

(1) *Type of information collection:* Reinstatement with change of a previously approved collection for which approval has expired.

(2) *The title of the form/collection:* Subgrant Award Report (STOP Violence Against women Formula Grant Program) and Subgrant Award Report Instructions.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number: none. Office on Violence Against Women, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: the affected public includes the 56 STOP state and administrators (from 50 states, the District of Columbia and five territories and commonwealths (Guan, Puerto Rico, American Samoa, Virgin Islands, Northern Marina Islands)) and their subgrantees. The STOP Violence Against Women Formula Grant was authorized through the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000). Its purpose is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system's response to violence against women. The STOP Formula Grant Program envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. The Department of Justice's Office on Violence Against Women administers the STOP Formula Grant Program funds which must be distributed by STOP state administrators according to a statutory formula (as amended by VAWA 2000).

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that it will take the 56 respondents (STOP administrators) approximately one hour to complete an annual progress report. It is estimated that it will take approximately one hour for roughly 2500 subgrantees to complete the relevant portion of the annual progress report. The Annual Progress Report for the STOP Formula Grant Program is divided into sections that pertain to the different types of activities that grantees may engage in and the different types of grantees that receive funds, *i.e.* law enforcement agencies, prosecutors' offices, courts, victim services agencies, etc.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total annual public burden associated with this application is 2,556 hours.

If additional information is required contact: Brenda E. Dyer, Department Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: October 3, 2003.

**Brenda E. Dyer,**

*Department Deputy Clearance Officer,  
Department of Justice.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Prohibited Transaction Exemption 2003-30; [Exemption Application No. D-11101] et al.; Grant of Individual Exemptions; Fifth Third Bank

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of Individual Exemptions.

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

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 exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, 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 proposed to the Secretary of Labor.

### Statutory Findings

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

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

### Fifth Third Bank, Located in Grand Rapids, Michigan

[Prohibited Transaction Exemption 2003-30; Exemption Application No. D-11101]

#### Exemption

Section I—Exemption for Receipt of Fees

Effective on or after April 2, 2001, 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 (F) of the Code, shall not apply, to: the receipt of fees by Fifth Third Bank, a Michigan banking corporation, and its affiliates (Fifth Third), from the Kent Funds prior to October 26, 2001 or from the Fifth Third Funds on or after October 26, 2001 (the Funds), open-end investment companies registered under the Investment Company Act of 1940 (the 1940 Act), for acting as an investment adviser for the Funds, as well as for acting as administrator, custodian, accountant, transfer agent, and provider of other services to the Funds (including brokerage services in the future) which are not advisory services (collectively referred to as "Secondary Services" as defined in Section III(h) below), in connection with the purchase and sale of shares of the Funds by certain employee benefit plans and individual retirement accounts (the Plans) for which Fifth Third serves as fiduciary with investment discretion; provided that the conditions set forth in Section II are met.

## Section II—Conditions

(a) No sales commissions, redemption fees, or other fees are paid by the Plans in connection with the purchase or sale of shares of the Funds.

(b) The price paid or received by a Plan for shares in the Funds is the net asset value per share, as defined in Section III(e), at the time of the transaction, and is the same price that would have been paid or received for the shares by any other investor at that time.

(c) Fifth Third, including any officer or director of Fifth Third, does not purchase or sell shares of the Funds from or to any Plan.

(d) Each Plan receives a credit, through a cash rebate that will be accrued daily and, if the Plan so elects, will be automatically invested in shares of the money market funds selected by the Plan, of such Plan's proportionate share of all fees charged to the Funds by Fifth Third for investment advisory services, including any investment advisory fee paid to third-party subadvisors, not later than two business days (or, prior to the date this final exemption is published in the **Federal Register**, one business day) after receipt of such fees by Fifth Third. The crediting of all investment advisory fees to the Plans by Fifth Third is audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Plan.

(e) The combined total of all fees received by Fifth Third for the provision of services to a Plan, and in connection with the provision of services to the Funds in which the Plan may invest, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of ERISA.

(f) Fifth Third does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions.

(g) The Plans are not employee benefit plans sponsored or maintained by Fifth Third.

(h) A second fiduciary acting for the Plan, who is independent of and unrelated to Fifth Third (the Second Fiduciary), receives, in advance of any initial investment by the Plan in a Fund, full and detailed written disclosure of information concerning the Fund, including, but not limited to:

(1) A current prospectus for each Fund in which a Plan is considering investing;

(2) A statement describing the fees for investment advisory or similar services and any Secondary Services and all other fees to be charged to or paid by the Plan and by the Fund, including the

nature and extent of any differential between the rates of such fees;

(3) The reasons why Fifth Third may consider such investment to be appropriate for the Plan;

(4) A statement describing whether there are any limitations applicable to Fifth Third with respect to which assets of the Plan may be invested in the Fund, and, if so, the nature of such limitations; and

(5) Upon the request of the Second Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption once such documents are published in the **Federal Register**.

(i) After consideration of the information described in paragraph (h) above, the Second Fiduciary authorizes in writing the investment of assets of the Plan in each particular Fund, the fees to be paid by such Fund to Fifth Third (including fees for investment advisory services), and the cash rebate to the Plan of fees received by Fifth Third from the Fund for investment advisory services.

(j) All authorizations made by a Second Fiduciary regarding investments in a Fund and the fees paid to Fifth Third (including fees for investment advisory services) are subject to an annual reauthorization wherein any such prior authorization referred to in paragraph (i) above shall be terminable at will by the Plan, without penalty to the Plan, upon receipt by Fifth Third of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (i) above (the "Termination Form") with instructions on the use of the form must be provided to the Second Fiduciary at least annually. However, if the Termination Form has been provided to the Second Fiduciary pursuant to paragraph (k) or paragraph (l) below, then the Termination Form need not be provided again for an annual reauthorization pursuant to this paragraph unless at least six months have elapsed since the form was provided in connection with the additional service or fee increase. The instructions for the Termination Form must include the following information:

(1) The authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by Fifth Third's investment services group of written notice from the Second Fiduciary; and

(2) Failure to return the Termination Form will result in continued authorization of Fifth Third to engage in the transactions described above on behalf of the Plan.

(k) The Second Fiduciary of each Plan invested in a particular Fund receives full written disclosure, in a statement separate from the Fund prospectus, of

any proposed increases in the rates of fees charged by Fifth Third to the Fund for Secondary Services at least 30 days prior to the implementation of such increase in fees. The disclosure will be accompanied by a copy of the Termination Form, with instructions as described in paragraph (j) above. The Second Fiduciary will also receive full written disclosure, prior to the effective date, in a Fund prospectus or otherwise, of any increases in the rates of fees charged by Fifth Third to the Fund for investment advisory services even though such fees will be rebated as required by paragraph (d) above.

(l) In the event that Fifth Third provides an additional Secondary Service to a Fund for which a fee is charged or there is an increase in the amount of fees paid by the Fund to Fifth Third for any Secondary Services resulting from a decrease in the number of services performed by Fifth Third for such fees in connection with a previously authorized Secondary Service, Fifth Third will, at least 30 days in advance of the implementation of such additional service or effective fee increase, provide written notice to the Second Fiduciary explaining the nature and the amount of such services or of the effective increase in fees of the affected Fund. Such notice shall be accompanied by the Termination Form.

(m) On an annual basis, Fifth Third provides the Second Fiduciary of a Plan investing in the Fund with:

(1) A copy of the current prospectus for the Fund and, upon such Second Fiduciary's request, a copy of the Statement of Additional Information for such Fund which contains a description of all fees paid by the Fund to Fifth Third (including fees for investment advisory services);

(2) A copy of the annual financial disclosure report of the Fund in which such Plan is invested, which includes information about the Fund portfolios as well as audit findings of an independent auditor, within 60 days of the preparation of the report;

(3) Oral or written responses to inquiries of the Second Fiduciary as they arise; and

(4) With respect to each of the Funds in which a Plan invests, in the event such Fund places brokerage transactions with Fifth Third, a statement specifying:

(i) The total (expressed in dollars) of brokerage commissions of each Fund's investment portfolio that are paid to Fifth Third by such Fund;

(ii) The total (expressed in dollars) of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to Fifth Third;

(iii) The average brokerage commissions per share (expressed as cents per share) paid to Fifth Third by each investment portfolio of a Fund; and

(iv) The average brokerage commissions per share (expressed as cents per share) paid by each investment portfolio of a Fund to brokerage firms unrelated to Fifth Third.

(o) All dealings between the Plans and the Fund are on a basis no less favorable to the Plans than dealings with other shareholders of the Fund.

(p) Fifth Third maintains for a period of six years the records necessary to enable the persons described in paragraph (q) below to determine whether the conditions of this exemption have been met, except that: (i) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Fifth Third, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest other than Fifth Third shall be subject to the civil penalty that may be assessed under section 502(i) of ERISA or to the taxes imposed by section 4975 (a) and (b) of the Code if the records are not maintained or not available for examination as required by paragraph (q) below.

(q)(1) Except as provided in paragraph (p) above and notwithstanding any provisions of section 504 (a)(2) and (b) of ERISA, the records referred to in paragraph (p) above are unconditionally available at their customary location for examination during normal business hours by:

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

(ii) Any fiduciary of a Plan who has authority to acquire or dispose of shares of the Funds owned by the Plans, or any duly authorized employee or representative of such fiduciary; and

(iii) Any participant or beneficiary of a Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (1) (ii) and (iii) above shall be authorized to examine trade secrets of Fifth Third, commercial or financial information which is privileged or confidential, or records that are unrelated to the Plan(s) that the fiduciary serves or under which the participant or beneficiary is entitled to receive benefits.

(r) Within sixty (60) days of [insert the date of publication in the **Federal Register** of the notice granting this exemption], Fifth Third will file Form 5330 with the Internal Revenue Service

and pay the excise taxes applicable under section 4975(a) of the Code in connection with the error in processing rebates of investment advisory fees during the period beginning October 26, 2001 and ending on March 1, 2003.

#### Section III—Definitions

For purposes of this exemption:

(a) “*Fifth Third*” means Fifth Third Bank, a Michigan banking corporation, and any affiliate thereof (as affiliate is defined below in paragraph (b) of this section).

(b) An affiliate of a person includes:

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

(2) Any officer, director, employee, relative, or partner in any such person; and

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

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

(d) “*Fund*” or “*Funds*” means the Kent Funds prior to October 26, 2001, the Fifth Third Funds on and after October 26, 2001, and each separate investment portfolio thereof, or any other diversified open-end investment company registered under the 1940 Act for which Fifth Third serves as investment advisor and may also serve (or may in the future serve) as administrator, custodian, accountant, or transfer agent, or provide some other Secondary Service (as defined in paragraph (h) below) which has been approved by the Funds.

(e) “*Net asset value*” means the amount for purposes of pricing all purchases and sales, calculated by dividing the value of all securities, determined by a method as set forth in a Fund’s prospectus and statement of additional information, and other assets belonging to the Fund or portfolio of the Fund, less the liabilities charged to each such portfolio or Fund, by the number of outstanding shares.

(f) “*Relative*” means a relative as that term is defined in section 3(15) of ERISA (or a “member of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) “*Second Fiduciary*” means a fiduciary of a Plan who is independent of and unrelated to Fifth Third. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Fifth Third if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Fifth Third;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary is an officer, director, partner, or employee of Fifth Third (or is a relative of such persons); or

(3) Such fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this exemption.

If an officer, director, partner, or employee of Fifth Third (or relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Plan’s investment advisor, (ii) the approval of such purchase or sale between the Plan and a Fund, and (iii) the approval of any change in fees charged to or paid by the Plan in connection with any of the transactions described in Section II above, then subparagraph (2) above shall not apply.

(h) “*Secondary Service*” means a service other than an investment management, investment advisory, or similar service that is (or will in the future be) provided by Fifth Third to a Fund, including (but not limited to) brokerage services, custodian services, transfer and dividend disbursing agent services, administrator or sub-administrator services, accounting services, and shareholder servicing agent services.

(i) “*Termination Form*” means the form supplied to the Second Fiduciary that expressly provides an election to the Second Fiduciary to terminate on behalf of a Plan the authorization described in paragraph (i) of Section II above. Such Termination Form may be used at will by the Second Fiduciary to terminate an authorization without penalty to the Plan and to notify Fifth Third in writing to effect a termination by selling the shares of the Fund held by the Plan requesting such termination within one business day following receipt by Fifth Third of the form; provided that if, due to circumstances beyond the control of Fifth Third, the sale cannot be executed within one business day, Fifth Third shall have one additional business day to complete such sale.

**EFFECTIVE DATE:** This exemption is effective generally as of April 2, 2001. Effective on or after October 14, 2003, Fifth Third shall credit a Plan the cash rebate of such Plan’s share of fees charged to the Funds by Fifth Third for investment advisory services not later

than two business days after receipt of such fees by Fifth Third as provided in Section II(d) of the exemption.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 24, 2003 at 68 FR 37539 (the Proposed Exemption).

#### Written Comment

The Department received one written comment and no requests for a public hearing. In a letter dated August 5, 2003, Fifth Third (the Applicant) requested a clarification with regard to the "Summary of Facts and Representations" (the Summary) in the Proposed Exemption. Although the term "Fifth Third" as defined in the proposed exemption itself includes Fifth Third Bank, a Michigan banking corporation, and its affiliates, the Applicant believed that the definition of the same term in item 1 of the Summary did not include the Fifth Third Bank affiliates. The Department notes that the term "Fifth Third" does include Fifth Third Bank, a Michigan banking corporation, and its affiliates in both the proposed exemption and the Summary of the Proposed Exemption.

After giving full consideration to the entire record, including the written comment noted above, the Department has decided to grant the exemption.

For information regarding the comment and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11101) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ms. Wendy McColough of the Department, telephone (202) 693-8561. This is not a toll-free number.

**RBC Dain Rauscher, Inc. (RBC-DR)  
Located in Minneapolis, Minnesota**

[Prohibited Transaction Exemption 2003-31; Exemption Application No. D-11189]

#### Exemption

##### I. Transactions

A. Effective for transactions occurring on or after April 18, 2003, the restrictions of section 406(a) and 407(a)

of the Employee Retirement Income Security Act of 1974, as amended (the Act), and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986, as amended (the Code), by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the following transactions involving Issuers and Securities evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of Securities in the initial issuance of Securities between the Sponsor or Underwriter and an employee benefit plan when the Sponsor, Servicer, Trustee or Insurer of an Issuer, the Underwriter of the Securities representing an interest in the Issuer, or an Obligor is a party in interest with respect to such plan;

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

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

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

B. Effective for transactions occurring on or after April 18, 2003, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

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

(i) The plan is not an Excluded Plan; and  
(ii) Solely in the case of an acquisition of Securities in connection with the initial issuance of the Securities, at least 50 percent of each class of Securities in which plans have invested is acquired

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

by persons independent of the members of the Restricted Group, and at least 50 percent of the aggregate interest in the Issuer is acquired by persons independent of the Restricted Group;

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

(iv) Immediately after the acquisition of the Securities, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in Securities representing an interest in a Issuer containing assets sold or serviced by the same entity.<sup>2</sup> For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in an Issuer if it is merely a Subservicer of that Issuer;

(2) The direct or indirect acquisition or disposition of Securities by a plan in the secondary market for such Securities, provided that conditions set forth in paragraphs B.(1)(i), (iii) and (iv) are met; and

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

C. Effective for transactions occurring on or after April 18, 2003, the restrictions of sections 406(a), 406(b) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975 (c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of an Issuer, including the use of any Eligible Swap transaction; or the defeasance of a mortgage obligation held as an asset of the Issuer through the substitution of a new mortgage obligation in a commercial mortgage-backed Designated Transaction, provided:

(1) Such transactions are carried out in accordance with the terms of a binding Pooling and Servicing Agreement;

(2) The Pooling and Servicing Agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they

<sup>2</sup> For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

purchase Securities issued by the Issuer;<sup>3</sup> and

(3) The defeasance of a mortgage obligation and the substitution of a new mortgage obligation in a commercial mortgage-backed Designated Transaction meet the terms and conditions for such defeasance and substitution as are described in the prospectus or private placement memorandum for such Securities, which terms and conditions have been approved by a Rating Agency and does not result in the Securities receiving a lower credit rating from the Rating Agency than the current rating of the Securities.

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by the Servicer of the Issuer from a person other than the Trustee or Sponsor, unless such fee constitutes a "Qualified Administrative Fee."

D. Effective for transactions occurring on or after April 18, 2003, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of Securities.

## Section II—General Conditions

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

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

(2) The rights and interests evidenced by the Securities are not subordinated to

the rights and interests evidenced by other Securities of the same Issuer, unless the Securities are issued in a Designated Transaction;

(3) The Securities acquired by the plan have received a rating from Rating Agency at the time of such acquisition that is in one of the three (or in the case of Designated Transactions, four) highest generic rating categories.

(4) The Trustee is not an Affiliate of any member of the Restricted Group, other than an Underwriter. For purposes of this requirement:

(a) the Trustee shall not be considered to be an Affiliate of a Servicer solely because the Trustee has succeeded to the rights and responsibilities of the Servicer pursuant to the terms of a Pooling and Servicing Agreement providing for such succession upon the occurrence of one or more events of default by the Servicer; and

(b) subsection II.A.(4) will be deemed satisfied notwithstanding a Servicer becoming an Affiliate of the Trustee as a result of a merger or acquisition involving the Trustee, such Servicer and/or their Affiliates which occurs after the initial issuance of the Securities provided that:

(i) Such Servicer ceases to be an Affiliate of the Trustee no later than six months after the date such Servicer became an Affiliate of the Trustee; and

(ii) Such Servicer did not breach any of its obligations under the Pooling and Servicing Agreement, unless such breach was immaterial and timely cured in accordance with the terms of such agreement, during the period from the closing date of such merger or acquisition transaction through the date the Servicer ceased to be an Affiliate of the Trustee;

(5) The sum of all payments made to and retained by the Underwriters in connection with the distribution or placement of Securities represents not more than Reasonable Compensation for underwriting or placing the Securities; the sum of all payments made to and retained by the Sponsor pursuant to the assignment of obligations (or interests therein) to the Issuer represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the Servicer represents not more than Reasonable Compensation for the Servicer's services under the Pooling and Servicing Agreement and reimbursement of the Servicer's reasonable expenses in connection therewith;

(6) The plan investing in such Securities is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange

Commission (SEC) under the Securities Act of 1933; and

(7) In the event that the obligations used to fund an Issuer have not all been transferred to the Issuer on the Closing Date, additional obligations as specified in subsection III.B.(1) may be transferred to the Issuer during the Pre-Funding Period in exchange for amounts credited to the Pre-Funding Account, provided that:

(a) The Pre-Funding Limit is not exceeded;

(b) All such additional obligations meet the same terms and conditions for eligibility as the original obligations used to create the Issuer (as described in the prospectus or private placement memorandum and/or Pooling and Servicing Agreement for such Securities), which terms and conditions have been approved by a Rating Agency. Notwithstanding the foregoing, the terms and conditions for determining the eligibility of an obligation may be changed if such changes receive prior approval either by a majority vote of the outstanding securityholders or by a Rating Agency;

(c) The transfer of such additional obligations to the Issuer during the Pre-Funding Period does not result in the Securities receiving a lower credit rating from a Rating Agency, upon termination of the Pre-Funding Period than the rating that was obtained at the time of the initial issuance of the Securities by the Issuer;

(d) The weighted average annual percentage interest rate (the average interest rate) for all of the obligations in the Issuer at the end of the Pre-Funding Period will not be more than 100 basis points lower than the average interest rate for the obligations which were transferred to the Issuer on the Closing Date;

(e) In order to ensure that the characteristics of the receivables actually acquired during the Pre-Funding Period are substantially similar to those which were acquired as of the Closing Date, the characteristics of the additional obligations will either be monitored by a credit support provider or other insurance provider which is independent of the Sponsor or an independent accountant retained by the Sponsor will provide the Sponsor with a letter (with copies provided to the Rating Agency, the Underwriter and the Trustee) stating whether or not the characteristics of the additional obligations conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or Pooling and Servicing Agreement. In preparing such letter, the independent accountant

<sup>3</sup>In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the Securities were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

will use the same type of procedures as were applicable to the obligations which were transferred on the Closing Date;

(f) The Pre-Funding Period shall be described in the prospectus or private placement memorandum provided to investing plans; and

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

(8) In order to insure that the assets of the Issuer may not be reached by creditors of the Sponsor in the event of bankruptcy or other insolvency of the Sponsor:

(a) The legal documents establishing the Issuer will contain:

(i) Restrictions on the Issuer's ability to borrow money or issue debt other than in connection with the securitization;

(ii) Restrictions on the Issuer merging with another entity, reorganizing, liquidating or selling assets (other than in connection with the securitization);

(iii) Restrictions limiting the authorized activities of the Issuer to activities relating to the securitization;

(iv) If the Issuer is not a Trust, provisions for the election of at least one independent director/partner/member whose affirmative consent is required before a voluntary bankruptcy petition can be filed by the Issuer; and

(v) If the Issuer is not a Trust, requirements that each independent director/partner/member must be an individual that does not have a significant interest in, or other relationships with, the Sponsor or any of its Affiliates;

(b) The Pooling and Servicing Agreement and/or other agreements establishing the contractual relationships between the parties to the securitization transaction will contain covenants prohibiting all parties thereto from filing an involuntary bankruptcy petition against the Issuer or initiating any other form of insolvency proceeding until after the Securities have been paid; and

(c) Prior to the issuance by the Issuer of any Securities, a legal opinion is received which states that either:

(i) A "true sale" of the assets being transferred to the Issuer by the Sponsor

has occurred and that such transfer is not being made pursuant to a financing of the assets by the Sponsor; or

(ii) In the event of insolvency or receivership of the Sponsor, the assets transferred to the Issuer will not be part of the estate of the Sponsor;

(9) If a particular class of Securities held by any plan involves a Ratings Dependent or Non-Ratings Dependent Swap entered into by the Issuer, then each particular swap transaction relating to such Securities:

(a) Shall be an Eligible Swap;

(b) Shall be with an Eligible Swap Counterparty;

(c) In the case of a Ratings Dependent Swap, shall provide that if the credit rating of the counterparty is withdrawn or reduced by any Rating Agency below a level specified by the Rating Agency, the Servicer (as agent for the Trustee) shall, within the period specified under the Pooling and Servicing Agreement:

(i) Obtain a replacement swap agreement with an Eligible Swap Counterparty which is acceptable to the Rating Agency and the terms of which are substantially the same as the current swap agreement (at which time the earlier swap agreement shall terminate); or

(ii) Cause the swap counterparty to establish any collateralization or other arrangement satisfactory to the Rating Agency such that the then current rating by the Rating Agency of the particular class of Securities will not be withdrawn or reduced.

In the event that the Servicer fails to meet its obligations under this subsection II.A.(9)(c), plan securityholders will be notified in the immediately following Trustee's periodic report which is provided to securityholders, and sixty days after the receipt of such report, the exemptive relief provided under section I.C. will prospectively cease to be applicable to any class of Securities held by a plan which involves such Ratings Dependent Swap; provided that in no event will such plan securityholders be notified any later than the end of the second month that begins after the date on which such failure occurs.

(d) In the case of a Non-Ratings Dependent Swap, shall provide that, if the credit rating of the counterparty is withdrawn or reduced below the lowest level specified in section III.GG., the Servicer (as agent for the Trustee) shall within a specified period after such rating withdrawal or reduction:

(i) Obtain a replacement swap agreement with an Eligible Swap Counterparty, the terms of which are substantially the same as the current swap agreement (at which time the

earlier swap agreement shall terminate); or

(ii) Cause the swap counterparty to post collateral with the Trustee in an amount equal to all payments owed by the counterparty if the swap transaction were terminated; or

(iii) Terminate the swap agreement in accordance with its terms; and

(e) Shall not require the Issuer to make any termination payments to the counterparty (other than a currently scheduled payment under the swap agreement) except from Excess Spread or other amounts that would otherwise be payable to the Servicer or the Sponsor;

(10) Any class of Securities, to which one or more swap agreements entered into by the Issuer applies, may be acquired or held in reliance upon this Underwriter Exemption only by Qualified Plan Investors; and

(11) Prior to the issuance of any debt securities, a legal opinion is received which states that the debt holders have a perfected security interest in the Issuer's assets.

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

#### Section III—Definitions

For purposes of this exemption:

A. "Security" means:

(1) A pass-through certificate or trust certificate that represents a beneficial ownership interest in the assets of an Issuer which is a Trust and which entitles the holder to pass-through payments of principal, interest, and/or

other payments made with respect to the assets of such Trust; or

(2) A Security which is denominated as a debt instrument that is issued by and is an obligation of an Issuer; with respect to which the Underwriter is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

B. "Issuer" means an investment pool, the corpus or assets of which are held in trust (including a grantor or owner Trust) or whose assets are held by a partnership, special purpose corporation or limited liability company (which Issuer may be a Real Estate Mortgage Investment Conduit (REMIC) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of section 860D(a) or section 860L, respectively, of the Code); and the corpus or assets of which consist solely of:

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

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, Qualified Equipment Notes Secured by Leases); and/or

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

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or Qualified Motor Vehicle Leases; and/or

(e) Guaranteed governmental mortgage pool certificates, as defined in 29 CFR 2510.3-101(1)(2) <sup>4</sup> and/or

(f) Fractional undivided interests in any of the obligations described in clauses (a)-(e) of this subsection B.(1); <sup>5</sup>

<sup>4</sup> In Advisory Opinion 99-05A (Feb. 22, 1999), the Department expressed its view that mortgage pool certificates guaranteed and issued by the Federal Agricultural Mortgage Corporation ("Farmer Mac") meet the definition of a guaranteed governmental mortgage pool certificate as defined in 29 CFR 2510.3-101(i)(2).

<sup>5</sup> It is the Department's view that the definition of "Issuer" contained in section III.B. includes a two-tier structure under which Securities issued by the first Issuer, which contains a pool of receivables described above, are transferred to a second Issuer which issues Securities that are sold to plans. However, the Department is of the further view that, since the exemption generally provides relief for the

Notwithstanding the foregoing, residential and home equity loan receivables issued in Designated Transactions may be less than fully secured, provided that (i) The rights and interests evidenced by the Securities issued in such Designated Transactions are not subordinated to the rights and interests evidenced by Securities of the same Issuer; (ii) such Securities acquired by the plan have received a rating from a Rating Agency at the time of such acquisition that is in one of the two highest generic rating categories; and (iii) any obligation included in the corpus or assets of the Issuer must be secured by collateral whose fair market value on the Closing Date of the Designated Transaction is at least equal to 80% of the sum of: (I) the outstanding principal balance due under the obligation which is held by the Issuer and (II) the outstanding principal balance(s) of any other obligation(s) of higher priority (whether or not held by the Issuer) which are secured by the same collateral.

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

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

(b) Cash or investments made therewith which are credited to an account to provide payments to securityholders pursuant to any Eligible Swap Agreement meeting the conditions of subsection I.A.(9) or pursuant to any Eligible Yield Supplement Agreement, and/or

(c) Cash transferred to the Issuer on the Closing Date and permitted investments made therewith which:

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

(ii) are credited to a Capitalized Interest Account; and

(iii) are held by the Issuer for a period ending no later than the first distribution date to securityholders occurring after the end of the Pre-Funding Period.

For purposes of this clause (c) of subsection III.B.(3), the term "permitted investments" means investments which

direct or indirect acquisition or disposition of Securities that are not subordinated, no relief would be available if the Securities held by the second Issuer were subordinated to the rights and interests evidenced by other Securities issued by the first Issuer, unless such Securities were issued in a Designated Transaction.

are either (i) direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States, or (ii) have been rated (or the Obligor has been rated) in one of the three highest generic rating categories by a Rating Agency; are described in the Pooling and Servicing Agreement; and are permitted by the Rating Agency.

(4) Rights of the Trustee under the Pooling and Servicing Agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship, Eligible Yield Supplement Agreements, Eligible Swap Agreements meeting the conditions of subsection II.A.(9) or other credit support arrangements with respect to any obligations described in section III.B.(1).

Notwithstanding the foregoing, the term "Issuer" does not include any investment pool unless: (i) The assets of the type described in paragraphs (a)-(f) of subsection III.B.(1) which are contained in the investment pool have been included in other investment pools, (ii) Securities evidencing interests in such other investment pools have been rated in one of the three (or in the case of Designated Transactions, four) highest generic rating categories by a Rating Agency for at least one year prior to the plan's acquisition of Securities pursuant to this exemption, and (iii) Securities evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of Securities pursuant to this exemption.

C. "Underwriter" means:

(1) RBC-DR;

(2) any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such investment banking firm; and

(3) any member of an underwriting syndicate or selling group of which such firm or person described in subsections III.C.(1) or (2) above is a manager or co-manager with respect to the Securities.

D. "Sponsor" means the entity that organizes an Issuer by depositing obligations therein in exchange for Securities.

E. "Master Servicer" means the entity that is a party to the Pooling and Servicing Agreement relating to assets of the Issuer and is fully responsible for servicing, directly or through Subservicers, the assets of the Issuer.

F. "Subservicer" means an entity which, under the supervision of and on behalf of the Master Servicer, services

loans contained in the Issuer, but is not a party to the Pooling and Servicing Agreement.

G. “*Servicer*” means any entity which services loans contained in the Issuer, including the Master Servicer and any Subservicer.

H. “*Trust*” means an Issuer which is a trust (including an owner trust, grantor trust or a REMIC or FASIT which is organized as a Trust).

I. “*Trustee*” means the trustee of any Trust which issues Securities and also includes an Indenture Trustee.

“*Indenture Trustee*” means the Trustee appointed under the indenture pursuant to which the subject Securities are issued, the rights of holders of the Securities are set forth and a security interest in the Trust assets in favor of the holders of the Securities is created. The Trustee or the Indenture Trustee is also a party to or beneficiary of all the documents and instruments transferred to the Trust, and as such, has both the authority to, and the responsibility for, enforcing all the rights created thereby in favor of holders of the Securities, including those rights arising in the event of default by the servicer.

J. “*Insurer*” means the insurer or guarantor of, or provider of other credit support for, an Issuer. Notwithstanding the foregoing, a person is not an Insurer solely because it holds securities representing an interest in an Issuer which are of a class subordinated to Securities representing an interest in the same Issuer.

K. “*Obligor*” means any person, other than the Insurer, that is obligated to make payments with respect to any obligation or receivable included in the Issuer. Where an Issuer contains Qualified Motor Vehicle Leases or Qualified Equipment Notes secured by Leases, “*Obligor*” shall also include any owner of property subject to any Lease included in the Issuer, or subject to any Lease securing an obligation included in the Issuer.

L. “*Excluded Plan*” means any plan with respect to which any member of the Restricted Group is a “plan sponsor” within the meaning of section 3(16)(B) of the Act.

M. “*Restricted Group*” with respect to a class of Securities means:

- (1) Each Underwriter;
- (2) Each Insurer;
- (3) The Sponsor;
- (4) The Trustee;
- (5) Each Servicer;
- (6) Any Obligor with respect to obligations or receivables included in the Issuer constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the Issuer, determined on the date of the

initial issuance of Securities by the Issuer;

(7) Each counterparty in an Eligible Swap Agreement; or

(8) Any Affiliate of a person described in (1)–(7) above.

N. “*Affiliate*” of another person includes:

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

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

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

O. “*Control*” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

P. A person will be “independent” of another person only if:

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

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

Q. “*Sale*” includes the entrance into a Forward Delivery Commitment, provided:

(1) The terms of the Forward Delivery Commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm’s-length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the Forward Delivery Commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

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

S. “*Reasonable Compensation*” has the same meaning as that term is defined in 29 CFR 2550.408c-2.

T. “*Qualified Administrative Fee*” means a fee which meets the following criteria:

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

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

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

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

U. “*Qualified Equipment Note Secured by a Lease*” means an equipment note:

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

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

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

V. “*Qualified Motor Vehicle Lease*” means a lease of a motor vehicle where:

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

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

(3) the Issuer’s security interest in the leased motor vehicle is at least as protective of the Issuer’s rights as the Issuer would receive under a motor vehicle installment loan contract.

W. “*Pooling and Servicing Agreement*” means the agreement or agreements among a Sponsor, a Servicer and the Trustee establishing a Trust. “*Pooling and Servicing Agreement*” also includes the indenture entered into by the Issuer and the Indenture Trustee.

X. “*Rating Agency*” means Standard & Poor’s Ratings Services, a division of The McGraw-Hill Companies, Inc., Moody’s Investors Service, Inc., Fitch, Inc. or any successors thereto.

Y. “*Capitalized Interest Account*” means an Issuer account (i) which is established to compensate securityholders for shortfalls, if any, between investment earnings on the Pre-Funding Account and the pass-through rate payable under the Securities; and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

Z. “*Closing Date*” means the date the Issuer is formed, the Securities are first issued and the Issuer’s assets (other than those additional obligations which are to be funded from the Pre-Funding Account pursuant to subsection III.A.(7)) are transferred to the Issuer.

AA. “*Pre-Funding Account*” means an Issuer account (i) which is established to purchase additional obligations, which obligations meet the conditions set forth in clauses (a)–(g) of subsection II.A.(7); and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

BB. “*Pre-Funding Limit*” means a percentage or ratio of the amount allocated to the Pre-Funding Account, as compared to the total principal amount of the Securities being offered which is less than or equal to 25 percent.

CC. “*Pre-Funding Period*” means the period commencing on the Closing Date and ending no later than the earliest to occur of (i) the date the amount on deposit in the Pre-Funding Account is less than the minimum dollar amount specified in the Pooling and Servicing Agreement; (ii) the date on which an event of default occurs under the Pooling and Servicing Agreement; or (iii) the date which is the later of three months or 90 days after the Closing Date.

DD. “*Designated Transaction*” means a securitization transaction in which the assets of the Issuer consist of secured consumer receivables, secured credit instruments or secured obligations that bear interest or are purchased at a discount and are: (i) Motor vehicle, home equity and/or manufactured housing consumer receivables; and/or (ii) motor vehicle credit instruments in transactions by or between business entities; and/or (iii) single-family residential, multi-family residential, home equity, manufactured housing and/or commercial mortgage obligations that are secured by single-family residential, multi-family residential, commercial real property or leasehold interests therein. For purposes of this section III.CC., the collateral securing motor vehicle consumer receivables or motor vehicle credit instruments may include motor vehicles and/or Qualified Motor Vehicle Leases.

EE. “*Ratings Dependent Swap*” means an interest rate swap, or (if purchased by or on behalf of the Issuer) an interest rate cap contract, that is part of the structure of a class of Securities where the rating assigned by the Rating Agency to any class of Securities held by any plan is dependent on the terms and conditions of the swap and the rating of the counterparty, and if such Security rating is not dependent on the existence of the swap and rating of the counterparty, such swap or cap shall be referred to as a “Non-Ratings Dependent Swap”. With respect to a Non-Ratings Dependent Swap, each Rating Agency rating the Securities must confirm, as of

the date of issuance of the Securities by the Issuer, that entering into an Eligible Swap with such counterparty will not affect the rating of the Securities.

FF. “*Eligible Swap*” means a Ratings Dependent or Non-Ratings Dependent Swap:

(1) Which is denominated in U.S. dollars;

(2) Pursuant to which the Issuer pays or receives, on or immediately prior to the respective payment or distribution date for the class of Securities to which the swap relates, a fixed rate of interest, or a floating rate of interest based on a publicly available index (e.g., the London Interbank Offered Rate (LIBOR) or the U.S. Federal Reserve’s Cost of Funds Index (COFI)), with the Issuer receiving such payments on at least a quarterly basis and obligated to make separate payments no more frequently than the counterparty, with all simultaneous payments being netted;

(3) Which has a notional amount that does not exceed either: (i) The principal balance of the class of Securities to which the swap relates, or (ii) the portion of the principal balance of such class represented solely by those types of corpus or assets of the Issuer referred to in subsections III.B.(1), (2) and (3);

(4) Which is not leveraged (i.e., payments are based on the applicable notional amount, the day count fractions, the fixed or floating rates designated in subsection III.EE.(2), and the difference between the products thereof, calculated on a one to one ratio and not on a multiplier of such difference);

(5) Which has a final termination date that is either the earlier of the date on which the Issuer terminates or the related class of securities is fully repaid; and

(6) Which does not incorporate any provision which could cause a unilateral alteration in any provision described in subsections III.EE.(1) through (4) without the consent of the Trustee.

GG. “*Eligible Swap Counterparty*” means a bank or other financial institution which has a rating, at the date of issuance of the Securities by the Issuer, which is in one of the three highest long-term credit rating categories, or one of the two highest short-term credit rating categories, utilized by at least one of the Rating Agencies rating the Securities; provided that, if a swap Counterparty is relying on its short-term rating to establish eligibility under the Underwriter Exemption, such swap Counterparty must either have a long-term rating in one of the three highest long-term rating categories or not have a long-term rating

from the applicable Rating Agency, and provided further that if the class of Securities with which the swap is associated has a final maturity date of more than one year from the date of issuance of the Securities, and such swap is a Ratings Dependent Swap, the swap Counterparty is required by the terms of the swap agreement to establish any collateralization or other arrangement satisfactory to the Rating Agencies in the event of a ratings downgrade of the swap Counterparty.

HH. “*Qualified Plan Investor*” means a plan investor or group of plan investors on whose behalf the decision to purchase Securities is made by an appropriate independent fiduciary that is qualified to analyze and understand the terms and conditions of any swap transaction used by the Issuer and the effect such swap would have upon the credit ratings of the Securities. For purposes of the Underwriter Exemption, such a fiduciary is either:

(1) A “qualified professional asset manager” (QPAM),<sup>6</sup> as defined under Part V(a) of PTE 84–14, 49 FR 9494, 9506 (March 13, 1984);

(2) An “in-house asset manager” (INHAM),<sup>7</sup> as defined under Part IV(a) of PTE 96–23, 61 FR 15975, 15982 (April 10, 1996); or

(3) A plan fiduciary with total assets under management of at least \$100 million at the time of the acquisition of such Securities.

II. “*Excess Spread*” means, as of any day funds are distributed from the Issuer, the amount by which the interest allocated to Securities exceeds the amount necessary to pay interest to securityholders, servicing fees and expenses.

JJ. “*Eligible Yield Supplement Agreement*” means any yield supplement agreement, similar yield maintenance arrangement or, if purchased by or on behalf of the Issuer, an interest rate cap contract to supplement the interest rates otherwise

<sup>6</sup> PTE 84–14 provides a class exemption for transactions between a party in interest with respect to an employee benefit plan and an investment fund (including either a single customer or pooled separate account) in which the plan has an interest, and which is managed by a QPAM, provided certain conditions are met. QPAMs (e.g., banks, insurance companies, registered investment advisers with total client assets under management in excess of \$50 million) are considered to be experienced investment managers for plan investors that are aware of their fiduciary duties under ERISA.

<sup>7</sup> PTE 96–23 permits various transactions involving employee benefit plans whose assets are managed by an INHAM, an entity which is generally a subsidiary of an employer sponsoring the plan which is a registered investment adviser with management and control of total assets attributable to plans maintained by the employer and its affiliates which are in excess of \$50 million.

payable on obligations described in subsection III.B.(1). Such an agreement or arrangement may involve a notional principal contract provided that:

(1) It is denominated in U.S. dollars;  
 (2) The Issuer receives on, or immediately prior to the respective payment date for the Securities covered by such agreement or arrangement, a fixed rate of interest or a floating rate of interest based on a publicly available index (e.g., LIBOR or COFI), with the Issuer receiving such payments on at least a quarterly basis;

(3) It is not "leveraged" as described in subsection III.EE.(4);

(4) It does not incorporate any provision which would cause a unilateral alteration in any provision described in subsections III.II.(1)–(3) without the consent of the Trustee;

(5) It is entered into by the Issuer with an Eligible Swap Counterparty; and

(6) It has a notional amount that does not exceed either:

(i) The principal balance of the class of Securities to which such agreement or arrangement relates, or (ii) the portion of the principal balance of such class represented solely by those types of corpus or assets of the Issuer referred to in subsections III.B.(1), (2) and (3).

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

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on August 15, 2003 at 68 FR 49304.

**EFFECTIVE DATE:** This exemption is effective for all transactions described herein which occurred on or after April 18, 2003.

**FOR FURTHER INFORMATION CONTACT:** Gary Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary

responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 8th day of October, 2003.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
Department of Labor.*

[FR Doc. 03–25911 Filed 10–10–03; 8:45 am]

**BILLING CODE 4510–29–P**

#### DEPARTMENT OF LABOR

##### Employee Benefits Security Administration

##### Lodgian, Inc. 401(k) Plan and Trust Agreement (the Plan) Exemption Application No. D–11180

**AGENCY:** Employee Benefits Security Administration, Department of Labor (the Department).

**ACTION:** Notice of technical correction.

On September 29, 2003, the Department published in the **Federal Register** (68 FR 56013) a notice of a proposed exemption (the Notice) which would apply, effective December 3, 2002, to (1) the past acquisition and holding by the Plan of certain warrants (the Warrant(s)) issued by the employer, Lodgian, Inc. (Lodgian), a party in interest with respect to the Plan, which would permit the purchase of new common stock (New Lodgian Stock); (2) the cancellation payment (the Cancellation Payment) by Lodgian to the Plan in exchange for the Warrants (i) at

the election of active participants (ii) at the election of the terminated vested participants whose vested interests exceed \$5,000, or (iii) in accordance with the procedures for the automatic cash out of the value of Warrants held in the accounts of terminated vested participants whose vested interests are \$5,000 or less, for an amount that represents the highest value of the Warrants determined by an independent, qualified, appraiser between December 31, 2002 and the date of the individual election; (3) the sale of the Warrants from Plan participants to Lodgian to cash out active and terminated vested participants; and (4) the potential exercise of the Warrants into the New Lodgian Stock.

On page 56015 of the Notice, the first sentence of Representation 8 states the following: Lodgian's obligation to purchase the Warrants is effective at a time when the New Lodgian Stock price is greater than the Warrant exercise price; the Department notes that this sentence is inaccurate and should be deleted, and hereby amends the proposal to incorporate such change.

On page 56016 of the Notice, paragraph (j) of Representation 9 states the following:

(j) Lodgian is required to purchase the Warrants upon request by a Plan participant provided that on the day of the request the price of the New Lodgian Stock is greater than the exercise price of the Warrants;

The Department notes that paragraph (j) of Representation 9 should be corrected to read as follows:

(j) Lodgian is required to purchase the Warrants upon request by a Plan participant provided that on the day of the request the price of the New Lodgian Stock is less than the exercise price of the Warrants; The Department hereby amends the proposal to incorporate such change.

**FOR FURTHER INFORMATION CONTACT:** Mr. Khalif Ford of the Department at (202) 693–8540. (This is not a toll-free number.)

Signed at Washington, DC this 8th day of October, 2003.

**Ivan L. Strasfeld,**

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

[FR Doc. 03–25912 Filed 10–10–03; 8:45 am]

**BILLING CODE 4520–29–P**