

and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information-collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA-95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are understandable, and OSHA's estimate of the information-collection burden is correct.

The Standard specifies one paperwork requirement. The following section describes who uses the information collected under the requirement, as well as how they use it. The purpose of the requirement is to reduce employees' risk of death or serious injury by ensuring that aerial lifts are in safe operating condition.

*Manufacturer's Certification of Modifications (paragraph (b)(2)).* The standard requires that when aerial lifts are "field modified" for uses other than those intended by the manufacturer, the manufacturer or other equivalent entity, such as a nationally recognized testing laboratory, must certify in writing that the modification is in conformity with all applicable provisions of ANSI A92.2-1969 and the OSHA standard and that the modified aerial lift is at least as safe as the equipment was before modification. Employers are to maintain the certification record and make it available to OSHA compliance officers. This record provides assurance to employers, employees, and compliance officers that the modified aerial lift was inspected and/or tested after the modification and that the aerial lift is safe to use, thereby preventing failure while employees are being elevated. The certification record also provides the most efficient means for the compliance officers to determine that an employer is complying with the standard.

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for

example, by using automated or other technological information-collection and -transmission techniques.

## III. Proposed Actions

OSHA proposes to extend the Office of Management and Budget's (OMB) approval of the collection-of-information requirement specified by the Aerial Lifts Standard (29 CFR 1910.67). The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of the information-collection requirement.

*Type of Review:* Extension of a currently-approved information-collection requirement.

*Title:* Aerial Lifts Standard (29 CFR 1910.67).

*OMB Number:* 1218-0230.

*Affected Public:* Business or other for-profit; not-for-profit institutions; Federal government; State, local, or tribal governments.

*Number of Respondents:* 900.

*Frequency of Recordkeeping:* On occasion.

*Average Time per Response:* 3 minutes (.05 hour).

*Total Annual Hours Requested:* 45.

*Total Annual Costs (O&M):* \$0.

## IV. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), and Secretary of Labor's Order No. 3-2000 (65 FR 50017).

Signed at Washington, DC, on June 3, 2002.

**John L. Henshaw,**

*Assistant Secretary of Labor.*

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**BILLING CODE 4510-26-M**

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

**[Application No. D-10959, et al.]**

### Proposed Exemptions; Adams Wood Products, Inc. Profit Sharing 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 requests 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 requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), 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. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffittb@pwba.dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. 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-1513, 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.

**Adams Wood Products, Inc. Profit Sharing Plan (the Plan),**

**Located in Morristown, Tennessee**

[Application No. D-10959]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to: (1) The proposed non-interest bearing loan (the Loan) by Adams Wood Products, Inc. (AWP), the Plan sponsor, to the Plan to reimburse the Plan for losses incurred concerning past investments by the Plan in certain promissory notes (the Notes); and (2) the potential repayment by the Plan to AWP of certain moneys if the Plan recovers any of the investments in the Notes. This proposed exemption is subject to the following conditions:

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

(b) The amount of the Loan includes the following:

(1) \$340,187.38, which represents the amount due on the consolidated note (the Consolidated Note) on June 30, 2000;

(2) opportunity costs as follows: (a) The amount due on the Consolidated Note from June 30, 2000, the last date when the Plan received interest on the Consolidated Note to January 26, 2001, the date when AWP placed funds in Certificates of Deposit (CDs); and (b) an

additional amount yet to be determined to provide the Plan with an identical rate of return as AWP received as a result of AWP's investment in the CDs for the period between January 26, 2001 and the date the Plan receives the Loan amount; and

(3) \$4,630.84 to reimburse the Plan for all interest on the 1st note and 2nd note, due respectively, on April 20, 2001 and April 15, 2002.

(c) Any repayment by the Plan is restricted solely to the amount, if any, recovered by the Plan with respect to the Loan.

*Summary of Facts and Representations*

1. The Plan is a profit sharing plan, sponsored by AWP, a Tennessee subchapter S corporation, which is engaged in the production of wood components for furniture. As of September 30, 2000, the Plan had total assets of approximately \$828,142.89 with approximately 68 participants and beneficiaries. The only person having investment discretion over the assets involved in the proposed transaction is the trustee of the Plan, Larry Swinson, who is the sole limited partner of AWP.

2. As of December 31, 1999, the Plan held the Notes as part of its investment portfolio. The value of the Notes is \$340,187.38 or 41% of the Plan's assets. The Plan invested in the Notes based on the advice of a benefits advisor. The fiduciary to the Plan found the Notes to be attractive investments for the Plan in light of the fact that they were at a fixed rate and the Notes had a rate of return that was very attractive at the time they were purchased.

The Plan purchased the 1st Note from the issuer, an unrelated third party with respect to the Plan, on June 20, 1997 for \$100,000 with a 12% interest rate, with BFM Leasing serving as the issuer of the Note. The Plan received \$58,644.85 in principal with a principal balance remaining of \$41,355.15 and received interest in the amount of \$24,144.95 for the 1st Note. The 1st Note was secured by auto leases with various corporate entities. The terms of the Note called for the payment of principal and interest on or before April 20, 2001.

The Plan purchased the 2nd Note from the issuer, an unrelated third party with respect to the Plan, on April 15, 1998 for \$55,000 with a 10% interest rate, with BFM Leasing serving as the issuer of the note. The Plan received \$13,041.99 in principal, with a principal balance remaining of \$41,958.01 and received interest in the amount of \$9,385.81 for the 2nd Note. The 2nd Note also was secured by auto leases with various corporate entities. The terms of the Note called for the payment

of principal and interest on or before April 15, 2002.

The Plan purchased the 3rd Note from the issuer, an unrelated third party with respect to the Plan, on July 5, 1999 for \$120,000 with a 12% interest rate, with BFM Leasing serving as the issuer of the Note. The Plan received \$8,876.91 in principal, with a principal balance remaining of \$111,123.09 and received interest in the amount of \$10,658.32 for the 3rd Note. The 3rd Note was secured by leases with various corporate entities. The terms of the Note called for the payment of principal and interest no later than July 5, 2003.

The Plan purchased the 4th Note from the issuer, an unrelated third party with respect to the Plan, on December 31, 1999 for \$150,000 with a 10.5% interest rate, with Land Oak Capital serving as the issuer of the Note. Land Oak Capital and BFM Leasing are related parties. The Plan received \$4,278.24 in principal, with a principal balance remaining of \$145,721.76 and received interest in the amount of \$4,804.39 for the 4th Note. The 4th Note however, was unsecured. The terms of the Note called for payment of principal and interest no later than December 31, 2003.

3. In the spring of 2000, the Plan agreed to the four notes being consolidated into the Consolidated Note for \$340,187.38.<sup>1</sup> The Interest rate on the Consolidated Note was 10%. The Consolidated Note was not secured. The Notes were consolidated because the debtor encountered financial difficulty and as a result it was necessary to restructure the Notes into the Consolidated Note that called for periodic payments of interest only with principal due on April 1, 2005, at the end of the Consolidated Note.

4. On September 29, 2000, the debtor informed the Plan that due to fraud on the debtor by another company, there was a significant probability that the debtor might default on the Consolidated Note. As a result, the Plan was given two choices: (1) Keep the Consolidated Note, or (2) exchange the Consolidated Note for another new note, which also would be unsecured. The

<sup>1</sup> The Department notes that ERISA's general standards of fiduciary conduct would apply to the Plan's acquisition and holding of the Notes and the Consolidated Note. The Department expresses no opinion herein as to whether the failure to secure collateral for the 4th note or the Consolidated Note by the Plan violated section 404(a) of the Act. In this regard, section 404(a) of the Act requires, among other things, that a plan fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries in a prudent fashion, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of the plan.

Plan did not deem it advisable from a fiduciary standpoint or otherwise to exchange the Consolidated Note for a new note. For that reason, the Plan chose not to exchange the Consolidated Note for a new note.

5. Accordingly, AWP proposes to make the Plan whole by making an interest-free loan to the Plan for:

(1) \$340,187.38, which represents the amount due on the Consolidated Note as of June 30, 2000;

(2) opportunity costs as follows: (a) \$16,571.63,<sup>2</sup> which represents interest due on the Consolidated Note from June 30, 2000, the last date when the Plan received interest on the Consolidated Note to January 26, 2001, the date when AWP purchased CDs;<sup>3</sup> and (b) an additional amount starting January 26, 2001 to provide the Plan with a rate of return on the \$356,759.01 (\$340,187.38 + 16,571.63) = \$356,759.01) based on the continued investment by AWP in the CD's and ending on the date the Plan receives the complete Loan amount; and

(3) \$4,630.84, which reimburses the Plan for all interest on the 1st Note and 2nd Note, due respectively, on April 20, 2001 and April 15, 2002.

6. The Loan will be evidenced by a promissory note and all proceeds will be paid to the Plan within 30 days of publication in the **Federal Register** of the grant of this exemption.

7. The Loan will be repaid only to the extent of any amount recovered by the Plan with respect to the Consolidated Note. The potential Loan obligation on the part of the Plan serves the legitimate purpose of preventing a "double recovery" by the Plan.

8. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

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

(b) The amount of the Loan includes the following:

<sup>2</sup> The calculated amount of interest due on January 26, 2001 (the date the first CD was purchased) was formulated by multiplying the amount due on the Consolidated Note on June 30, 2000, \$340,187.38, by the interest rate on the Consolidated Note at 10% per annum times a fraction with the numerator being the number of days from June 30, 2000 to January 26, 2001 and the denominator being 365 (representing the number of days within a year).

<sup>3</sup> The CDs accrued interest at the rate of 5.35% per annum. The first CD was purchased on January 26, 2001 for \$185,000 and the second CD was acquired on January 31, 2001 (the Original CDs) for the balance owed to the Plan on that date. The Original CDs matured at the end of April 2001 and have been reinvested in two three month CDs.

(1) \$340,187.38, which represents the amount due on the Consolidated Note on June 30, 2000;

(2) opportunity costs as follows: (a) the amount due on the Consolidated Note from June 30, 2000, the last date when the Plan received principal and interest on the Consolidated Note to January 26, 2001, the date when AWP placed funds in CDs; and (b) an additional amount yet to be determined to provide the Plan with an identical rate of return as AWP received as a result of AWP's investment in the CDs for the period between January 26, 2001 and the date the Plan receives the Loan amount;

(3) \$4,630.84 to reimburse the Plan for all interest on the 1st note and 2nd note, due respectively, on April 20, 2001 and April 15, 2002; and

(c) Any repayment by the Plan is restricted solely to the amount, if any, recovered by the Plan with respect to the Consolidated Note.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

*For Further Information Contact:* Mr. Khalif Ford of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

#### The Banc Funds Company, LLC (TBFC) Located in Chicago, IL

[Application No. D-11083]

#### 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 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).<sup>4</sup>

#### Section I. Covered Transactions

If the exemption is granted, the restrictions of sections 406(a) and 406(b) 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 purchase or redemption of interests in the Banc Fund VI L.P. (the Partnership) by employee benefit plans (the Plans)

<sup>4</sup> For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

investing in the Partnership, where TBFC, a party in interest with respect to the Plans, is the general partner of MidBanc VI, L.P. (MidBanc VI), which is, in turn, the general partner (the General Partner) of the Partnership; (2) the sale, for cash or other consideration, by the Partnership of certain securities that are held as Partnership assets to a party in interest with respect to a Plan participating in the Partnership, where the party in interest proposes to acquire or merge with the portfolio company (the Portfolio Company) that issued such securities; and (3) the payment to the General Partner, by Plans participating in the Partnership, of an incentive fee (the Performance Fee) which is intended to reward the General Partner for the superior performance of investments in the Partnership.

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

#### Section II. General Conditions

(a) Prior to a Plan's investment in the Partnership, a Plan fiduciary which is independent of TBFC and its affiliates (the Independent Fiduciary) approves such investments on behalf of the Plan.

(b) Each Plan investing in the Partnership has total assets that are in excess of \$50 million.

(c) No Plan may invest more than 10 percent of its assets in the Partnership, and the interests held by the Plan may not exceed 25 percent of the assets of the Partnership.

(d) No Plan may invest more than 25 percent of its assets in investment vehicles (i.e., collective investment funds or separate accounts) managed or sponsored by TBFC and/or its affiliates.

(e) Prior to investing in the Partnership, each Independent Fiduciary contemplating investing therein receives a Private Placement Memorandum and its supplement containing descriptions of all material facts concerning the purpose, structure and the operation of the Partnership.

(f) An Independent Fiduciary which expresses further interest in the Partnership receives a copy of the Partnership Agreement describing the organizational principles, investment objective and administration of the Partnership, the manner in which the Partnership interests may be redeemed, the manner in which Partnership assets are to be valued, the duties and responsibilities of the General Partner, the rate of remuneration of the General Partner, and the conditions under which the General Partner may be removed.

(g) If accepted as an investor in the Partnership, the Independent Fiduciary is—

(1) Furnished with the names and addresses of all other participating Plan and non-Plan investors in the Partnership;

(2) Required to acknowledge, in writing, prior to purchasing an interest in the Partnership as a limited partner (the Limited Partner) that such Independent Fiduciary has received copies of such documents; and

(3) Required to acknowledge, in writing, to the General Partner that such fiduciary is independent of TBFC and its affiliates, capable of making an independent decision regarding the investment of Plan assets, knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the Partnership.

(h) Each Plan receives the following written disclosures from the General Partner with respect to its ongoing participation in the Partnership:

(1) Within 90 days after the end of each fiscal year of the Partnership as well as at the time of termination, an annual financial report containing a balance sheet for the Partnership as of the end of such fiscal year and a statement of changes in the financial position for the fiscal year, as audited and reported upon by independent, certified public accountants. The annual reports will also disclose the remuneration that has accrued or is paid to the General Partner.

(2) Within 60 days after the end of each quarter (except in the last quarter) of each fiscal year of the Partnership, an unaudited quarterly financial report consisting of at least a balance sheet for the Partnership as of the end of such quarter and a profit and loss statement for such quarter. The quarterly report will also specify the remuneration that is actually paid or accrued to the General Partner.

(3) Such other written information as may be needed by the Plans (including copies of the proposed exemption and grant notice describing the exemptive relief provided herein).

(i) At least annually, the General Partner will hold a meeting of the Partnership, at which time, the Independent Fiduciaries of the participating Plans will have the opportunity to decide on whether the Partnership and/or the General Partner should be terminated as well discuss any aspect of the Partnership and the agreements promulgated thereunder with the General Partner.

(j) During each year of the Partnership, representatives of the General Partner will be available to confer by telephone or in person with

Independent Fiduciaries of participating Plans to discuss matters concerning the Partnership.

(k) The terms of all transactions that are entered into on behalf of the Partnership remain at least as favorable to a Plan investing in the Partnership as those obtainable in arm's length transactions with unrelated parties. In this regard, the valuation of assets in the Partnership that is done in connection with the distribution of any part of the General Partner's Performance Fee will be based upon independent market quotations or (where the same are unavailable) determinations made by an independent appraiser (the Independent Appraiser).

(l) In the case of the sale by the Partnership of Portfolio Company securities to a party in interest with respect to a participating Plan that occurs in connection with the acquisition of a Portfolio Company represented in the Partnership's portfolio (the Portfolio), the party in interest may not be the General Partner, TBFC, any employer of a participating Plan, or any affiliated thereof, and the Partnership receives the same terms as is offered to other shareholders of a Portfolio Company.

(m) As to each Plan, the total fees paid to the General Partner and its affiliates constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(n) Any increase in the General Partner's Performance Fee is based upon a predetermined percentage of net realized gains minus net unrealized losses determined annually between the date the first contribution is made to the Partnership until the time the Partnership disposes of its last investment. In this regard,

(1) Except as provided below in Section II(o), no part of the General Partner's Performance Fee may be withdrawn before December 31, 2007, which represents the end of the Acquisition Phase (the Acquisition Phase) for the Partnership, and not until Plans have received distributions equal to 100 percent of their capital contributions made to the Partnership.

(2) Prior to the termination of the Partnership, no more than 75 percent of the Performance Fee credited to the General Partner may be withdrawn by the Partnership.

(3) The debit account established for the General Partner to calculate the Performance Fee (the Performance Fee Account) is credited annually with a predetermined percentage of net realized gains minus net unrealized losses, minus Performance Fee distributions.

(4) No portion of the Performance Fee may be withdrawn if the Performance Fee Account is in a deficit position.

(5) The General Partner repays all deficits in its Performance Fee Account and it maintains a 25 percent cushion in such account prior to receiving any further distribution.

(o) During the Acquisition Phase of the Partnership only,

(1) The General Partner is entitled to take distributions with respect to the Performance Fee in the amount of any income tax liability it or its affiliates become subject to with respect to net capital gains of the Partnership, provided such gains are based upon the sale of Portfolio Company securities that is initiated by a third party in connection with a merger, tender offer or acquisition, and does not involve the exercise of discretion by the General Partner.

(2) The tax distributions are deducted from the Performance Fee.

(3) The General Partner repays to the Partnership any tax refund received to the extent a distribution has been made to such General Partner.

(4) The General Partner provides the Plans with an annual report and accounting of all distributions and repayments attributable to income taxation of the General Partner and its affiliates, including written evidence that the distributions have been utilized exclusively to pay the income tax liability.

(p) The General Partner maintains, for a period of six years, the records necessary to enable the persons described in paragraph (q) of this Section II to determine whether the conditions of this 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 the General Partner, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than the General Partner 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 (q) below.

(q)(1) Except as provided in section (q)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (p) of this Section II shall be unconditionally available at their customary location during normal business hours by:

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

(B) Any Independent Fiduciary of a participating Plan or any duly authorized representative of such Independent Fiduciary;

(C) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(D) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(q)(2) None of the persons described above in subparagraphs (B)–(D) of this paragraph shall be authorized to examine the trade secrets of the General Partner or TBFC or commercial or financial information which is privileged or confidential.

### Section III. Definitions

For purposes of this proposed exemption,

(a) The term “TBFC” means The Banc Funds Company, LLC and any affiliate of TBFC as defined in paragraph (b) of Section III.

(b) An “affiliate” of TBFC includes—

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

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

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) An “Independent Fiduciary” is a Plan fiduciary which is independent of TBFC and its affiliates and is either a Plan administrator, trustee, named fiduciary, as the recordholder of the Limited Partner’s interest in the Partnership or an investment manager.

(e) The term “Portfolio Companies” include commercial banks and other depository institutions such as savings banks, savings and loan associations, holding companies controlling those entities (together, the Bank Companies), and companies providing financial services in the United States, which include, but are not limited to, consumer finance companies and demutualizing life insurance companies (together, the Financial Services Companies).

(f) The term “net realized gains” refers to the excess of realized gains over realized losses.

(g) The term “net realized losses” refers to the excess of realized losses over realized gains.

(h) The term “net unrealized losses” refer to the excess of unrealized losses over unrealized gains.

(i) The term “net unrealized gains” refers to the excess of unrealized gains over unrealized losses.

For a gain or loss to be “realized,” an asset of the Partnership must be sold for more than or less than its acquisition price. For a gain or loss to be “unrealized,” the Partnership asset must increase or decrease in value but not be sold.

### Preamble

On September 22, 1993, the Department granted PTE 93–63 (58 FR 49322), a temporary exemption which was effective for a period of eight years from the date of the grant. PTE 93–63 permitted a series of transactions relating to the (a) sale by the Bank Fund III Group Trust (the BF III Group Trust) in which Plans invested, of certain securities which had been issued by Bank Companies and held in the BF III Group Trust’s Portfolio, to a party in interest with respect to a Plan, where the party in interest proposed to acquire or merge with the Bank Company that issued such securities. In addition, PTE 93–63 permitted the BF III Group Trust to purchase Bank Company securities from the Midwest Bank Fund I Limited Partnership (MBF I LP) and the Midwest Bank Fund II, Limited Partnership (MBF II LP), two entities organized by The Chicago Corporation (TCC), the company from which TBFC was spun off. Further, PTE 93–63, allowed Plans investing in the BF III Group Trust to pay a performance fee to TCC and subsequently to TBFC.

On March 5, 1997, the Department granted PTE 97–15 at 62 FR 10078. PTE 97–15, which is still in effect, permits the Banc Fund IV Group Trust (the BF IV Group Trust) in which Plans invest, to sell certain securities that are held in the BF IV Group Trust Portfolio to a party in interest with respect to a participating Plan, where the party in interest proposes to acquire or merge with a bank company or a financial services company. In addition, PTE 97–15 permitted TCC (and currently permits TBFC, which was spun-off from TCC on April 30, 1997) to receive a Performance Fee from Plans investing in the BF IV Group Trust.

On August 10, 2000, the Department granted PTE 2000–37 at 65 FR 49018. PTE 2000–37 permits the purchase or redemption of interests in the Banc Fund V, L.P. (BF V) by Plans investing in the Banc Fund V Group Trust (the BF

V Group Trust), where TBFC, a party in interest with respect to such Plans, is the general partner of MidBanc V, L.P., which is, in turn, the general partner of BF V. In addition, PTE 2000–37 permits the sale, for cash or other consideration, by BF V, of certain securities that are held as assets of BF V, to a party in interest with respect to a Plan participating in BF V through the BF V Group Trust, where the party in interest proposes to acquire or merge with a bank company or a financial services company that issued the securities. Further, PTE 2000–37 permits TBFC to receive a Performance Fee from Plans investing in the Partnership through the BF V Group Trust.<sup>5</sup>

The pooled investment vehicle that is described herein is similar to five investment funds that were organized by TCC or TBFC in 1986, 1989, 1993, 1996 and 1998 and described in PTEs 93–63, 97–15 and 2000–37. As noted above, these vehicles have been operated by TCC and more recently, by TBFC.

### Summary of Facts and Representations

1. TBFC is a Chicago, Illinois-based investment advisory firm founded in 1997 as a spin-off from, and by the individuals who managed the financial services company advisory division of TCC.<sup>6</sup> TBFC is a registered investment adviser under the Investment Advisers Act of 1940, as amended, and it has a single line of business. TBFC currently provides institutional investors with investment management services through BF IV and BF V and it acts as a fiduciary with respect to these clients. TBFC currently manages \$126.2 million in assets of plans that are covered under the Act, \$195 million in the assets of

<sup>5</sup> In 1986, TCC organized the MBF I LP. The general partners of MBF I LP were two partnerships (MidBanc I and MidBanc II), whose general partners were corporate affiliates of TCC and whose limited partners were members of TCC’s staff. Less than 25 percent of the assets of MBF I LP were provided by Plans. On December 31, 1994, MBF I LP was liquidated.

In 1989, TCC organized the MBF II LP. This partnership had the same general partners as MBF I LP. Also, less than 25 percent of the assets of MBF II LP were provided by Plans. On December 31, 1997, MBF II LP was liquidated.

Finally, in 1993, TCC completed the organization of Banc Fund III (BF III) which was structured as both a limited partnership and a group trust.

In 1996, TCC organized Banc Fund IV (BF IV) as a limited partnership and as a group trust. Each entity has or had investment policies and strategies similar to the proposed investment vehicle (i.e., the Partnership).

<sup>6</sup> During 1997, TCC’s parent was acquired by ABN AMRO North America, Inc., a subsidiary of ABN AMRO Bank N.V., a global bank headquartered in the Netherlands. The acquisition did not involve the purchase of the assets of TCC’s parent and TCC retains its separate corporate identity.

governmental plans and \$128.8 million in non-Plan assets.

TBFC's relevant specialty is its expertise in the financial services and banking industries. In this regard, TBFC employees provide management, investment and capital formation services to collective investment vehicles which invest in commercial banks and other financial institutions and expend significant resources to research specific financial institutions.

As described below, TBFC requests an administrative exemption from the Department with respect to the purchase or redemption of interests in the Partnership by Plans investing in the Partnership, where TBFC, a party in interest with respect to such Plans, is the general partner of MidBanc VI, which is, in turn, the General Partner of the Partnership. In addition, TBFC requests exemptive relief to permit the sale, for cash or other consideration, by the Partnership of certain securities that are held as Partnership assets to a party in interest with respect to a Plan participating in the Partnership, where the party in interest proposes to acquire or merge with the Portfolio Company that issued such securities. Further, TBFC requests that the exemption apply to the General Partner's receipt of a Performance Fee from the Partnership that is based upon a debit account structure (i.e., the Performance Fee Account) which will keep track of the General Partner's compensation for managing the Partnership but will not represent actual dollars that are reserved or set aside for the General Partner.

2. The Partnership is intended to be a "pooled fund" as that term is defined in 29 CFR 2570.31(g). All employee benefit plan investors that are Limited Partners of the Partnership must evidence the following characteristics in order to acquire interests as Limited Partners: (a) Each investor must commit to making at least \$2 million in initial capital contributions; (b) each Plan must have at least \$50 million in assets; and (c) no Plan may invest more than 10 percent of its assets in interests in the Partnership and such interests held by a Plan may not exceed 25 percent of the Partnership; and (e) no Plan may subscribe for a Limited Partner's interest which, when aggregated with all other Plan assets that are subject to investment funds or separate accounts managed by TBFC and/or its affiliates, is valued in excess of 25 percent of such Plan's net assets. The Partnership will not be organized unless \$50 million in capital contribution commitments is subscribed for by investors.

3. Approximately 5–10 Plans may invest in the Partnership. An additional

8 to 12 non-Plan investors are also expected to participate in the Partnership. However, no Plan may invest more than 25 percent of its assets in the Partnership and every other pooled investment vehicle sponsored by TBFC, as measured on the date of such investment. Each participating Plan must invest a minimum of \$2 million in the Partnership. Further, no Plan benefiting employees of TBFC will be permitted to invest in the Partnership.<sup>7</sup>

4. Pooled investments for Plans investing in the Partnership will be made through the Partnership. The maximum capital contribution commitment of the Partnership will be \$350 million. The primary purpose of the Partnership is to engage in the business of providing capital to, acquiring equity and debt interests in, and making available consultative services to Portfolio Companies such as Bank Companies and Financial Services Companies having assets under \$10 billion. The Partnership may also invest in demutualizing thrift institutions, business services companies (providing outsourcing, transaction processing and other information management services to Financial Services Companies), insurance contracts, short term investments, derivatives (for hedging purposes only) and covered put and call options. Further, the Partnership may make loans of securities. In short, it is anticipated that the Partnership will share the same basic investment strategy as was held by MBF I, MBF II, BF III, BF IV and BF V, and in many ways, the operations and fee structures of these entities.<sup>8</sup>

<sup>7</sup> Although TBFC will not be affiliated with, or under the control of, or controlling, any participating Plan, it is likely that certain Plans will have a preexisting relationship with TBFC in the form of an investment in BF IV or BF V, investment vehicles managed by TBFC.

<sup>8</sup> According to TBFC, there are circumstances militating against investments by the Partnership in either BF IV or BF V. First, the Partnership will be structured as a separate investment entity apart from BF IV and BF V. BF IV, BF V and BF VI (collectively, the Funds) will all have somewhat different charters with respect to what investments each can make. Second, many companies in which the Funds invest are (or will be acquired) by larger banks within three years of the particular Fund making an investment. Therefore, something acquired by an earlier Fund is unlikely to be acquired by a later Fund. Third, the Partnership will not come into existence until BF IV and BF V are fully invested, so concurrent purchases are deemed impossible. Fourth, BF IV may complete its wind-up and termination before the Partnership becomes invested. Fifth, there is an outright prohibition against the Partnership buying investments in BF IV and BF V and also against investing directly in BF IV and BF V. Sixth, the Partnership will invest in an area in which the availability of Portfolio Company securities will be extremely limited. For the Partnership to invest in any of the same investment vehicles as BF IV and

5. The General Partner of the Partnership will be MidBanc VI LP. The general partner of MidBanc VI LP will be TBFC and the Limited Partners will be individuals employed by TBFC. The General Partner will acquire a one percent interest in the Partnership, for cash. As described later in this proposed exemption, all fees that are paid to the General Partner and/or its affiliates will be paid by the Partnership.

The principal place of business of the Partnership will be 208 LaSalle Street, Chicago, Illinois or at such other location as the General Partner may select. The Partnership is expected to terminate on December 31, 2011, unless terminated sooner.

6. Some of the Limited Partners of the Partnership will consist of non-Plan investors, which will acquire, by making capital contributions in cash directly to the Partnership, a Limited Partner's interest in such Partnership. However, as noted above, other Limited Partners will be Plans covered under the provisions of the Act, and governmental plans. In the same manner, these Plans will acquire, for cash, a Limited Partner's interest in the Partnership. It is expected that upon the creation of this structure, the Plans will own a 75 percent equity interest in the Partnership. Because none of the exceptions to the plan asset regulations will apply, the assets of the Partnership will constitute plan assets.<sup>9</sup>

The General Partner will not have any control over the decision to cause any Plan to invest in the Partnership. Under these circumstances, the decision to participate in the Partnership will be made by a Plan fiduciary which is independent of the General Partner. In each instance, even though the General Partner may present a Plan fiduciary with information concerning investment in the Partnership, the Plan fiduciary who makes the investment decision will agree not to rely on the advice of the General Partner as the primary basis for a Plan's investment, and the Independent Fiduciary will be specifically required to do so in every instance.<sup>10</sup> The General Partner assumes

BF V, it would mean that none of the investment circumstances described above would apply.

<sup>9</sup> See 29 CFR 2510.3–101(a)(2)(ii) and (f).

<sup>10</sup> The Department notes that the general standards of fiduciary conduct promulgated under the Act would apply to the participation in the Partnership by an Independent Fiduciary. Section 404 of the Act requires that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, an Independent Fiduciary must act prudently with respect to the decision to invest in the Partnership. The Department expects that an Independent Fiduciary, prior to investing in the Partnership, to fully

that a Plan will invest in the Partnership only if the fiduciaries of the Plan determine that investment performance is anticipated to be superior.<sup>11</sup>

7. The contribution provisions for the Partnership will be identical as between Plan and non-Plan investors. For example, capital calls for Plans participating in the Partnership will be concurrent and in the same proportional amount as are capital calls by the Partnership from Limited Partners that are not Plans.<sup>12</sup> The General Partner may call any amount of the capital commitment upon 7 days' advance written notice, and in increments of 3 percent or more, when cash is needed to fund the acquisition of Portfolio Company securities by the Partnership. However, there are two limitations upon the General Partner's power to call contributions. First, no more than 50 percent of the contribution commitment may be called in any twelve month period. Second, the General Partner cannot call any contributions after the sixth anniversary date of the inception of the Partnership (the period running from the date on which initial capital contributions are made to such sixth anniversary date being referred to as "the Acquisition Phase").

If an investing Plan cannot or does not meet a capital call, the Partnership Agreement provides that ten days after the investor receives notice of default on a capital call, the General Partner may (a) permit the investor's continued participation in the Partnership with a commensurate reduction in both the investor's proportionate interest in such Partnership and aggregate size of the Partnership;<sup>13</sup> (b) declare the investor's

understand all aspects of such investments following disclosure by the General Partner of all relevant information.

<sup>11</sup> The Department is not expressing an opinion on whether the Trustee or the General Partner would be deemed to be fiduciaries under section 3(21)(A)(ii) of the Act with respect to a Plan's investment in the Partnership. The Department is also not proposing relief for the rendering of investment advice in connection with the acquisition of interests in the Partnership.

<sup>12</sup> It is represented that capital calls will be handled as follows:

On the same day, the General Partner will notify all Limited Partners, including Plan investors that capital is being called. All investors will have 7 days to forward the appropriate amount of cash.

As a matter of practice, all Limited Partners will wire their contributions to the Partnership on the same day.

All investors' contributions will be credited to the Partnership's Capital Account.

The General Partner will then utilize the Partnership's Capital Account to acquire the appropriate securities until the Partnership account is exhausted, at which time, another capital call will be made.

<sup>13</sup> Reductions in a Limited Partner's participations are based upon the relative amount of capital contributions that are omitted. For

entire capital commitment due and pursue collection of the same; or (c) expel, at fair market value, the defaulting investor and offer its interest in the Partnership first to the non-defaulting investors and then to non-investors who are qualified to invest in such Partnership. In making the choice between these alternatives, it is represented that the General Partner will be guided by then-current investment strategies and the best interest of the non-defaulting investors.

8. The terms of the Partnership control the duties and authority of the General Partner. For example, the General Partner, at its own expense, will provide the Partnership with personnel who are able to undertake the investment strategies for these entities as well as perform their clerical, bookkeeping and administrative functions. In addition, the General Partner, at its own expense, will provide the Partnership with office space, telephones, copying machines, postage and all other necessary items of office services. Further, the General Partner will control proxy voting on all Portfolio securities.<sup>14</sup> The Partnership Agreement permits the General Partner to allocate securities transactions to broker-dealers of its choice.

The General Partner will prepare, or cause to be prepared on behalf of the Partnership, the following reports: (a) annual audited financial statements; and (b) quarterly unaudited financial statements. In addition, the General Partner will keep the accounts of the Partnership.<sup>15</sup>

example, if a Limited Partner subscribes for a 10 percent interest in the Partnership and neglects to honor 25 percent of its commitment, the Limited Partner will only have a 7.5 percent interest in the Partnership if it is permitted to continue its investment.

<sup>14</sup> The Department is not providing exemptive relief herein for any prohibited transactions that may arise as a result of proxy voting on the part of the General Partner. The Department also notes that the general standards of fiduciary conduct promulgated under the Act would apply to such voting practices.

<sup>15</sup> Some examples of the types of accounts that will be maintained by the Partnership for each Limited Partner are (a) the Capital Account, which reflects the original capital paid into the Partnership by the Limited Partner and any adjustments thereto; (b) the Income Account, to which will be credited income, interest, dividends, fees for services (i.e., consulting services provided by the Partnership to financial institutions) and any other income items (other than gains or losses on the sale or other disposition of securities or other assets and other than income from high yield investments) and to which will be debited any expenses of the Partnership other than those which are to be taken into account to determine gains and losses; and (c) the Gain Account, to which will be credited or debited gains or losses after expenses of sale, when and as realized from the sale or other disposition by the Partnership of securities or other assets, whether or not any such gain or loss is

9. Under the Partnership Agreement, two types of fees will be payable to the General Partner by the Partnership. These fees are a management fee (the Management Fee) and the Performance Fee, the components of which are described below.

The General Partner's Management Fee is payable as a percentage of the aggregate capital contributions to the Partnership. The fee will be equal to 5 percent of the first \$20 million in capital contributions, 1.79 percent of the next \$280 million of capital contributions and 2 percent on amounts in excess of \$300 million. On average, the fee will not exceed 2 percent of committed capital when all capital is contributed, even if the Partnership is capitalized at less than \$300 million.<sup>16</sup>

Although Limited Partners will receive distributions from the Partnership throughout its duration, if, as a result of distributions to the Limited Partners, paid-in capital contributions are reduced to 50 percent or less of the original aggregate capital contributions to the Partnership after December 31, 2008, the Management Fee will be reduced to 70 percent of the amount otherwise payable, effective for fiscal years subsequent to the year in which said reduction was achieved. Upon the return to the Limited Partners of capital contributions so as to reduce their capital contributions to 25 percent or less of the total capital contributions paid-in, the Management Fee will be reduced to 50 percent of the amount otherwise payable, effective for fiscal years subsequent to the year in which said reduction was achieved.

10. In addition to the Management Fee, the General Partner<sup>17</sup> will be entitled to receive the Performance Fee, which will accrue annually in a debit account (i.e., the Performance Fee Account) between the date the first contribution is made to the Partnership until the time the Partnership disposes of its last investment. As noted above,

recognized or constitutes long-term or short-term capital gain or loss or ordinary income or loss for Federal income tax purposes.

<sup>16</sup> It is represented that the Management Fee is covered by the statutory exemptive relief available under section 408(b)(2) of the Act. However, the Department expresses no opinion herein on whether the General Partner's receipt of the Management Fee will satisfy the terms and conditions of section 408(b)(2) of the Act.

<sup>17</sup> As briefly alluded to in Representation 1, certain employees of TBFC, generally those who take an active part in the management of the Partnership, are limited partners in MidBanc VI, the General Partner of the Partnership. MidBanc VI will be entitled to receive the Performance Fee to the extent that it is earned. MidBanc VI will then allocate the Performance Fee among TBFC and the employees of TBFC who are limited partners in MidBanc VI.

the Performance Fee Account will provide a mechanism for measuring the General Partner's compensation for managing the Partnership. Such account will be a "moving" balance that will reflect the activity of the Partnership instead of actual dollars that are reserved or set aside for the General Partner. Until distributions from the Performance Fee Account are made, funds that the debit account credits represent will be invested for the benefit of the Limited Partners.

The Performance Fee will be paid during the final three years of the Partnership. Simply stated, the Performance Fee will equal 20 percent of the excess of net realized gains minus net unrealized losses of the Partnership, minus allowed distributions determined annually between the date of the first contribution to the Partnership until the disposition of the last Partnership asset.

In addition, the General Partner's Performance Fee will subject to the following terms and conditions:

(a) *Fee Base.* As noted above, the amount credited to the General Partner as the Performance Fee will be equal to a percentage of net realized gains minus net unrealized losses. The fee will be annually credited to the General Partner.<sup>18</sup>

(b) *Reduced Availability.* Prior to the termination of the Partnership, only 75 percent of the General Partner's Performance Fee may be drawn from the Partnership. (This limit will also apply

to special income tax draws as described in Representation 12.)

(c) *Limited Deferral/Return of Capital.* Again, with the exception of the General Partner's income tax liabilities that are described in Representation 12, distributions of the Performance Fee cannot be made until January 1, 2009, which is after the completion of the Partnership's Acquisition Phase. Withdrawals with respect to the Performance Fee cannot be paid until investors have received distributions equal to 100 percent of their capital contributions.<sup>19</sup>

(d) *Debits.* The General Partner's Performance Fee Account is debited for the appropriate percentage of realized losses and net unrealized losses and distributions pursuant to the formula. The Performance Fee cannot be drawn when the Performance Fee Account is in a deficit position. Thus, if a gain is realized when the Performance Fee Account is in a deficit position, no Performance Fee can be paid to the General Partner and accrue in the Performance Fee Account. Sufficient gains must be realized to restore the deficit, restore the 25 percent cushion and generate surplus before any part of the Performance Fee can eventually be drawn down.

(e) *Unrealized Gains.* Although net unrealized losses are subtracted from net realized gains before the Performance Fee is calculated, net unrealized gains are excluded from the calculation of the General Partner's

Performance Fee. In essence, the exclusion of net unrealized gains serves as an additional reserve ensuring that the General Partner will not be permitted withdrawals based on early gains that are subject to offset by later losses. The exclusion of net unrealized gains and the inclusion of net unrealized losses in the Performance Fee calculation operate to create a moving threshold or hurdle. If the General Partner draws on its Performance Fee Account and the Partnership experiences a later loss, the General Partner cannot take another fee until that loss is made up.

(f) *Distribution Repayment.* The General Partner must repay any deficit in the Performance Fee Account such that if the Partnership were to terminate at any time, the General Partner would not have received a Performance Fee in excess of that which reflects the Partnership's performance to that date.

11. The following examples illustrate the calculation of the General Partner's Performance Fee. Although the Performance Fee may be drawn annually for the specific purpose of satisfying the General Partner's tax liabilities under certain limited circumstances (see Section II(o) and Representation 12), generally the Performance Fee can only be drawn during 2009 and 2011, the final three years of the Partnership's anticipated term. However, for purposes of illustration, four draw years have been assumed in the examples.

#### EXAMPLE #1

Year	Cumulative net position	Performance fee account	Maximum draw	Draw or Refund
1 .....	\$800	\$160	\$120	\$120
2 .....	200	40	30	(90)
3 .....	1,000	200	150	120
4 .....	700	140	105	(45)

Year 1 Assume that when the Performance Fee first becomes drawable in 2009 the Partnership's Cumulative Net Position is \$800. The General Partner's Performance Fee is 20% of \$200 or \$160. The General Partner may draw 75% of the \$160 or \$120.<sup>20</sup>

Year 2 The Partnership's Cumulative Net Position at the end of Year 2 is \$200. The

General Partner's Performance Fee is 20% of \$200 or \$40. The General Partner is entitled to draw \$30, but since it has previously drawn \$120, it must refund \$90.

Year 3 The Partnership now has a Cumulative Net Position of \$1,000. The General Partner's Performance Fee is \$200 with a permitted draw of \$150. Because the

General Partner has previously drawn a net amount of \$30 at the end of Year 2 (i.e., \$120 - \$90), it may now draw an additional \$120.

Year 4 The Partnership's Cumulative Net Position falls to \$700 and the General Partner's Performance Fee falls to \$140. The 75% draw equals \$105, but the General Partner has previously drawn a total of \$150

that gives rise to a gain attributed to the Partnership during the Acquisition Phase will be reinvested by the General Partner. Conversely, the contributed capital that gives rise to a gain attributed to the Partnership after the Acquisition Phase has been completed, will be distributed to a Limited Partner if the gain is realized after the Acquisition Phase expires.

<sup>18</sup> Any payments of the Performance Fee will reflect realized gains inuring to the Partnership. For the Partnership to make a Performance Fee payment to the General Partner, it must sell a Partnership investment for a price exceeding the purchase price for such investment. Therefore, the proceeds of the sale will reflect the source of Performance Fee payments.

After the Partnership has invested its capital, it will have two sources of cash. One is income received from its investments, such as dividends or

interest. The other is money received when it sells an investment.

<sup>19</sup> Where a partnership, such as the Partnership described herein, makes a distribution to the Limited Partners, that distribution can include any of the following: Income, realized gains, and/or return of capital. Income and gains can arise at any time during the partnership's life. Although income and gains occur after the initial investment phase of a partnership, in the case of the Funds, such distributions have occurred during the Acquisition Phase. However generally, the contributed capital

example, that all Limited Partners investing in the Partnership have received a 100 percent return of their capital contributions.

(i.e., \$120 – \$90 + \$120). Therefore, the

General Partner must make a refund to the Partnership of \$45.

#### EXAMPLE #2

Year	Cumulative net position	Performance fee account	Maximum draw	Draw or Refund
1 .....	\$2,000	\$400	\$300	\$300
2 .....	1,000	200	150	(150)
3 .....	500	100	75	(75)
4 .....	900	180	135	60

Year 1 Assume that when the General Partner's Performance Fee first becomes drawable in 2009, the Cumulative Net Position for the Partnership is \$2,000. The General Partner's Performance Fee is 20% of \$2,000 or \$400. The General Partner may draw 75% of the \$400 fee or \$300. \$100 or 25% of the draw amount must be left in the Partnership as a cushion.<sup>21</sup>

Year 2 The Cumulative Net Position for the Partnership at the end of Year 2 has fallen to \$1,000. The General Partner's Performance Fee is 20% of \$1,000 or \$200. The General Partner is entitled to draw \$150, but since it has previously drawn \$300, it must refund \$150.

Year 3 The Cumulative Net Position for the General Partner has fallen to \$500. The General Partner's Performance Fee now falls to \$100 (i.e., 20% of \$500) with a permitted draw of \$75 and a cushion of \$25. Because the General Partner has previously drawn \$150 (\$300 – \$150), it must make a refund to the Partnership of \$75.

Year 4 The Cumulative Net Position for the Partnership is \$900 at the end of Year 4. The General Partner's Performance Fee is 20% of \$900 or \$180. The General Partner's 75% draw on the Performance Fee equals \$135. However, since the General Partner has previously drawn a total of \$75 (\$300 – \$150 – \$75), it may now draw a Performance Fee of \$60.

12. The General Partner has been informed by its counsel that gains realized by the Partnership will, to the extent that they are allocable to the General Partner's Performance Fee Account, be taxable to the General Partner in the year gains are realized by the Partnership, even though the distribution of gains attributable to the General Partner will be deferred. Therefore, to enable the individual owners of the General Partner or its affiliates (collectively, referred to as the General Partner) to discharge their obligations to state or federal taxing authorities, it is proposed that an amount sufficient to pay taxes (representing approximately 5 percent of the gains of the Partnership) be distributed to the General Partner solely during the Partnership's Acquisition

<sup>21</sup> The assumption is again, for purposes of this example, that all Plans investing in the Partnership have received a 100 percent return of their capital contributions.

Phase. The sale of the Portfolio Company securities that gives rise to the early distribution of such gains may only occur in connection with a third party merger, acquisition or tender offer and not through an exercise of discretion by the General Partner.

Such distributions will be charged against the General Partner's Performance Fee Account and will reduce the balance that is used to calculate the 25 percent cushion required before actual distributions can be made to the General Partner.<sup>22</sup> In the event the General Partner receives a tax refund, the amount will be repaid by the General Partner to the Partnership to the extent a distribution has been made to such General Partner.

To ensure that tax refunds are repaid, the General Partner will retain an independent accounting firm to calculate the tax liabilities and credits. If a tax payment is owed by the General Partner, it will appear as an asset (i.e., a receivable) on the Partnership's financial reports that are given to the Limited Partners.

In addition, the tax distributions will be in the exact amount of the General Partner's tax liability. All funds received

in the distribution will be forwarded to the Service and no portion will be retained by either the General Partner or the Limited Partners. Therefore, there will be no gain by the General Partner.

Finally, TBFC notes that all of the Limited Partners were made aware of the tax distribution feature of the Partnership. TBFC states that this disclosure was made before the Limited Partners determined to commit capital to the Partnership.

13. The Partnership will terminate upon the earliest to occur of (a) the complete distribution of its assets, (b) a vote in favor of termination by 75 percent of the Limited Partners,<sup>23</sup> or (c) December 31, 2011. If it would be to the financial benefit of the Limited Partners to extend the term of the Partnership beyond 2011, extensions of up to two years may be initiated by the General Partner. Any further extension must be approved by the Limited Partners holding a majority of the Limited Partnership interests. Neither the General Partner nor the Partnership may acquire additional Partnership investments at the time of an extension. The purpose of the extension will be to allow the General Partner to liquidate the Partnership's existing investments, distribute the cash proceeds received from the liquidation to the Limited Partners, and terminate the Partnership.

Upon termination of the Partnership, all Portfolio positions will be liquidated, Partnership expenses will be paid and distributions will be made (including any remaining portion of the General Partner's Performance Fee). If all assets cannot be converted into cash or if it would be disadvantageous to liquidate every asset, remaining assets may be distributed in-kind, at the discretion of the General Partner. The General Partner will then receive a fractional portion of its fee, in-kind. To ensure that the General Partner will not select higher income-generating Partnership assets for itself, each Limited Partner, as well as the General Partner, will receive a

<sup>22</sup> With the exception of the General Partner, all Limited Partners will receive distributions of gains when they are realized. (As noted previously, this could occur prior to the ending of the Acquisition Phase for the Partnership.) For example, if at any time during the Partnership's existence, a Portfolio Company security is purchased for \$1 million and sold by the General Partner for \$3 million, a \$2 million gain will be realized by the Partnership. The Limited Partners will own \$1.6 million of the gain while the General Partner will own \$400,000 of the gain (i.e., 20 percent of the Performance Fee). Both Plan and non-Plan Limited Partners will receive an aggregate distribution of \$1.6 million which will be allocated among such Limited Partners. Depending on whether the Limited Partner receiving a portion of the \$1.6 million gain is a taxable or non-taxable entity, the amount allocated to the Limited Partner will be taxed. Although the \$400,000 gain attributable to the General Partner will be deferred, the Service will view the General Partner as having received taxable income of \$400,000. If the tax rate is 25 percent, the General Partner will owe the Service \$100,000. It is the \$100,000 that the General Partner seeks to obtain as a tax distribution. The General Partner's remaining Performance Fee amount of \$300,000 will stay in the Partnership even though the Limited Partners will receive their proportionate share of the \$1.6 million.

<sup>23</sup> A vote of 75 percent of the Limited Partners to remove the General partner will also result in the termination of the Partnership.

proportionate share of each Portfolio Company security that is distributed in-kind.

14. The following example illustrates the manner in which in-kind distributions will be made by the General Partner:

Assume that there are only two Limited Partners investing in the Partnership and that each has received a full return of capital. Non-Plan A investor has a Partnership interest worth \$60 and Plan B has a Partnership interest worth \$40.

The Partnership holds 100 shares of Bank X stock which it acquired for \$5 per share. Upon termination of the Partnership, Bank X stock is worth \$7 per share.

The total unrealized gain attributable to Bank X stock is  $(\$7 - \$5) \times 100 = \$200$ .

The General Partner's Performance Fee is equal to  $\$200 \times 20\% = \$40$ .

The General Partner receives  $\$40 / \$7 = 5.7$  shares of Bank X stock.

The non-Plan investor receives  $60\% \times 94.3 = 56.6$  shares of Bank X stock.

The Plan investor receives  $40\% \times 94.3 = 37.7$  shares of Bank X stock.

15. In general, Partnership interests will not be assignable, and no Limited Partner may assign or otherwise transfer, pledge or otherwise encumber any or all of its interest in the Partnership without the prior consent of the General Partner. However, a Limited Partner may transfer its interest only after extending to the Partnership and the other Limited Partners the right of "first offer."

In addition, because the Partnership's investment philosophy is inconsistent with at-will withdrawals, redemptions of Partnership interests by Plan investors are limited to situations where (a) a replacement Plan is available from either current Plans investing in the Partnership or there are new, qualified investors; (b) a Plan submits to the General Partner, a written opinion of counsel to the effect that the Plan's continued participation in the Partnership would violate the Act and that relief from the violation cannot be obtained; and (c) the Partnership fails to obtain the exemptive relief proposed herein necessary for its operation. This information will be disclosed to investors.

16. The Partnership Agreement requires that the General Partner provide the Independent Fiduciary of each Plan proposing to invest in the Partnership with a copy of the Private Placement Memorandum by the General Partner. The Private Placement Memorandum describes all material facts concerning the purpose, structure and operation of the Partnership.

If the Independent Fiduciary expresses further interest in participating in the Partnership, such

Independent Fiduciary will be provided with copies of the Partnership Agreement outlining the organizational principles, investment objectives and administration of the Partnership, the manner in which Partnership interests can be redeemed, the duties of the parties retained to administer the Partnership and the manner in which Partnership assets will be valued, the duties and responsibilities of the General Partner, the rate of remuneration that the General Partner will be paid and the conditions under which the General Partner may be removed. Once the Independent Fiduciary has made a decision to invest in the Partnership, the General Partner will provide such Independent Fiduciary with the names and addresses of all other participating Plans as well as non-Plan investors.

17. The Independent Fiduciary will be required to acknowledge, in writing, prior to purchasing a Limited Partner's interest in the Partnership that such fiduciary has received copies of the foregoing documents. The Independent Fiduciary will also be required to acknowledge, in writing, to the General Partner that such fiduciary is independent of the General Partner and its affiliates, capable of making an independent decision regarding the investment of Plan assets, knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the Partnership.

With respect to its ongoing participation in the Partnership, each Plan will receive the following written disclosures from the General Partner:

(a) Within 90 days after the end of each fiscal year of the Partnership as well as at the time of termination, an annual financial report containing a balance sheet for the Partnership as of the end of such fiscal year and a statement of the changes in the financial position for the fiscal year, as audited and reported upon by independent, certified public accountants. The annual report will also disclose the remuneration actually paid or accrued to the General Partner.

(b) Within 60 days after the end of each quarter (except in the last quarter) of each fiscal year of the Partnership, an unaudited quarterly financial report consisting of at least a balance sheet for the Partnership as of the end of such quarter and a profit and loss statement for such quarter. The quarterly report will also specify the remuneration that is actually paid or accrued to the General Partner.

In addition to the foregoing reports, the General Partner will prepare and distribute to each Plan such other information as may be reasonably

requested by the Plans to comply with the reporting requirements of the Act or Code (including copies of the proposed exemption and grant notice with respect to the exemptive relief granted herein).

At least annually, the General Partner will hold a meeting of the Partnership, at which time, the Independent Fiduciaries of participating Plans will have the opportunity to decide on whether the Partnership or the General Partner should be terminated as well as discuss any aspect of the Partnership and Partnership Agreement under which it is operated. Finally, during each year of the Partnership, representatives of the General Partner will be available to confer by telephone or in person with Independent Fiduciaries on matters concerning the Partnership.

18. The terms of all transactions that are entered into on behalf of the Partnership by the General Partner will be at least as favorable to an investing Plan as those obtainable in arm's length transactions with unrelated parties. In this regard, valuations of (and for) the Partnership will be needed for general accounting purposes, to determine the value of the Partnership's assets for reports to the Limited Partners, for distributions of securities and to calculate the General Partner's Performance Fee when the General Partner seeks to draw upon it. The General Partner, subject to the review and approval of the Valuation Committee, will determine the fair market value of the assets and liabilities of the Partnership as of each fiscal date.<sup>24</sup> The Valuation Committee, which is the same advisory committee that served MBF I, MBF II and BF III, and currently serves BF IV and BF V, will also serve as the Independent Appraiser. The Valuation Committee is composed of three members who are experienced in valuing the securities of Portfolio Companies. None of the members of the Valuation Committee has an ownership

<sup>24</sup> It is represented that the General Partner will gather all requisite information to produce the valuation. This information may include pricing information on any exchange-traded securities plus more voluminous operating and financial data on the companies for whose securities there is a thinner market. The General Partner will then compile this information into a report which is submitted to the Valuation Committee. After reviewing the submitted information, the Committee will meet with the staff of the General partner to discuss the valuation materials. At the end of this meeting, the Valuation Committee will set the valuation for all Portfolio holdings. Thus, from both a legal and operative standpoints, the partnership Agreement will control the valuation process and the Valuation Committee will value the Fund.

or creditor relationship with the General Partner.

As the Independent Appraiser, each member of the Valuation Committee must not be controlled by (or control) TBFC or the Partnership and must not receive more than 5 percent of their lowest annual income from the General Partner or the Partnership, either during the term of the Partnership or in the three years preceding its creation. Individual members of the Valuation Committee or the entire committee may be removed by the General Partner only for cause and with or without cause by Limited Partners holding a majority of the Limited Partnership interests. A majority of the Limited Partners must approve a replacement Independent Appraiser. If the Limited Partners and the General Partner cannot agree upon a replacement Independent Appraiser, the firm of KPMG Peat Marwick LLP will be appointed.

Although the General Partner will nominate the Independent Appraiser, the Limited Partners will be given the option of either approving or disapproving the nominee. The Independent Appraiser will not be appointed absent the affirmative written approval of a majority of the Limited Partners. However, the Limited Partners will have no veto power over the General Partner's decision that an Independent Appraiser is required.

If applicable, the Independent Appraiser will use the principles set forth in Revenue Ruling 59-60 and any regulations that the Department might propose to define "Adequate Consideration" to determine fair market value. The valuations made by the Independent Appraiser will be binding upon the General Partner. In addition, the Independent Appraiser will issue a report to the General Partner which sets forth the Independent Appraiser's pricing methodology and rationale for securities it has been asked to value. Such report will be issued after each required valuation and will comply with the aforementioned regulations.

With respect to securities for which a market exists, the Independent Appraiser will determine their value according to the following principles:

(a) *National Securities Exchange.* Any security which is listed on a national securities exchange generally will be valued based on its last sales price on the national securities exchange on which the security is principally traded on the valuation date.<sup>25</sup> If no sale of a

listed security occurred on the valuation date, the value will be based on the last bid price.

(b) *No Listing.* Any security which is not listed on a national securities exchange will be valued upon the last publicly available bid price.<sup>26</sup>

(c) *Discount for Illiquidity.* Anything herein to the contrary notwithstanding, the Independent Appraiser in its discretion may apply a discount for illiquidity, on the valuation of securities that have a thin public market.

In the event that there is no independent market for a security or the security is not listed on a national securities exchange, the Independent Appraiser will be required to value such securities. Under such circumstances, the securities will be valued at the time of acquisition at their cost. The Independent Appraiser will continue valuing the securities at their cost until a determination is made that a different valuation level is indicated by the occurrence of (a) a significant change in book value, (b) a significant change in a Portfolio Company's business, (c) a significant third-party transaction, or (d) any other significant change in the Financial Company, its industry or the general market.

19. With respect to transactions that may arise during the existence of the Partnership and which involve parties in interest with respect to participating Plans, the General Partner requests exemptive relief from the provisions of section 406(a) of the Act. Specifically, TBFC requests exemptive relief where the Partnership sells securities in the Partnership Portfolio for cash or other securities to a party in interest with respect to a participating Plan in the context of an acquisition or merger by the party in interest, provided the party in interest is not an affiliate of the General Partner. TBFC represents that the Partnership will receive the same offer that other shareholders of Portfolio Companies will receive. Because the Partnership will always be a minority shareholder in such situation, TBFC states that the Partnership will be in the position of a beneficiary of the

exchange on which the largest volume of that security has traded.

<sup>26</sup> TBFC explains that the most recent trade price is not used to value a security in this instance because it may be too dated to provide an accurate estimate of value. Instead, TBFC considers the bid price to be indicative of the current value at which someone would be willing to acquire a security on the valuation date. TBFC further notes that the use of the bid price rather than the previous trading or closing price in valuing a security provides a conservative valuation approach which will result, in most instances, in a lower Performance Fee paid to the General Partner. The Department assumes that the bid price described herein represents active bids and is a true indicator of market prices.

acquisition offer, and it will not be in the position of an active player in the merger or acquisition transactions.

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 participation by an Plan in the Partnership will be approved by an Independent Fiduciary.

(b) Each Plan investing in the Partnership will have assets that are in excess of \$50 million.

(c) No Plan will invest more than 10 percent of its assets in the Partnership and a Plan's respective interest in this entity will not represent more than 25 percent of the assets of such Partnership.

(d) No Plan will invest more than 25 percent of its assets in investment funds and separate accounts managed or sponsored by TBFC and/or its affiliates.

(e) Prior to making an investment in the Partnership, each Independent Fiduciary contemplating investing therein will receive offering materials which disclose all material facts concerning the purpose, structure and operation of the Partnership and the fees paid to the General Partner.

(f) Each Plan investing in the Partnership will be required to acknowledge, in writing, prior to purchasing interests that such fiduciary has received copies of such documents and to acknowledge, in writing, to the General Partner that such fiduciary is (1) independent of the General Partner and its affiliates, (2) capable of making an independent decision regarding the investment of Plan assets; and (3) knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the Partnership.

(g) The General Partner will make quarterly and annual written disclosures to participating Plans with respect to the financial condition of the Partnership and the total fees that it will receive for services rendered to such Partnership.

(h) The General Partner will hold annual meetings and conduct periodic discussions with Independent Fiduciaries to address matters pertaining to the Partnership.

(i) The terms of all transactions that are entered into on behalf of the Partnership by the General Partner shall remain at least as favorable to an investing Plan as those obtainable in arm's length transactions with unrelated parties. In this regard, the valuation of assets of the Partnership will be based upon independent market quotations or determinations made by an Independent Appraiser.

<sup>25</sup> TBFC explains that the phrase "principally traded" means that if a security is traded on more than one exchange and if the trade prices differ between exchanges, the value will be taken from the

(j) As to each Plan, the total fees paid to the General Partner and its affiliates will constitute no more than reasonable compensation.

(k) Any increase in the General Partner's Performance Fee will be based upon a predetermined percentage of net realized gains minus net unrealized losses. In this regard,

(1) Except as described below in paragraph (1) of this Representation 20, no part of the General Partner's Performance Fee may be withdrawn before December 31, 2009, which represents the completion of the Acquisition Phase of the Partnership and not until the Limited Partners have received distributions equal to 100 percent of their capital contributions to the Partnership.

(2) Prior to the termination of the Partnership, no more than 75 percent of the Performance Fee credited to the General Partner may be withdrawn from the Partnership.

(3) The Performance Fee Account established for the General Partner will be credited with net realized gains and charged for net unrealized losses and Performance Fee distributions.

(4) The General Partner will repay all deficits in its Performance Fee Account and it will maintain a 25 percent cushion in such account before receiving any further distribution.

(l) The General Partner will be entitled to take distributions with respect to its Performance Fee in the amount of any income tax liability it or its affiliates become subject to with respect to net capital gains of the Partnership:

(i) only during the Partnership's Acquisition Phase; and

(ii) provided such gains are based on the sale of Portfolio Company securities that is initiated by a third party in connection with a merger, tender offer or acquisition.

(m) The General Partner will be obligated to repay to the Partnership any tax refund received to the extent a distribution has been made to such General Partner.

#### Notice to Interested Persons

Notice of the proposed exemption will be given to Plans intending to invest in the Partnership within 3 days of the date of publication of the notice of pendency in the **Federal Register**. Such 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 and/or to request a hearing.

Comments and hearing requests with respect to the proposed exemption are due 33 days after the date of publication of the proposed exemption in the **Federal Register**.

*For Further Information Contact:* Ms. Jan D. Broady of the Department, telephone (202) 693-8556. (This is not a toll-free number.)

#### Unifi, Inc. Retirement Savings Plan (the Plan) Located in Greensboro, North Carolina

[Application No. D-11094]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale of a certain parcel of improved real property (the Property) by the Plan to Unifi, Inc., the Plan's sponsor and, as such, a party in interest with respect to the Plan; provided that the following conditions are satisfied:

(a) The proposed sale is a one-time cash transaction;

(b) The Plan receives the greater of: (i) \$7,500,000; or (ii) fair market value for the Property, as established by an independent qualified appraiser at the time of the sale;

(c) The Plan pays no commissions or other expenses associated with the sale; and

(d) the applicant files Form 5330 with the Internal Revenue Service (IRS) and pays all of the appropriate excise taxes within 60 days of the date that the grant for this proposed exemption is published in the **Federal Register**.

#### Summary of Facts and Representations

1. The Plan is a successor in interest to the Unifi, Inc. Profit Sharing Plan and Trust, which was merged therein effective December 25, 2001. The Plan is a defined contribution profit sharing plan with a safe harbor cash or deferred arrangement. As of December 31, 2001, the Plan had 4,754 participants, and \$169,680,792 in total assets. The Plan's real estate trustee is Merrill Lynch Trust Company of North Carolina (MLTC of N.C.), a North Carolina corporation, having its principal office at 1600 Merrill Lynch Drive, MSC-0601, Pennington, New Jersey. MLTC of N.C.

is the current title holder of the Property.

Unifi, Inc. (Unifi) is the sponsor of the Plan. Unifi is a New York corporation which is in the business of texturizing and producing fabrics.

2. In 1987, Unifi contributed the Property to the Plan, and subsequently leased (the Lease) such Property back from the Plan. These transactions were the subject of an individual prohibited transaction exemption (PTE) granted by the Department (see PTE 87-28, 52 FR 8380, March 17, 1987). The Lease expired, by its terms, on March 12, 2002. The applicant maintains that all terms and conditions of PTE 87-28 have been met. The applicant, however, makes no representations as to whether Wachovia Bank and Trust Company, N.A. (Wachovia) fulfilled all of its obligations as the independent fiduciary (the I/F) under PTE 87-28.<sup>27</sup> The applicant states that at all times during the Lease, the Plan received rent payments consistent with the fair market value of the property, as required by the Lease. However, in a prior application submitted to the Department on March 13, 2002, which requested relief for a continuation of the Lease by Unifi,<sup>28</sup> the applicant stated that Wachovia, the I/F for the Lease under PTE 87-28, unilaterally elected to cease functioning as an independent fiduciary for the Plan effective on or before March 13, 2002. Therefore, as of that date, Unifi states that it was engaging in a prohibited transaction by continuing the Lease pursuant to a holdover provision contained therein. Unifi represents that it was unsuccessful in locating a successor I/F for the Lease or a new lease of the Property to Unifi. In this regard, Unifi states that it will file Form 5330 with the IRS and pay all of the appropriate excise taxes for the period that the Property remains leased after March 12, 2002 to Unifi until the date of the proposed sale of the Property to Unifi. Such excise taxes will be paid within sixty (60) days of the date that the final exemption for this proposed sale is published in the **Federal Register**.

The applicant represents that the Plan has paid no expenses or holding costs during the period of time it has owned the Property. Unifi has paid all real estate taxes, the cost of improvements, repairs or insurance during the time the Property has been owned by the Plan, as

<sup>27</sup> In this regard, the Department is providing no opinion, or comments, at this time with respect to Wachovia's successful completion of its duties and obligations as the I/F for the Lease.

<sup>28</sup> This application was subsequently withdrawn by Unifi (see Exemption Application No. D-11080).

was required by the Lease under PTE 87-28.

4. The Property is located at 7201 West Friendly Street in Greensboro, North Carolina. The Property consists of 8.52 acres of land with improvements. These improvements are a one and two-story, single-user professional office building, containing approximately 98,717 square feet of gross building area. The Property was appraised on March 7, 2002 (the Appraisal) by Mark A. Morgan and Fred H. Beck, Jr., MAI, CCIM, both qualified independent real estate appraisers (collectively, the Appraisers). The Appraisers are with Fred H. Beck and Associates, LLC, Real Estate Appraisers and Consultants, which is located on 6525 Morrison Boulevard, Charlotte, North Carolina.

In determining the fee simple estate<sup>29</sup> value of the Property, the Appraisers considered the Cost Approach, the Income Approach, and the Sales Comparison Approach. Based on their analysis, the Property had a fair market value of approximately \$7.5 million, as of March 7, 2002. In addition, the Appraisal states that the current fair market rental rate for the entire Property, as would be leased to one tenant on an absolute net basis, was \$72,058 per month, as of March 7, 2002. Unifi represents that it is currently paying this amount to the Plan each month as rent for the Property.

The applicant states that the Appraisal will be updated at the time of the proposed transaction, in order to ensure that the Plan receives no less than the current fair market value of the Property (i.e., the fee simple estate) on the date of the sale. In any event, the applicant represents that the purchase price of the Property to be paid by Unifi will be the greater of: (i) \$7,500,000, the fair market value as currently appraised; or (ii) the fair market value of the Property as determined by the updated Appraisal.

5. The applicant proposes that Unifi purchase the Property from the Plan in a one-time cash transaction. The applicant represents that the proposed transaction would be in the best interest and protective of the Plan because, among other things, the Plan will pay no expenses or commissions associated with the sale. Unifi will pay the Plan an amount equal to the current fair market value of the Property, as established by an independent, qualified appraiser. In this regard, the applicant maintains that

<sup>29</sup>The Appraisal defines the term "fee simple estate" as " \* \* \* absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the government powers of taxation, eminent domain, police power and escheat."

the Property is not adjacent to any other real estate owned by Unifi or the Plan. The sale of the Property by the Plan to Unifi will help to avoid the time and expense of locating an unrelated third party buyer<sup>30</sup> or lessee for the Property. In addition, the applicant wants to avoid the time and expense of obtaining the Department's approval for a new lease of the Property to Unifi, pursuant to a new PTE with a new I/F.

6. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) the proposed sale will be a one-time cash transaction;  
(b) the Plan will receive the greater of: (i) \$7,500,000; or (ii) the fair market value for the Property, as established by an independent qualified appraiser at the time of the sale;

(c) the Plan will pay no commissions or other expenses associated with the sale;  
(d) the sale will enable the Plan to sell the Property, which is currently subject to a lease that became a prohibited transaction under the Act as of March, 2002; and

(e) the applicant will file Form 5330 with the IRS and pay appropriate excise taxes within 60 days of the date of a grant of this proposed exemption.

*For Further Information Contact:* Ekaterina A. Uzlyan of the Department at (202) 693-8540. (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;

<sup>30</sup>The applicant represents that the Plan has been unsuccessful in locating an independent third party buyer for the Property.

(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 3rd day of June, 2002.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

**[Prohibited Transaction Exemption 2002-28; (Exemption Application No. D-10869), et al.]**

### Grant of Individual Exemptions; Massachusetts Mutual Insurance Company (MassMutual)

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

**ACTION:** Grant of individual exemption.

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

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for