plan of Rehabilitation) with the Court which included an Investment Agreement executed by the Presidential Life Insurance Company (Presidential). The framework for the First Amended Plan of Rehabilitation was similar to the Original Plan, with additional definition. The First Amended Plan of Rehabilitation provided that 10 million shares of Group Stock would be placed in a stock trust to be distributed to Contractholders for Impairment [14] and thereafter, if any shares remained, to creditors with allowed claims. The First Amended Plan of Rehabilitation also provided that Group could sell up to 49.9 percent of Group Common Stock to Presidential in exchange for an investment of up to $45 million and could sell $25 million in debt instruments to the Presidential Life Corporation. The moratorium charge applicable to Contractholder cash values upon surrender after closing was reduced to 14 percent during the first year and 8 percent during the second year. Further, the liquidation value that Contractholders would receive if electing to opt out of the First Amended Plan of Rehabilitation was approximately 89 percent of their cash surrender value. Notice of the filing of the First Amended Plan of Rehabilitation was provided to all Contractholders and other interested persons and objections had to be filed by March 31, 1995.

6. In January 1995, a new Commissioner was appointed who became the new Rehabilitator for FML. In March 1995, the Court approved the appointment of a Policyholder Committee at the request of a group of former FML agents. Subsequently, the Policyholder Committee engaged counsel, an accounting firm and an investment banking firm. Also, in March 1995, a bidder who was not selected as the Investor objected to the First Amended Plan of Rehabilitation and ultimately sought permission to intervene and propose an alternative rehabilitation plan. In May 1995, the Policyholder Committee filed objections to the First Amended Plan of Rehabilitation and specifically objected to the selected investor, Presidential. Also in May 1995, Presidential petitioned the Court for permission to intervene in the rehabilitation proceedings. In early September 1995, the Deputy Rehabilitator for FML resigned and a Deputy Commissioner from the Pennsylvania Insurance Department was assigned to oversee the daily affairs of FML. Negotiations with the Policyholder Committee, Presidential, and the objecting bidder continued during the remainder of 1995 through 1996. In May 1996, Presidential filed a petition for payment of expenses and liquidated damages under the 1995 Stock Purchase Agreement and the Policyholder Committee and former FML agents objected to that petition.

7. On June 25, 1996, the Rehabilitator filed the Second Amended Plan for the Rehabilitation of The Fidelity Mutual Life Insurance Company (the Second Amended Plan of Rehabilitation) with the Court. The framework for the Second Amended Plan was substantially the same as the predecessor Plans but there were significant differences. For example, the concept of Plan Credits was introduced for the first time. In addition, Group could sell 35 percent of its issued and outstanding common stock to the Investor under bid procedures to be approved by the Court. However, Group could not issue any debt instruments. The other 65 percent of the Group Stock was to be allocated to Contractholders and creditors, except that the stock would no longer be held and distributed by a stock trust, but would be distributed directly to the Contractholders and creditors around the Closing Date. Based on an assumed Closing Date of June 30, 1997, Impairment had increased to an estimated total of $57.1 million. Also, the Liquidation Value as of September 30, 1995 was estimated to be 95 percent of the cash surrender value of any Contractholder who elected to opt out of the Plan. The moratorium period of two years in the previous Plans was reduced to one year and the moratorium charge would be equal to the Liquidation Discount (5 percent of September 30, 1995).

Notice of the filing of the Second Amended Plan of Rehabilitation was not sent to Contractholders and other interested persons because the Policyholder Committee filed significant objections to both the Notice Package and the Second Amended Plan of Rehabilitation, including an objection asserting that the Contractholders should receive cash rather than Group Stock for Impairment. In July 1996,

[12] Under the Original Plan, the term ''Impairment'' was defined as ''* * * the sum of (a) the loss of interest which would have been credited to Participating Contractholders in the normal course of business had FML not been placed in rehabilitation, as determined by the Receiver, and (b) the loss of liquidity due to the limited access of Participating Contractholders to their cash values, as determined by the Receiver.''

[13] It is represented that many of the objections concerning the Original Plan of Rehabilitation related to the fact that the Plan had not included an Investor and that there was no certainty that an Investor could be found.

[14] Impairment under the First Amended Plan of Rehabilitation was defined as ''* * * the loss of liquidity due to the lack of access of Participating Contractholders to their Surrender Values measured from the Rehabilitation Date to the Closing Date * * *'' Aggregate Impairment was estimated to have a value of $40 million as of September 30, 1994.

Presidential filed a motion asking the Court to enjoin any new Investor selection process until their claim for relief was addressed. The Presidential claim was finally settled and approved by the Court in March 1997.

8. Negotiations with the Policyholder Committee continued and the Third Amended Plan for the Rehabilitation of The Fidelity Mutual Life Insurance Company (*i.e.,* the Third Amended Plan of Rehabilitation) was filed with the Court on June 30, 1998. The Plan included several significant improvements for Contractholders due to the improved financial condition of FML.[15] For example, under the Third Amended Plan of Rehabilitation, there are no moratorium charges after the Closing Date and Contractholders may immediately surrender their Contracts for the full cash surrender value. Consequently, no opt out period is necessary to allow the option of immediate surrender. Further, all creditor claims will be paid in full with 6 percent interest.

Subject to the approval of the Court, the Rehabilitator is proposing that FML transfer, on the Closing Date,[16] pursuant to assumption reinsurance and transfer agreements, its insurance operations to FLIC, which will continue as a wholly owned subsidiary of Group and a successor to FML. In addition, FML will modify the terms of the FML Contracts by endorsement prior to their transfer to and assumption by FLIC. Group Common Stock and Preferred Stock[17] that has been denominated as Plan Stock will be allocated and then distributed to Mutual Members in exchange for their Membership Interests in FML rather than for the Impairment of their Contracts, except that Contractholders of certain tax-qualified retirement funding accounts (who have impediments to holding stock generally), will be entitled to have Plan Credits made to their Contracts in lieu of receiving Plan Stock.

Therefore, FML requests an administrative exemption from the Department with respect to the receipt of Plan Stock or the receipt of Plan Credits by Mutual Members that are Plans. FML is not requesting, nor is the Department providing, exemptive relief with respect to the receipt of Plan Stock by the FML Plan because it believes such stock will constitute ''qualifying employer securities'' within the meaning of section 407(d)(5) of the Act. Therefore, FML represents that the acquisition of Plan Stock by the FML Plan will satisfy the requirements of section 408(e) of the Act.[18]

9. As with the other Plans of Rehabilitation, under the Third Amended Plan of Rehabilitation, an independent party (*i.e.,* the Investor), approved by the Court, will be selected pursuant to bid procedures[19] to purchase Common Stock from Group so that immediately after the Closing Date, the Investor will own more than 50 percent of such Common Stock. The Investor will acquire Preferred Stock only through the required purchase of Plan Credit Shares but not through the bid process.

Under the Third Amended Plan of Rehabilitation, the Investor may be a foreign or domestic entity such as a life/health insurer, a property/casualty insurer, an investment company or other investment fund, a joint venture, general partnership or a limited partnership. In addition, the Investor may be required to satisfy certain ratings or capitalization criteria. For example, if the Investor is a property/casualty insurer, it must have an A.M. Best rating of at least A−, a minimum Total Adjusted Capital of $500 million, and a ratio of Total Adjusted Capital to Authorized Control Level Risk Based Capital of 5:1 or better. If the Investor is not a publicly-rated entity but is an investment company or other investment fund, it must have a net worth of at least $500 million and minimum available equity of $150 million. Further, the Investor must be either a Qualified Institutional Buyer within the meaning of Rule 144A under the Securities Exchange Act of 1933 (the 1933 Act), an Institutional Accredited Investor within the meaning of Rule 501(a)(1), (2), (3) or (7) under the 1933 Act, or a sophisticated institutional investor not requiring the protections of the registration requirements of the 1933 Act.

10. The rehabilitation strategy, which is aimed at maximizing the interests of FML's Contractholders and creditors, is to transfer FML's insurance operations into a stock life insurance company. The Contractholders and creditors will be provided benefits in accordance with the priorities for distribution to be determined under the Pennsylvania law applicable to insurance company rehabilitations.[20]

Thus, the treatment of FML's Contracts and the Contractholder's interests thereunder is a significant aspect of the Third Amended Plan of Rehabilitation. These Contracts include, but are not limited to, traditional ordinary life insurance Contracts and universal life insurance Contracts.

11. Section 2.01 of the Third Amended Plan of Rehabilitation specifies a classification of claims (the Claims) and interests and priorities governing the receipt of distributions. The rights provided the Contractholders under section 2.04 of the Third Amended Plan of Rehabilitation (for the Contracts to be modified by endorsement in FML and reinsured by FLIC) will have a Class 3 priority (along with certain other Claims under the Contracts), following certain secured and administrative claims which are classified as Class 1 and Class 2 Claims. Classes 4 through 9 Claims provide for claims for governments, general creditors, employees, debt holders, etc. Class 10, the last and residual category,

[15] In this regard, since its rehabilitation, FML has improved the investment quality of its assets and its financial strength. In addition, FML has stabilized its revenue and achieved levels of surplus in excess of minimum state regulatory requirements. Further, FML has continued to pay dividends to Contractholders under participating Contracts and excess interest credits under other Contracts (*e.g.,* universal life and deferred annuity contracts).

By an order of the Court dated April 30, 1996, FML increased policyholder dividends and declared interest crediting rates of certain Contracts beginning in 1996. In addition, FML petitioned the Court to pay an increased one-time policyholder dividend and declared interest credit beginning in 1999 because of its financial capacity to do so and in recognition of the fact that the policyholder dividends and declared interest credits paid on its Contracts had generally been lower during the period of rehabilitation than those for comparable policies of other insurers.

[16] The Closing Date of the rehabilitation under the Third Amended Plan of Rehabilitation is expected to occur after December 31, 2000.

[17] The Rehabilitator has been advised by outside securities and tax counsel that the Preferred Stock constitutes equity rather than debt. Additionally, the Rehabilitator has relied upon a private letter ruling issued by the Internal Revenue Service on July 14, 1999 which treats the Preferred Stock and the Common Stock as equity rather than as debt.

[18] However, the Department expresses no opinion herein on whether such distributions will satisfy the terms and conditions of section 408(e) of the Act.

[19] The bid procedures, which will strictly control the selection process for the Investor as well as the post-closing activities of the Investor, are designed to prevent any negotiation among potential Investors because the winning bid is to be determined solely on the basis of the bid price per share, the financial condition of the Investor and the statutory requirements of the Pennsylvania Rehabilitation Statute.

[20] It is represented that the Rehabilitator has been advised by outside rehabilitation counsel and attorneys for the Pennsylvania Insurance Department that the Pennsylvania Insurance Company Mutual Stock Conversion Act (Conversion Act), which governs the demutualization of an insurer under Pennsylvania law, will not be applicable to FML's situation. It was determined that the Third Amended Plan of Rehabilitation did not contemplate a conversion transaction since the assets of FML would be transferred to a separate company (FLIC) by assumption reinsurance and FML would then be liquidated. Also, it was determined that the Conversion Act would not apply to a company in rehabilitation or liquidation because conflicts would exist with the applicable Pennsylvania rehabilitation/liquidation laws.

provides for the Claims of the Membership Interests of FML's Mutual Members.

Allowed Claims 1 through 9 will be paid in full in cash. Each Contractholder having a Contract in force on the Closing Date will have his or her Contract assumed and reinsured by FLIC as of the Closing Date. In addition, at Closing, Class 10 Claims will be satisfied by an allocation of Plan Stock in exchange for the Mutual Member's relinquishment of his or her membership interest in FML.[21] No other class of Claims will be paid or satisfied either partially or totally by a distribution or allocation of Plan Stock or Plan Credits.[22]

12. Under Section 4.05 of the Third Amended Plan of Rehabilitation, any Contract held in connection with a qualified retirement plan or an arrangement described in section 401(a), 403(a) or 408 of the Code, other than a Contract held by a trustee under a plan described in section 401(a) of the Code, (*i.e.,* a Non-Trusteed Tax-Qualified Retirement Funding Contract) will be allocated Plan Credits in lieu of Plan Stock in exchange for the relinquishment of the Mutual Member's Membership Interest under such Contract. The Plan Credits allocated to such Mutual Member's Contract will be equal in value to the Plan Stock otherwise allocable to the Non-Trusteed Tax-Qualified Retirement Funding Contract.

13. As noted above, the Plan Stock allocated to Mutual Members for Class 10 Claims will consist of Group Common Stock and Preferred Stock. Twenty percent of the Plan Stock will be allocated based on voting rights[23] and 80 percent will be allocated based on a Contract's contribution to FML's surplus. If a Mutual Member has two or more Contracts, the Plan Stock allocated to such Mutual Member, based on voting rights, will be allocated in equal portions to each such Contract.

14. Each Mutual Member which is a Class 10 Claimant will be allocated Group Common Stock and Preferred Stock, in the ratio of 3 shares of Common Stock to 2.8 shares of Preferred Stock. At closing, the total value of the Plan Stock, immediately prior to the sale of Common Stock to the Investor, is projected at approximately $100 million. Of this amount, 70 percent of the value of the Plan Stock will be represented by the Preferred Stock, which will have an estimated value of $70 million. The 30 percent remaining Plan Stock will consist of Common Stock and it will have a value of approximately $30 million. If desired, a Mutual Member may disclaim any interest in the Plan Stock. Although the Mutual Member will receive no consideration for any disclaimed Stock, such Mutual Member will continue to retain all benefits.

The distribution of the Group Stock will occur at Closing when Group will issue and distribute Plan Stock on behalf of FML to Mutual Members. FML, simultaneously, will return all Group Stock to Group for cancellation. Disclaimed shares will not be issued or, if issued, will be canceled and returned to Group.

15. There will be 40 million shares, par value $.01 per share, of Common Stock authorized and 6.1 million shares of such stock outstanding at the Closing Date. The Common Stock will have voting rights of one vote per share.

Group will sell approximately 3.1 million shares of its Common Stock to the Investor in a private placement pursuant to bid procedures approved by the Court and utilize the majority of the sale proceeds to supplement the capital of FLIC. FML will designate a maximum of 3 million shares of the remaining Common Stock as the ''Common Stock component'' of Plan Stock. Included in this amount will be between 15,000 and 180,000 shares of Common Stock allocable to Mutual Members who will receive Plan Credits in lieu of Plan Stock.[24]

In addition, Group will sell to the Investor the shares of Common Stock and Preferred Stock equal to the Plan Credits[25] and contribute to the capital of FLIC the sales proceeds of such sale. Consequently, the Investor will own, at the Closing Date, more than 50 percent of the total outstanding Group Common Stock, and such percentage will increase to the extent there are disclaimed shares and Plan Credits which require the Investor to purchase more Plan Stock.

At the Closing Date, Group will have authorized 10 million shares and will have outstanding 2.8 million shares of Preferred Stock, all of which will be allocated as Plan Stock. There will be no other class of Preferred Stock.

The Preferred Stock will have a liquidation preference and redemption value of $25 per share. The holders of Preferred Stock will be entitled to cumulative annual dividends, payable quarterly, at the rate of 7 percent per annum of the liquidation preference, resulting in an annual dividend of $1.75 per share. Shares of Preferred Stock will be non-voting except (a) when four quarterly dividends on such class of stock are in arrears, (b) for certain matters pertaining to that class of stock, or (c) as otherwise required by law. Upon liquidation of Group, a share of Preferred Stock will be entitled to a distribution preference of $25 per share plus the amount of any accrued but unpaid dividends. Group, at its option, may redeem shares of Preferred Stock at any time after 20 years from the later of the issue date and the Closing Date, at a redemption price of $25 per share plus the amount of any accrued but unpaid dividends.

[21] Even though Mutual Members are deemed ''Contractholders'' for purposes of claims distribution, they are not entitled to receive cash as are Class 3 Claimants. Instead, Mutual Members will be entitled to receive Plan Stock. Class 3 Claims include claims for losses under the insurance policy such as death proceeds, annuity proceeds or investment values. Class 10 Claims, which represent the claims of shareholders or other owners, are not deemed ''loss claims'' under a policy. Rather, such claims are deemed analogous to mutual membership interests.

[22] Article IV of the Third Amended Plan of Rehabilitation generally provides that the policyholder eligible to participate in the distribution of Plan Stock or Plan Credits resulting from such Plan is ''the Person specified in the Contract, or in a subsequent document, as the 'Contractholder' or 'owner' of such Contract, or any similar designation in the Contract, as shown on the books and records of FML.'' FML further represents that its insurance contracts that provide benefits under an employee benefit plan, typically designate the employer that sponsors the plan, or a trustee acting on behalf of the plan, as the Contractholder or owner of the policy. In regard to those Contracts that designate the employer or trustee as Contractholder or owner of the policy, FML represents that under Article IV of the Third Amended Plan of Rehabilitation, it will make distributions resulting from such Plan to the employer or trustee as Contractholder or owner of the Contract.

In general, it is the Department's view that, if an insurance policy is purchased with assets of an employee benefit plan, including participant contributions, and if there exist any participants under the plan (as defined at 29 CFR 2510.3–3) at the time when FML incurs the obligation to distribute Plan Stock or Plan Credits, then such consideration would constitute an assets of such employee benefit plan. Under these circumstances, the appropriate plan fiduciaries must take all necessary steps to safeguard the assets of the plan in order to avoid engaging in a violation of the fiduciary responsibility provisions of the Act.

[23] Voting rights are set forth in the FML By-laws which provide: ''At all meetings, each member shall be entitled to one vote irrespective of the number of policies or amount of insurance held by a member.''

[24] It should be noted that the value of the Plan Stock or Plan Credits that will be received by a Mutual Member will reflect the bid price paid by the Investor for Group Common Stock. Because the bid process does not allow the Investor to bid on or purchase Preferred Stock (except for the Plan Credit Shares), there is no means of establishing an immediate market value. Consequently, the $25 per share liquidation value as described herein is deemed to approximate the fair market value of such stock. The Investor will also be required to purchase Preferred Stock at that price as well.

[25] In other words, if a Mutual Member is eligible to receive Plan Credits, the Common Stock allocated to that Mutual Member will become part of the Plan Credit Shares that will be purchased by the Investor in order to fund the purchase of Plan Credits for the Mutual Member.

A share of Preferred Stock is convertible into shares of Common Stock at any time at the option of the holder. The number of shares of Common Stock that will be received by a Mutual Member upon such a conversion will be determined by dividing $25 by the result of multiplying 1.20 times the price per share paid by the Investor for the Common Stock (which price will be determined by the competitive bidding process approved by the Court). The conversion rate for the Preferred Stock is also subject to various anti-dilution provisions.

16. Under Section 4.10 of the Third Amended Plan of Rehabilitation, Policyholder Stock [26] will be issued pursuant to the exemption from the registration requirements provided in section 3(a)(10) of the 1933 Act. In addition, Policyholder Stock will be publicly-traded and listed on the NASDAQ National Market or the New York or American Stock Exchange, as determined by the Rehabilitator prior to Closing.

Investor Stock will be issued in a private placement pursuant to the exemption from the registration requirements of the 1933 Act provided by section 4(2) thereof and the rules and regulations thereunder. Neither Policyholder Stock nor Investor Stock will be registered under the 1933 Act.

Group Stock will be registered under section 12(g) of the Securities Exchange Act of 1934.

17. Since the participation by all Mutual Members in the Third Amended Plan of Rehabilitation will be mandatory (although Mutual Members may disclaim Plan Stock), any determination by a Mutual Member which is a Plan to receive Plan Stock or Plan Credits will be made by one or more Plan fiduciaries which are independent of FML and its affiliates. As a result, neither FML nor any of its affiliates will exercise investment discretion nor render ''investment advice'' within the meaning of 29 CFR 2510.3–21(c) with respect to an independent Plan fiduciary's decision to elect to receive Plan Stock or Plan Credits.

In addition, all Mutual Members that are Plans will participate in the transactions on the same basis as all other Mutual Members that are not Plans. Moreover, no Mutual Member will pay any brokerage commissions or fees in connection with the receipt of Plan Stock or Plan Credits. Finally, all of FML's Contractholder obligations will remain in force upon endorsement and transfer to FLIC and will essentially be unaffected by the Third Amended Plan of Rehabilitation.

18. Mutual Members will not be restricted from selling or otherwise transferring the Plan Stock received, including converting the Preferred Stock to Common Stock, although Group, its affiliates and the Investor are subject to restrictions on purchasing or redeeming such Stock.[27] In addition, Group will not be precluded from establishing a commission-free purchase or sales program after the Rehabilitation which would allow Mutual Members who receive a small number of shares of Plan Stock the opportunity to round-up those shares or sell such shares for a temporary period without the payment of any sales commissions.[28] It is not contemplated that FLIC or any of its affiliates will be engaged in such transactions.

19. The Plan will be approved by and be under the continued jurisdiction of the Court. The Court's review will include, among other matters, (a) a determination, after hearings available to Contractholders, creditors and other interested parties, the procedural and substantive fairness of the terms and conditions of the allocation and distribution of the Plan Stock in exchange for Membership Interests, including a review of the methodology for allocating Plan Stock based on the basis of contribution to surplus and voting rights and (b) approval of the modification, by endorsement, of the terms and conditions of the Contract.

FLIC and Group will be subject to the jurisdiction of the Court and the supervision of the Rehabilitator prior to and through the Closing Date. In addition, the Court will retain, after the Closing Date, exclusive jurisdiction over Group and FLIC to enforce the provisions of the Third Amended Plan of Rehabilitation to ensure that its intent and purposes are carried out and given effect.

FML will discontinue its business operations, liquidate and dissolve shortly after completing all transfers. FLIC will continue the business of FML in a substantially unchanged manner after the transfer from FML by receiving premiums, paying claims and generally administering the assumed Endorsed Contracts.

Further, for a period of 2 years following the Closing Date, the Investor will not be allowed to cause a change to the business plan for FLIC without the prior written approval of the Department if the change might reasonably result in the dissolution of FLIC or the operation of FLIC in a ''run off'' mode.

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

(a) The Third Amended Plan of Rehabilitation will be implemented in accordance with procedural and substantive safeguards that are imposed under Pennsylvania law and by the Court and will be subject to review and supervision of the Court and/or the Rehabilitator.

(b) The Court will review the terms of the Third Amended Plan of Rehabilitation and will approve such Plan following a determination and public hearing or hearings that the Plan is fair and equitable to all Mutual Members.

(c) Each Mutual Member will have an opportunity to participate in any hearing or hearings before the Court regarding the approval of the Third Amended Plan of Rehabilitation.

(d) Although participation by all Mutual Members in FML's Third Amended Plan of Rehabilitation will be mandatory (although Mutual Members may disclaim Plan Stock), the determination of whether a Mutual Member receives Plan Stock or Plan Credits will be made by one or more independent fiduciaries of such Plan and not by FML, Group or FLIC. As a result, FML nor any of its affiliates will exercise investment discretion nor render ''investment advice'' within the meaning of 29 CFR 2510.3–21(c) with respect to the decision by the independent Plan fiduciary to elect Plan Stock or Plan Credits.

(e) After each Mutual Member is allocated its share of Plan Stock based on voting rights, the remaining consideration will be allocated based

[26] As noted in Section III(i) of the Definitions, ''Policyholder Stock'' refers to those shares of Group Common or Group Preferred Stock that will be issued and distributed to Mutual Members. Thus, it consists of Plan Stock plus any shares of Group Stock (in excess of Plan Stock) that are issued for purposes of correcting errors in the allocation of Plan Stock, less Plan Credit Shares and any disclaimed shares.

[27] Specifically, Section 5.08 of the Third Amended Plan of Rehabilitation provides that for one year after closing, the Investor may not purchase or enter into an agreement to purchase Group Stock from Group or the shareholders of Group, or take other action which would result in the Investor being affiliated with Group. In addition, Section 5.09 of the Third Amended Plan provides that for one year after closing, Group and any company controlled directly or indirectly by Group will not purchase or redeem nor enter into an agreement to purchase or redeem, Group Stock from Mutual Members that, when combined with the value of Plan Credit Shares, has an aggregate value that exceeds 50 percent of the value of the Plan Stock.

[28] FML has still not determined how many shares of Plan Stock will constitute the ''small number of shares'' required for a Mutual Member to participate in the commission-free purchase and sales program nor has it decided on the duration of such program.

upon actuarial formulas that take into account each Mutual Member's contribution to the surplus of FML, which formulas have been approved by the Rehabilitator and the Court.

(f) The value of Plan Stock or Plan Credits that will be received by a Mutual Member will reflect the prices paid by the Investor for Group Common Stock and for Plan Credit Shares.

(g) All Plans will participate in the exemption transaction on the same basis as other Mutual Members that are not Plans.

(h) No Plan will pay any brokerage commissions or fees in connection with receipt of Plan Stock or Plan Credits.

(i) FML's Contractholder obligations will remain in force upon endorsement and transfer to FLIC.

Notice to Interested Persons

FML will provide notice of the proposed exemption to Mutual Members which are Plans within 5 days of the publication of the notice of proposed exemption in the **Federal Register**. Such notice will be provided to interested persons by first class mail and will include a copy of the notice of proposed exemption as published in the **Federal Register** as well as a supplemental statement, as required pursuant to 20 CFR 2570.43(b)(2) which shall inform interested persons of their right to comment on the proposed exemption. Comments with respect to the notice of proposed exemption are due within 35 days after the date of publication of this pendency notice in the **Federal Register**.

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

McDonald Investments Inc. (McDonald) Located in Cleveland, Ohio

[Application No. D–10857]

Proposed Exemption

I. Transactions

A. Effective January 4, 2000, 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.[29]

B. Effective January 4, 2000, 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.[30] 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 January 4, 2000, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing agreement; 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.[31]

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 January 4, 2000, 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

[29] 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).

[30] For purposes of this proposed 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.

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

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

II. General Conditions

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

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

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

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

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

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

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

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

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

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

(c) The transfer of such additional obligations to the trust during the pre-funding period does not result in the certificates receiving a lower credit rating from a rating agency upon termination of the pre-funding period than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

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

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

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

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

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this proposed 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) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of section 860D(a) or section 860L, respectively, of the Code; 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 McDonald 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 proposed exemption, references to ''certificates representing an interest in a trust'' include certificates denominated as debt which are issued by a trust.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notwithstanding the foregoing, the term ''trust'' does not include any investment pool unless: (i) the investment pool consists only of assets of the type described in clauses (a) through (f) of subsection III.B.(1) which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by a Rating Agency for at least one year prior to the plan's acquisition of certificates pursuant to this proposed 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 proposed exemption.

C. ''Underwriter'' means:

(1) McDonald;

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

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

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

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

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

G. ''Servicer'' means any entity which services obligations 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 proposed exemption (if granted) applicable to sales are met.

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

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

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

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

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

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

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

T. ''Qualified Equipment Note Secured By A Lease'' means an equipment note:

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

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

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

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

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

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

(3) The trust's 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. ''Rating Agency'' means Standard & Poor's Structured Rating Group (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Credit Rating Co. (D & P) or Fitch IBCA, Inc. (Fitch) or their successors;

X. ''Capitalized Interest Account'' means a trust account: (i) which is established to compensate certificateholders for shortfalls, if any, between investment earnings on the pre-funding account and the pass-through rate payable under the certificates; and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

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

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

AA. ''Pre-Funding Limit'' means a percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered which is less than or equal to 25 percent.

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

CC. ''McDonald'' means McDonald Investments 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 (see 60 FR 35932).

Summary of Facts and Representations

1. McDonald is an indirect, wholly-owned, separately capitalized investment banking and registered broker-dealer subsidiary of KeyCorp (the Corporation). As of September 30, 1999, McDonald's capitalization was approximately $310 million. The Corporation is a diversified financial services company incorporated under the laws of Ohio and a multi-bank holding company registered under the Bank Holding Company Act of 1956, as amended. As of September 30, 1999, the Corporation's consolidated assets were approximately $81 billion. The principal executive offices of the Corporation are located in Cleveland, Ohio. As of September 30, 1999, the Corporation directly owned a subsidiary

bank with offices located in twelve states. In addition, indirectly-held non-bank subsidiaries of the Corporation offer a wide range of insurance, securities brokerage, investment banking, venture capital investment, and consumer finance products and services.

KeyBank, National Association (the Bank), a direct, wholly-owned subsidiary of the Corporation, is a national banking association engaged in banking and related activities and is the largest bank in the Corporation's banking group. As of September 30, 1997, the Bank had total assets of approximately $80 billion. The principal executive offices of the Bank are located in Cleveland, Ohio.

McDonald was incorporated in 1983 as an Ohio corporation. McDonald maintains its principal place of business in Cleveland, Ohio and has branch offices in 24 states.

McDonald is a member of the National Association of Securities Dealers and the Securities Investor Protection Corporation and underwrites and deals in corporate debt securities, commercial paper, 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 the syndication and arranging and trading of bank loans.

Trust Assets

2. McDonald 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; [32] (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.[33]

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.[34]

Trust Structure

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee.[35] The sponsor or servicer of a trust selects assets to be included in the trust.[36] These assets are receivables which may have been originated, in the ordinary course of business, 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.[37]

Typically, 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. Typically, all receivables to be held in the trust are transferred as of the closing date, but in some transactions, as described more fully below, a limited percentage of the receivables to be held in the trust may be transferred during a limited period of time following the closing date, through the use of a pre-funding account.

McDonald, 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 have been or are to be underwritten by McDonald on a firm commitment basis. In addition, McDonald anticipates that it may privately place certificates on both a firm commitment and an agency basis. McDonald may also act as the lead underwriter for a syndicate of securities underwriters.

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

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

[32] 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. McDonald requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, McDonald has stated that it may still avail itself of the exemptive relief provided by PTE 83–1.

[33] 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.

[34] 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).

[35] The Department is of the view that the term "trust" includes a trust: (a) the assets of which, although all specifically identified by the sponsor or the originator as of the closing date, are not all transferred to the trust on the closing date for administrative or other reasons but will be transferred to the trust shortly after the closing date, or (b) with respect to which certificates are not purchased by plans until after the end of the pre-funding period at which time all receivables are contained in the trust.

[36] It is the Department's view that the definition of "trust" contained in section 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.

[37] 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 agreements or other notional principal contracts.

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. McDonald 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.[38]

''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.[39]

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.

In some cases the trust will be maintained as a Financial Asset Securitization Investment Trust (''FASIT''), a statutory entity created by the Small Business Job Protection Act of 1996, adding sections 860H, 860J, 860K and 860L to the Code. In general, a FASIT is designed to facilitate the securitization of debt obligations, such as credit card receivables, home equity loans, and auto loans, and thus, allows certain features such as revolving pools of assets, trusts containing unsecured receivables and certain hedging types of investments. A FASIT is not a taxable entity and debt instruments issued by such trusts, which might otherwise be recharacterized as equity, will be treated as debt in the hands of the holder for tax purposes. However, a trust which is the subject of the proposed exemption will be maintained as a FASIT only where the assets held by the FASIT will be comprised of secured debt; revolving pools of assets or hedging investments will not be allowed unless specifically authorized by the exemption, if granted, so that a trust maintained as a FASIT will be maintained as an essentially passive entity.

Trust Structure With Pre-Funding Account

Pre-Funding Accounts

7. As described briefly above, some transactions may be structured using a pre-funding account or a capitalized interest account. If pre-funding is used, cash sufficient to purchase the receivables to be transferred after the closing date will be transferred to the trust by the sponsor or originator on the closing date. During the pre-funding period, such cash and temporary investments, if any, made therewith will be held in a pre-funding account and used to purchase the additional receivables, the characteristics of which will be substantially similar to the characteristics of the receivables transferred to the trust on the closing date. The pre-funding period for any trust will be defined as the period beginning on the closing date and ending on the earliest to occur of: (i) The date on which the amount on deposit in the pre-funding account is less than a specified dollar amount, (ii) the date on which an event of default occurs under the related pooling and servicing agreement, or (iii) the date which is the later of three months or ninety (90) days after the closing date. Certain specificity and monitoring requirements described below will be met and will be disclosed in the pooling and servicing agreement and/or the prospectus or private placement memorandum.

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

On the closing date, the sponsor transfers the assets to the trust in exchange for the certificates. The certificates are then sold to McDonald

[38] 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)(l)(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 proposed exemption.

[39] 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 proposed exemption does not provide relief for plan investment in such subordinated certificates.

for cash or to the certificateholders directly if the certificates are sold through McDonald as a placement agent. The cash received by the sponsor from the certificateholders (or McDonald) for the sale of the certificates issued by the trust in excess of the purchase price for the receivables and certain other trust expenses, such as underwriting or placement agent fees and legal and accounting fees, constitutes the cash to be deposited in the pre-funding account. Such funds are either held in the trust and accounted for separately, or are held in a sub-trust. In either event, these funds are not part of the assets of the sponsor.

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

The pre-funding account of any trust will be limited so that the percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered (the pre-funding limit) will not exceed 25%. The pre-funding limit (which may be expressed as a ratio or as a stated percentage or a combination thereof) will be specified in the prospectus or the private placement memorandum.

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

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

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

The Capitalized Interest Account

8. In certain transactions where a pre-funding account is used, the sponsor and/or originator may also transfer to the trust additional cash on the closing date, which is deposited in a capitalized interest account and used during the pre-funding period to compensate the certificateholders for any shortfall between the investment earnings on the pre-funding account and the pass-through interest rate payable under the certificates.

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

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

Pre-Funding Account and Capitalized Interest Account Payments and Investments

9. Pending the acquisition of additional receivables during the pre-funding period, it is expected that amounts in the pre-funding account and the capitalized interest account will be invested in certain permitted investments or will be held uninvested. Pursuant to the pooling and servicing agreement, all permitted investments must mature prior to the date the actual funds are needed. The permitted types of investments in the pre-funding account and capitalized interest account are investments which are either: (i) Direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States, or (ii) have been rated (or the obligor has been rated) in one of the three highest generic rating categories by a rating agency, as set forth in the pooling and servicing agreement and as required by the Rating Agencies. The credit grade quality of the permitted investments is generally no lower than that of the certificates. The types of permitted investments will be described in the pooling and servicing agreement.

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

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

10. In order to ensure that there is sufficient specificity as to the representations and warranties of the sponsor regarding the characteristics of the receivables to be transferred after the closing date:

(i) All such receivables will meet the same terms and conditions for eligibility as those of the original receivables used to create the trust corpus (as described in the prospectus or private placement memorandum and/or pooling and servicing agreement for such certificates), which terms and conditions have been approved by a Rating Agency. However, the terms and conditions for determining the eligibility of a receivable may be changed if such changes receive prior approval either by a majority vote of the outstanding certificateholders or by a Rating Agency;

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

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

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

In order to ensure that the characteristics of the receivables actually acquired during the pre-funding period are substantially similar to receivables that were acquired as of the closing date, the characteristics of the additional obligations subsequently acquired will be either (i) monitored by a credit support provider or other insurance provider which is independent of the sponsor, or (ii) an independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the Rating Agency, McDonald and the trustee) stating whether or not the characteristics of the additional obligations acquired after the closing date conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the closing date.

Each prospectus, private placement memorandum and/or pooling and servicing agreement will set forth the terms and conditions for eligibility of the receivables to be included in the trust as of the related closing date, as well as those to be acquired during the pre-funding period, which terms and conditions will have been agreed to by the Rating Agencies which are rating the applicable certificates as of the closing date. Also included among these conditions is the requirement that the trustee be given prior notice of the receivables to be transferred, along with such information concerning those receivables as may be requested. Each prospectus or private placement memorandum will describe the amount to be deposited in, and the mechanics of, the pre-funding account and will describe the pre-funding period for the trust.

Parties to Transactions

11. 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 businesses, 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.

12. 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.

13. 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 McDonald, the trust sponsor, the servicer or any other member of the Restricted Group (as defined in section III.L.). McDonald 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 or out of the trust assets. The method of compensating the trustee will be specified in the pooling and servicing agreement and disclosed in the prospectus or private placement memorandum relating to the offering of the certificates.

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

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

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

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

The *underwriter* (*i.e.,* McDonald, its affiliate, or a member of an underwriting syndicate or selling group of which McDonald or its affiliate is a manager or co-manager) 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 McDonald. In other cases, however, affiliates of McDonald may originate or service receivables included in a trust or may sponsor a trust.

Certificate Price, Pass-Through Rate and Fees

15. 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.

16. 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.[40] 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.

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

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This ''credit support fee'' may be aggregated with other servicing fees, and is either paid out of the interest income received on the

[40] 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.

receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

18. 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.

19. 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.

20. 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

21. 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

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

Provision of Credit Support

23. 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

24. 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, any material risk factors with respect to the certificates, and the fact that principal amounts left in the pre-funding account at the end of the pre-funding period will be paid to certificateholders as a repayment of principal;

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

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

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects, and a description of any pre-funding account used or capitalized interest account used in connection with a pre-funding account;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets, including the terms and conditions for eligibility of any receivables transferred during the pre-funding period and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; a description of permitted investments for any pre-funding account or capitalized interest account; identification of the servicing compensation and 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;

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

(k) A statement as to the duration of any pre-funding period and the pre-funding limit for the trust.

25. 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.

26. 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 (SEC), 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 and copies of the statements sent to certificateholders. While the SEC'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.

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

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the servicer, paying agent or trustee summarizing information regarding the trust and its assets, 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

28. To date, no forward delivery commitments have been entered into by McDonald in connection with the offering of any certificates, but McDonald 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 McDonald may find it desirable in the future to enter into such commitments for the purchase of certificates.

Secondary Market Transactions

29. It is McDonald's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter, and it is McDonald's intention to make a market for any certificates for which it is lead or co-managing underwriter, although it is under no obligation to do so. At times McDonald will facilitate sales by investors who purchase certificates if McDonald has acted as agent or principal in the original private placement of the certificates and if such investors request McDonald's assistance.

Retroactive Relief

30. McDonald represents that it has not engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would be granted prior to the date of their application. However, McDonald requests the exemptive relief granted to be retroactive to January 4, 1999, the date of their application, and would like to rely on such retroactive relief for transactions entered into prior to the date exemptive relief may be granted.

Summary

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

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

(d) All transactions for which McDonald 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;

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

(f) McDonald anticipates that it will make a secondary market in certificates (although it is under no obligation to do so).

Notice to Interested Persons: The applicant represents that any securities offered in reliance upon the proposed exemption prior to the date the final exemption is published in the **Federal Register** shall disclose in the offering memorandum or prospectus: (a) The availability of the proposed exemption; (b) the right of potentially interested plan fiduciaries to comment on the proposed exemption; and (c) information on how an interested plan fiduciary can obtain a copy of the proposed exemption (once it is available) from McDonald.

Once this proposed exemption is granted, a copy of the exemption published in the **Federal Register** shall be distributed to any current or prospective plan investor in a security offered in reliance upon the exemption upon request of such investor, and each offering memorandum or prospectus offering securities in reliance upon the exemption shall describe and disclose the availability of the exemption.

Comments and requests for a hearing must be received by the Department not later than 45 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

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 or 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 that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 30th day of March, 2000.

Ivan Strasfeld,

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

[FR Doc. 00–8448 Filed 4–6–00; 8:45 am]

BILLING CODE 4510–29–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors

TIME AND DATE: The Board of Directors of the Legal Services Corporation will meet on April 15, 2000. The meeting will begin at 10 a.m. and continue until conclusion of the Board's agenda.

LOCATION: Marriott Wardman Park Hotel, 2660 Woodley Road, NW, Washington, DC 20008.

STATUS OF MEETING: Open, except that a portion of the meeting may be closed pursuant to a vote of the Board of Directors to hold an executive session. At the closed session, the Corporation's General Counsel will report to the Board on litigation to which the Corporation is or may become a party, and the Board may act on the matters reported. The closing is authorized by the relevant provisions of the Government in the Sunshine Act [5 U.S.C. 552b(c) (10)] and the corresponding provisions of the Legal Services Corporation's implementing regulation [45 CFR 1622.5(h)]. A copy of the General Counsel's Certification that the closing is authorized by law will be available upon request.

MATTERS TO BE CONSIDERED:

Open Session

1. Approval of agenda.
2. Approval of minutes of the Board's meeting of January 28–29, 2000.
3. Approval of minutes of the executive session of the Board's meeting of January 28–29, 2000.
4. Approval of minutes of the Board's teleconference meeting of January 28–29, 2000.
5. Approval of minutes of the Annual Performance Reviews Committee's teleconference meeting of November 19, 1999.
6. Approval of minutes of the Annual Performance Reviews Committee's teleconference meeting of January 24, 2000.
7. Approval of minutes of the November 19, 1999 meeting of the Committee on Provision for the Delivery of Legal Services.
8. Approval of minutes of the Operations & Regulations Committee's meeting of November 19, 1999.
9. Chairman's Report.
10. Members' Report.
11. Inspector General's Report.
12. President's Report.
13. Report on the status of Strategic Planning by the Corporation.
14. Review of the Corporation's Consolidated Operating Budget, Expenses and Other Funds Available through February 29, 2000.
15. Consider and act on the Board's meeting schedule, including designation of locations, for calendar year 2001.
16. Consider and act on the extension of John McKay's contract of employment as President of the Corporation.

Closed Session

17. Briefing [1] by the Inspector General on the activities of the Office of Inspector General.
18. Consider and act on the Office of Legal Affairs' report on potential and pending litigation involving the Corporation.

Open Session

19. Consider and act on other business.
20. Public Comment.

CONTACT PERSON FOR INFORMATION: Victor M. Fortuno, Vice President for Legal Affairs, General Counsel and Secretary of the Corporation, at (202) 336–8800.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Shannon Nicko Adaway, at (202) 336–8800.

Dated: April 4, 2000.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel and Corporate Secretary.

[FR Doc. 00–8745 Filed 4–5–00; 12:45 pm]

BILLING CODE 7050–01–M

[1] Any portion of the closed session consisting solely of staff briefings does not fall within the Sunshine Act's definition of the term ''meeting'' and, therefore, the requirements of the Sunshine Act do not apply to any such portion of the closed session. 5 U.S.C. 552(b)(a)(2) and (b). See also 45 CFR § 1622.2 & 1622.3.

LEGAL SERVICES CORPORATION

Sunshine Act Meeting; Meeting of the Board of Directors Operations and Regulations Committee

TIME AND DATE: The Operations and Regulations Committee of the Legal Services Corporation's Board of Directors will meet on April 14, 2000. The meeting will begin at 2:30 p.m. and continue until the Committee concludes its agenda.

LOCATION: Marriott Wardman Park Hotel, 2660 Woodley Road, NW, Washington, DC 20008.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of agenda.
2. Consider and act on proposed Operations and Regulations Committee procedures.
3. Consider and act on other business.
4. Public Comment.

CONTACT PERSON FOR INFORMATION: Victor M. Fortuno, Vice President for Legal Affairs, General Counsel and Secretary of the Corporation, at (202) 336–8800.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Shannon Nicko Adaway, at (202) 336–8800.

Dated: April 4, 2000.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel and Corporate Secretary.

[FR Doc. 00–8746 Filed 4–5–00; 12:45 pm]

BILLING CODE 7050–01–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors Committee on Provision for the Delivery of Legal Services

TIME AND DATE: The Committee on Provision for the Delivery of Legal Services of the Legal Services Corporation Board of Directors will meet on April 14, 2000. The meeting will begin at 10:00 a.m. and continue until the Committee concludes its agenda.

LOCATION: Marriott Wardman Park Hotel, 2660 Woodley Road, N.W., Washington, DC 20008.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of agenda.
2. Report by Robert Gross, of the Corporation's Office of Program Performance, on State Planning.
3. Update by Michael Genz and Glenn Rawdon, of the Corporation's Office of Program Performance, on the Technology Initiatives Grants Process.
4. Report by Michael Genz and Cynthia Schneider, of the Corporation's Office of Program Performance, on the Migrant Workers Legal Services Conference held on March 19–22, 2000, in Boerne, Texas.