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Department of Labor

Employee Benefits Security Administration

Proposed Exemptions; Harris Nesbitt Corporation (Harris Nesbitt) and Its Affiliates (the Affiliates); Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11281, et al.]

Proposed Exemptions; Harris Nesbitt Corporation (Harris Nesbitt) and Its Affiliates (the Affiliates)

AGENCY: Employee Benefits Security 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 Employee Benefits Security Administration (EBSA), 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 EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *"moffitt.betty@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 Employee Benefits Security 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.

Harris Nesbitt Corporation (Harris Nesbitt) and Its Affiliates (the Affiliates) (collectively, the Applicant) Located in New York, NY

[Application No. D–11281]

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, August 10, 1990).[1]

Section I. Covered Transactions

A. Effective for transactions occurring on or after October 15, 2004, 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 section 4975(c)(1)(A) through (D) of the Code, shall not apply to the following transactions involving issuers (Issuers) and securities (Securities) evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of Securities in the initial issuance of Securities between the sponsor (Sponsor) or underwriter (Underwriter) and an employee benefit plan when the Sponsor, servicer (Servicer), trustee (Trustee) or insurer (Insurer) of an Issuer, the Underwriter of the Securities representing an interest in the Issuer, or an obligor (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 (the Excluded Plan), by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[2]

B. Effective for transactions occurring on or after, October 15, 2004, the restrictions of section 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by sections 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 of a person described in (a); if

(i) The plan is not an Excluded Plan;

(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 by persons independent of the members of the restricted group (Restricted Group), and at least 50 percent of the aggregate interest in the Issuer is

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

[2] 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) of the Act and regulation 29 CFR 2510.3–21(c).

acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of Security 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 an Issuer containing assets sold or serviced by the same entity.[3] 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 (i), (iii) and (iv) of subsection I.B.(1) 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 October 15, 2004, the restrictions of sections 406(a), 406(b), and 407(a) of the Act and the taxes imposed by sections 4975(a) and (b) of the Code by reason of Code section 4975(c), shall not apply to the transactions in connection with the servicing, management and operation of an Issuer, including the use of the any eligible swap transaction (the 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 (the Designated Transaction), provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing agreement (the 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 purchase Securities issued by the Issuer;[4] 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 (the 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 a Servicer of the Issuer from a person other than the Trustee or Sponsor, unless such fee constitutes a qualified administrative fee (Qualified Administrative Fee).

D. Effective for transactions occurring after October 15, 2004, 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 Code section 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 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 (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 (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

[3] 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.

[4] 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. For purposes of this proposed exemption, references to "prospectus" include any related prospectus supplement thereto, pursuant to which Securities are offered to investors.

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 (Pre-Funding Period) in exchange for amounts credited to the pre-funding account (Pre-Funding Account), provided that:

(a) The pre-funding limit (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 (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 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, will enforce all the rights created in favor of Securityholders of the Issuer, including employee benefit plans subject to the Act.

(8) In order to ensure 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; and

(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 swap (the Ratings Dependent Swap) or a non-ratings dependent swap (the Non-Ratings Dependent Swap) entered into by the Issuer, then each particular swap transaction relating to such Security:

(a) Shall be an eligible swap (the Eligible Swap);

(b) Shall be with an eligible swap counterparty (the 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 (the 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 the underwriter exemptions (the Underwriter Exemptions) only by qualified plan investors (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 Section I., if the provision in subsection II.A.(6) 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 payments of principal, interest and/or other payments made with respect to the assets of such Trust; or

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; or

(2) A Certificate denominated as a debt instrument that represents an interest in either a Real Estate Mortgage Investment Conduit (REMIC) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of the section 860D(a) or section 860L of the Internal Revenue Code; and that is issued by and is an obligation of a Trust, with respect to Certificates defined in Section III.A. (1) and (2) above, for 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.

For purposes of this exemption, references to ''Certificates representing an interest in a Trust'' include Certificates denominated as debt, which are issued by a Trust.

B. ''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 consists solely of:

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

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases (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 and commercial real property (including obligations secured by leasehold interest 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 (Qualified Motor Vehicle Leases; and/or

(e) Guaranteed governmental mortgage pool certificates, as defined in 29 CFR 2510.3–101(1)(2); [5] and/or

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this subsection B.(1); [6]

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 Securities issued in such Designated Transactions (as defined in Section III.DD.) 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 Trust 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

[5] 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).

[6] 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 Underwriter Exemptions generally provide relief for the 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.

(b) Cash or investments made therewith which are credited to an account to provide payments to Securityholders pursuant to any eligible swap agreement (Eligible Swap Agreement) meeting the conditions of subsection II.A.(9) or pursuant to any eligible yield supplement agreement (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 paragraph (a)–(g) of subsection II.A.(7) are met; and/or

(ii) Are credited to a capitalized interest account (the 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: (i) are either (x) 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 (y) have been rated (or the Obligor has been rated) in one of the three highest generic rating categories by a Rating Agency; (ii) 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 investment pool consists only of assets of the type described in paragraph (a)–(f) of subsection III.B.(1) which 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 the Underwriter Exemptions.

C. ''Underwriter'' means

(1) Harris Nesbitt;

(2) Any U.S.-domiciled 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 as 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 in the case of Securities which are denominated as debt instruments, also means the Trustee of an indenture trust (the Indenture Trust). ''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 Trust. 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; or

(7) Each counterparty in an Eligible Swap Agreement;

(8) Any Affiliate of a person described in III.M. (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

(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 contact 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 subsection III.T.(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 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. In the case of Securities which are denominated as debt instruments, ''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 Issue's assets (other than those additional obligations which are to be funded from the Pre-Funding Account pursuant to subsection II.A.(7)) are transferred to the 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.DD., 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 Securities 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., 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.FF.(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.FF.(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 Exemptions, 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 Exemptions, such a fiduciary is either:

(1) A ''qualified professional asset manager'' (QPAM),[7] as defined under Part V(a) of PTE 84–14, 49 FR 9494, 9506 (March 13, 1984);

(2) An ''in-house asset manager'' (INHAM),[8] 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 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.FF.(4);

(4) It does not incorporate any provision which would cause a unilateral alteration in any provision described in subsections III.JJ.(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).

Effective Date: If granted, this proposed exemption will be effective for all transactions described herein which occurred on or after October 15, 2004.

Summary of Facts and Representations

1. Harris Nesbitt (or the Applicant), a Delaware corporation, is an indirect, wholly owned subsidiary of the Bank of Montreal. Harris Nesbitt maintains its principal office at 3 Times Square, New York, New York and it also maintains branch sales offices in seven states. Harris Nesbitt is a registered broker-dealer, a registered investment adviser, and a member of the New York Stock Exchange, the National Association of Securities Dealers, Inc., and other major securities exchanges, as well as the Securities Investor Protection Corporation.

Harris Nesbitt engages in the purchase and sale of securities for the account of its customers which include individual and institutional accounts. Harris Nesbitt also purchases and sells securities for its own proprietary trading accounts and for the accounts of its Affiliates. Harris Nesbitt engages in trading mortgage-related and other securities, including pass-through certificates issued by GNMA, FNMA and FHLMC, callable agency debt, and collateralized mortgage obligations for the account of its customers and for its own accounts.

Issuer Assets

2. Harris Nesbitt seeks exemptive relief to permit employee benefit plans to invest in pass-through securities representing undivided interests in the following categories of investments, which are held by an Issuer:[9] (a) Single and multi-family residential or commercial mortgages; (b) motor vehicle receivables; (c) consumer or commercial receivables; and (d) guaranteed governmental mortgage pool certificates.[10]

[7] 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 $85 million) are considered to be experienced investment managers for plan investors that are aware of their fiduciary duties under ERISA.

[8] 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.

[9] An issuer is an investment pool, the corpus or assets of which are held in trust or whose assets are held by a partnership, special purpose corporation or limited liability company.

[10] Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3–101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying

Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the terms of such mortgages.[11]

Residential and home equity loan receivables which are issued in certain Designated Transactions, may be less than fully secured, provided that: (a) The rights and interests evidenced by the Securities issued in such Designated Transactions are not subordinated to the rights and interests evidenced by the Securities of the same Issuer; (b) 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 (c) 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. Securitization transactions in which the assets of the securitization vehicle reflect the following categories of receivables (all of which are also described in more detail below) are referred to herein as ''Designated Transactions': (a) Automobile and other motor vehicle loans, (b) residential and home equity loans (which may have HLTV ratios in excess of 100%), (c) manufactured housing loans and (d) commercial mortgages.

Issuer Structure

3. Each Issuer is established under a Pooling and Servicing Agreement between a Sponsor, a Servicer and a Trustee. Prior to the Closing Date under the Pooling and Servicing Agreement, the Sponsor or Servicer of an Issuer establishes the trust, partnership, the special purpose corporation or limited liability company, designates an entity as Trustee, and, except to the extent a Pre-Funding Account, as described below, will be used, selects assets to be included in the Issuer. The assets are receivables, which may have been originated by a Sponsor or Servicer of an Issuer, an Affiliate of the Sponsor or Servicer, or by an unrelated lender and subsequently acquired by the Issuer, Sponsor or Servicer.[12]

Typically, on or prior to the Closing Date, the Sponsor acquires legal title to all assets selected for the Issuer. In some cases, legal title to some or all of such assets continues to be held by the originator of the receivable until the Closing Date. On the Closing Date, the Sponsor and/or the originator of the receivables conveys to the Issuer legal title to the assets, and the Trustee issues Securities representing fractional undivided interests in the Issuer's assets. The Applicant, alone or together with other broker-dealers, acts as Underwriter or placement agent with respect to the sale of the Securities. The Applicant currently anticipates that the public offerings of Securities will be underwritten by it on a firm commitment basis. In addition, the Applicant anticipates that it may privately place Securities on both a firm commitment and an agency basis. The Applicant may also act as the lead or co-managing Underwriter for a syndicate of securities Underwriters.

4. Securityholders will be entitled to receive distributions of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable and paid monthly, quarterly, or semi-annually as specified in the related prospectus or private placement memorandum.

When installments or payments are made on a semi-annual basis, funds are not permitted to be commingled with the Servicer's assets for longer than would be permitted for a monthly-pay security. A segregated account is established in the name of the Trustee (on behalf of Securityholders) to hold funds received between distribution dates. The account is under the sole control of the Trustee, who invests the account's assets in short-term securities, which have received a rating comparable to the rating assigned to the Securities. In some cases, the Servicer may be permitted to make a single deposit into the account once a month. When the Servicer makes such monthly deposits, payments received from Obligors by the Servicer may be commingled with the Servicer's assets during the month prior to deposit. Usually, the period of time between receipt of funds by the Servicer and deposit of these funds in a segregated account does not exceed one month. Furthermore, in those cases where distributions are made semiannually, the Servicer will furnish a report on the operation of the Trust to the Trustee on a monthly basis. At or about the time this report is delivered to the Trustee, it will be made available to Securityholders and delivered to or made available to each Rating Agency that has rated the Securities.

A Trust may elect to be treated as a real estate mortgage investment conduit (REMIC) or a financial asset securitization investment trust (FASIT), or may be treated as a grantor trust or a partnership, for Federal income tax purposes.

5. Some of the Securities will be multi-class Securities. Harris Nesbitt requests exemptive relief for two types

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such certificate. The Applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in such trusts may be plan assets.

[11] Trust assets may also include obligations that are secured by leasehold interests on residential real property. *But see* PTE 90–32 involving Prudential-Bache Securities, Inc., 55 FR 23147, 23150 (June 6, 1990). The Department received one comment from an affiliate of the applicant with respect to the notice of proposed exemption for PTE 90–32. The comment requested clarification that the definition of trust in section III.B. would include trusts containing certain obligations secured by leasehold interests on residential real property (Residential Leasehold Mortgages or RLMs). The comment noted that RLMs are originated in jurisdictions such as Hawaii in which they are a ''necessary alternative to mortgages secured by fee simple interests'' and that these RLMs are ''in essence, the same as, and provide substantially the same degree of security to investors as, mortgages secured by fee simple interests.''

The comment represented that both the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae) have purchase programs for these RLMs and that such RLMs included in pools underlying mortgage pass-through certificates would ''generally conform'' with either Freddie Mac or Fannie Mae leasehold guidelines. In this regard, the term of the leasehold underlying such RLMs would extend for at least five years beyond the term of the RLM. The comment noted that the affiliate of the applicant would ''comply with the requirement under the Freddie Mac and Fannie Mae leasehold guidelines that such mortgages constitute obligations secured by real property or an interest in real estate.''

In PTE 90–32, the Department concurred with the views expressed by the affiliate of the applicant that the definition of trust includes RLMs as described in the comment.

[12] It is the Applicant's understanding that the Department has indicated that the definition of the term ''trust'' includes rights under any yield supplement or similar arrangement which obligates the Sponsor or Master Servicer, or another party specified in the relevant Pooling and Servicing Agreement, to supplement the interest rates otherwise payable on the permissible obligations held in the trust, in accordance with the terms of a yield supplement arrangement described in the Pooling and Servicing Agreement, provided that such arrangements do not involve certain swap agreements or other notional principal contracts.

of multi-class Securities: ''strip'' Securities and ''senior/subordinate'' (also sometimes referred to as ''fast pay/slow pay'') Securities. Strip Securities are a type of Security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of Securities are established, each representing rights to disproportionate payments of principal and interest.[13]

''Senior/subordinate'' Securities involve the issuance of classes of Securities having different stated maturities or the same maturities with different payment schedules. Interest and/or principal payments received on the underlying receivables are distributed first to the class of Securities having the earliest stated maturity of principal, and/or earlier payment schedule, and only when that class of Securities has been paid in full (or has received a specified amount) will distributions be made with respect to the second class of Securities. Distributions on Securities having later stated maturities will proceed in like manner until all the Securityholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to Securityholders. In each case, Securityholders will have a beneficial ownership interest in the underlying assets. Except as permitted in a Designated Transaction, the rights of a plan purchasing a Security will not be subordinated to the rights of another Securityholder in the event of default on any of the underlying obligations. In particular, unless the Securities are issued in a Designated Transaction, if the amount available for distribution to Securityholders is less than the amount required to be so distributed, all senior Securityholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.[14]

6. For tax reasons, the Issuer will be maintained as an essentially passive entity. Therefore, both the Sponsor's discretion and the Servicer's discretion with respect to assets included in an Issuer are severely limited. Pooling and Servicing Agreements provide for the substitution of receivables by the Sponsor only in the event of defects in documentation discovered within a short time after the issuance of investor Securities (within 120 days, except in the case of obligations having an original term of 30 years, in which case the period will not exceed two years). Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to Securityholders.

Conditions to Interest Rate Swaps

7. The Applicant requests relief for both ratings dependent and non-ratings dependent swaps as described in Prohibited Transaction Exemption 2000–58 (65 FR 67765, November 13, 2000) (PTE 2000–58), subject to the same terms and conditions regarding interest rate swaps contained in that exemption.

In this regard, an Eligible Swap will be a swap transaction:

(a) Which is denominated in U.S. Dollars;

(b) Pursuant to which the Issuer pays or receives, on or immediately prior to the respective payment or distribution date for the applicable class of Securities, a fixed rate of interest or a floating rate of interest based on a publicly available index (e.g., 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 being obligated to make separate payments no more frequently than the counterparty, with all simultaneous payments being netted;

(c) 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) of the requested exemption;

(d) 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 item (b) above and the difference between the products thereof, calculated on a one-to-one ratio and not on a multiplier of such difference);

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

(f) Which does not incorporate any provision which could cause a unilateral alteration in any provision described in items (a) through (e) above without the consent of the Trustee.

In addition, any Eligible Swap entered into by the Issuer will be with an ''Eligible Swap Counterparty,'' which will be a bank or other financial institution with 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 its eligibility, such 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.

Under any termination of a swap, the Issuer will not be required to make any termination payments to the swap 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.

With respect to a Rating Dependent Swap, the Servicer shall either cause the eligible counterparty to establish certain collateralization or other arrangements satisfactory to the Rating Agencies in the event of a rating downgrade of such swap counterparty below a level specified by the Rating Agency (which will be no lower than the level which would make such counterparty an eligible counterparty), or the Servicer shall obtain a replacement swap with an Eligible Swap Counterparty acceptable to the Rating Agencies with substantially similar terms. If the Servicer fails to do so, the plan Securityholders will be notified in the immediately following Trustee's

[13] When a plan invests in REMIC ''residual'' interest Securities to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to federal income tax under the Code. The prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in Securities pursuant to this exemption.

[14] If an Issuer issues subordinated Securities, holders of such subordinated Securities may not share in the amount distributed on a pro rata basis with the senior Securityholders. The Department notes that the proposed exemption does not provide relief for plan investments in such subordinated Securities, unless issued in a Designated Transaction.

periodic report to Securityholders and will have a 60-day period thereafter to dispose of the Securities, at the end of which period the exemptive relief provided under Section I.C. of the requested exemption (relating to the servicing, management and operation of the Issuer) would prospectively cease to be available. With respect to Non-Ratings Dependent Swaps, each Rating Agency rating the Securities must confirm, as of the date of issuance of the Securities by the Issuer that entering into the swap transactions with the eligible counterparty will not affect the rating of the Securities.

Any class of Securities to which one or more swap agreements entered into by the Issuer applies will be acquired or held only by Qualified Plan Investors. Qualified Plan Investors will be plan investors represented by an appropriate independent fiduciary that is qualified to analyze and understand the terms and conditions of any swap transaction relating to the class of Securities to be purchased and the effect such swap would have upon the credit rating of the Securities to which the swap relates.

For purposes of the proposed exemption, such a qualified independent fiduciary will be either:

(a) A ''qualified professional asset manager'' (i.e., QPAM), as defined under Part V(a) of PTE 84–14;

(b) An ''in-house asset manager'' (i.e., INHAM), as defined under Part IV(a) of PTE 96–23; or

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

Yield Supplement Agreements

8. A yield supplement agreement (the Yield Supplement Agreement) is a contract under which the Issuer makes a single cash payment to the contract provider in return for the contract provider promising to make certain payments to the Issuer in the event of market fluctuations in interest rates. For example, if a class of Securities promises an interest rate which is the greater of 7% or LIBOR and LIBOR increases significantly, the Yield Supplement Agreement might obligate the contract provider pay to the Issuer the excess of LIBOR over 7%. In some circumstances, the contract provider's obligation may be capped at a certain aggregate maximum dollar liability under the contract. Alternatively, a cap could be placed on the supplemental interest that would be paid to a Securityholder from monies paid under the Yield Supplement Agreement. For example, the Yield Supplement Agreement would provide the difference between LIBOR and 7% but only to the extent that the Securityholder would be paid a total of 9%. The interest to be paid by the contract provider to the Issuer under the Yield Supplement Agreement is usually calculated based on a notional principal balance which may mirror the principal balances of those classes of Securities to which the Yield Supplement Agreement relates or some other fixed amount. This notional amount will not exceed either: (a) The principal balance of the class of Securities to which such agreement or arrangement relates, or (b) 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) of the proposed exemption. In all cases, the Issuer makes no payments other than the fixed purchase price for the Yield Supplement Agreement and may, therefore, be distinguished from an interest rate swap agreement, notwithstanding that both types of agreements may use an International Swaps and Derivatives Association, Inc. (ISDA) form of contract.

The Applicant notes that no ''plan assets'' within the meaning of the plan asset regulation (under 29 CFR 2510–3–101) are utilized in the purchase of the Yield Supplement Agreement, as the Sponsor or some other third party funds such arrangement with an up-front single-sum payment. The Issuer's only obligation is to receive payments from the counterparty if interest rate fluctuations require them under the terms of the contract and to pass them through to Securityholders. The Rating Agencies examine the creditworthiness of the counterparty in a ratings dependent yield supplement agreement.

Pre-Funding Accounts

9. Although many transactions occur as described above, it is also common for other transactions to be structured using a Pre-Funding Account and/or a Capitalized Interest Account as described below.

The Pre-Funding Period for any Issuer will be defined as the period beginning on the Closing Date and ending on the earliest to occur of (a) the date on which the amount on deposit in the Pre-Funding Account is less than a specified dollar amount, (b) the date on which an event of default occurs under the related Pooling and Servicing Agreement [15] or (c) the date which is the later of three months or ninety days after the Closing Date. If pre-funding is used, the Sponsor or originator will transfer to the Issuer on the Closing Date cash sufficient to purchase the receivables to be transferred after the Closing Date. During the Pre-Funding Period, such cash and temporary investments, if any, made therewith will be held in a Pre-Funding Account and used to purchase the additional receivables, the characteristics of which will be substantially similar to the characteristics of the receivables transferred to the Issuer on the Closing Date. Certain specificity and monitoring requirements described below must be met and will be disclosed in the Pooling and Servicing Agreement and/or the prospectus [16] or private placement memorandum.

For transactions involving an Issuer using pre-funding, on the Closing Date, a portion of the offering proceeds will be allocated to the Pre-Funding Account generally in an amount equal to the excess of (a) the principal amount of Securities being issued over (b) the principal balance of the receivables being transferred to the Issuer on such Closing Date. In certain transactions, the aggregate principal balance of the receivables intended to be transferred to the Issuer may be larger than the total principal balance of the Securities being issued. In these cases, the cash deposited in the Pre-Funding Account will equal the excess of the principal balance of the total receivables intended to be transferred to the Issuer over the principal balance of the receivables being transferred on the Closing Date.

On the Closing Date, the Sponsor transfers the assets to the Issuer in exchange for the Securities. The Securities are then sold to an Underwriter for cash or to the Securityholders directly if the Securities are sold through an initial purchaser or placement agent. The cash received by the Sponsor from the Securityholders (or the Underwriter) from the sale of the Securities issued by the Issuer in excess of the purchase price for the receivables and certain other Issuer expenses such as underwriting or placement agent fees and legal and accounting fees, constitutes the cash to be deposited in the Pre-Funding Account. Such funds are either held in the Issuer and accounted for separately, or held in a

[15] The minimum dollar amount is generally the dollar amount below which it becomes too uneconomical to administer the Pre-Funding Account. An event of default under the Pooling and Servicing Agreement generally occurs when: (a) A breach of a covenant or a breach of a representation and warranty concerning the Sponsor, the Servicer or certain other parties occurs which is not cured; (b) a required payment to Securityholders is not made; or (c) the Servicer becomes insolvent.

[16] References to the term ''prospectus'' herein shall include any prospectus supplement related thereto, pursuant to which Securities are offered to investors.

sub-account or sub-trust. In either event, these funds are not part of assets of the Sponsor.

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

The percentage or ratio of the amount allocated to the Pre-Funding Account, less the principal amount of any loan specifically identified for subsequent delivery to the Issuer as of the Closing Date, as compared to the total principal amount of the Securities being offered (the Pre-Funding Limit) will not exceed 25%. The Pre-Funding Limit (which may be expressed as a ratio or as a stated percentage or as a combination thereof) will be specified in the prospectus or the private placement memorandum.

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

A dramatic change in interest rates on the receivables to be transferred to an Issuer using a Pre-Funding Account is handled as follows. If the receivables (other than those with adjustable or variable rates) had already been originated prior to the Closing Date, no action would be required, as the fluctuations in market interest rates would not affect the receivables transferred to the Issuer after the Closing Date. In contrast, if interest rates fall after the Closing Date, receivables originated after the Closing Date will tend to be originated at lower rates, with the possible result that the receivables will not support the interest rate payable on the Securities. In such situations, the Sponsor could sell the receivables into the Issuer at a discount and more receivables will be used to fund the Issuer in order to support the pass-through rate. In a situation where interest rates drop dramatically and the Sponsor is unable to provide sufficient receivables at the requisite interest rates, the pool of receivables would be closed. In this latter event, under the terms of the Pooling and Servicing Agreement, the Securityholders would receive a repayment of principal from the unused cash held in the Pre-Funding Account. In transactions where the pass-through rates of the Security are variable or adjustable, the effects of market interest rate fluctuations are mitigated. In no event will fluctuations in interest rates payable on the receivables affect the pass-through rate for fixed rate Securities.

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

Capitalized Interest Accounts

10. When a Pre-Funding Account is used, the Sponsor and/or originator may also transfer to the Issuer additional cash on the Closing Date, to be deposited in a Capitalized Interest Account and used during the Pre-Funding Period to compensate the Securityholders for any shortfall between the investment earnings on the Pre-Funding Account and the pass-through interest rate payable under the Securities.

Because the Securities are supported by the receivables in the Issuer and the earnings on the Pre-Funding Account, the Capitalized Interest Account is needed when the investment earnings on the Pre-Funding Account and the interest paid on the receivables are less than the interest payable on the Securities. The Capitalized Interest Account funds are paid out periodically to the Securityholders as needed on distribution dates to support the pass-through rate. In addition, a portion of such funds may be returned to the Sponsor from time to time as the receivables are transferred into the Issuer and the need for the Capitalized Interest Account diminishes. Any amounts held in the Capitalized Interest Account generally will be returned to the Sponsor and/or originator either at the end of the Pre-Funding Period or periodically as receivables are transferred and the proportionate amount of funds in the Capitalized Interest Account can be reduced. Generally, the Capitalized Interest Account terminates no later than the end of the Pre-Funding Period. However, there may be some cases where the Capitalized Interest Account remains open until the first date distributions are made to Securityholders following the end of the Pre-Funding Period.

In other transactions, a Capitalized Interest Account is not necessary because the interest paid on the receivables exceeds the interest payable on the Securities at the applicable interest rate and the fees payable by the Issuer. Such excess is sufficient to make up any shortfall resulting from the Pre-Funding Account earning less than the interest rate payable on the Securities. In certain of these transactions, this occurs because the aggregate principal amount of receivables exceeds the aggregate principal amount of Securities.

Pre-Funding Account and Capitalized Interest Account Payments and Investments

11. Pending the acquisition of additional receivables during the Pre-Funding Period, it is expected that amounts in the Pre-Funding Account and the Capitalized Interest Account will be invested in certain permitted investments or will be held uninvested. Pursuant to the Pooling and Servicing Agreement, all permitted investments must mature prior to the date the actual funds are needed. The permitted types

of investments in the Pre-Funding Account and Capitalized Interest Account are investments which either: (a) Are 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 (b) have been rated (or the Obligor has been rated) in one of the three highest generic rating categories (or four, in the case of Designated Transactions) by a Rating Agency, as set forth in the Pooling and Servicing Agreement and as required by the Rating Agencies. The credit grade quality of the permitted investments is generally no lower than that of the Securities. The types of permitted investments will be described in the Pooling and Servicing Agreement.

The ordering of interest payments to be made from the Pre-Funding and Capitalized Interest Accounts is pre-established and set forth in the Pooling and Servicing Agreement. The only principal payments which will be made from the Pre-Funding Account are those made to acquire the receivables during the Pre-Funding Period and those distributed to the Securityholders in the event that the entire amount in the Pre-Funding Account is not used to acquire receivables. The only principal payments which will be made from the Capitalized Interest Account are those made to Securityholders if necessary to support the Security pass-through rate or those made to the Sponsor either periodically as they are no longer needed or at the end of the Pre-Funding Period when the Capitalized Interest Account is no longer necessary.

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

12. In order to ensure that there is sufficient specificity as to the representations and warranties of the Sponsor regarding the characteristics of the receivables to be transferred after the Closing Date:

(a) All such receivables will meet the same terms and conditions for eligibility as those of the original receivables 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. However, the terms and conditions for determining the eligibility of a receivable may be changed if such changes receive prior approval either by a majority vote of the outstanding Securityholders or by a Rating Agency;[17]

(b) The transfer of the receivables acquired during the Pre-Funding Period will not result in the Securities receiving a lower credit rating from the Rating Agency upon termination of the Pre-Funding Period than the rating that was obtained at the time of the initial issuance of the Securities by the Issuer;

(c) 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;

(d) 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 Issuer activities and familiar with its duties, responsibilities, and liabilities as a fiduciary under the Act. The Trustee, as the legal owner of the receivables in the Issuer or the holder of a security interest in the receivables, will enforce all the rights created in favor of Securityholders of such Issuer, including employee benefit plans subject to the Act.

In order to ensure that the characteristics of the receivables actually acquired during the Pre-Funding Period are substantially similar to receivables that were acquired as of the Closing Date, the characteristics of the additional receivables subsequently acquired 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 Trustees) stating whether or not the characteristics of the additional receivables acquired after the Closing Date conform to the characteristics of such receivables described in the prospectus, private placement memorandum and/or Pooling and Servicing Agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the Closing Date.

Each prospectus, private placement memorandum and/or Pooling and Servicing Agreement will set forth the terms and conditions for eligibility of the receivables to be included in the Issuer as of the related Closing Date, as well as those to be acquired during the Pre-Funding Period, which terms and conditions will have been agreed to by the Rating Agencies which are rating the applicable Securities as of the Closing Date. Also included among these conditions is the requirement that the Trustee be given prior notice of the receivables to be transferred, along with such information concerning those receivables as may be requested. Each prospectus or private placement memorandum will describe the amount to be deposited in, and the mechanics of, the Pre-Funding Account and will describe the Pre-Funding Period for the Issuer.

Parties to Transactions

13. The originator of a receivable is the entity that initially lends money to a borrower (Obligor), such as a homeowner or automobile purchaser, or leases property to a lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a Sponsor.

Originators of receivables held by the Issuer will be entities that originate receivables in the ordinary course of their business, including finance companies for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidental part of its operations. Each Issuer may contain assets of one or more originators. The originator of the receivables may also function as the Sponsor or Servicer.

14. The Sponsor will be one of three entities: (a) A special-purpose or other corporation unaffiliated with the Servicer, (b) a special-purpose or other corporation affiliated with the Servicer, or (c) the Servicer itself. Where the Sponsor is not also the Servicer, the Sponsor's role will generally be limited to acquiring the receivables to be held by the Issuer, establishing the Issuer, designating the Trustee, and assigning the receivables to the Issuer.

[17] In some transactions, the Insurer and/or credit support provider may have the right to veto the inclusion of receivables, even if such receivables otherwise satisfy the underwriting criteria. This right usually takes the form of a requirement that the Sponsor obtain the consent of these parties before the receivables can be included in the Issuer. The Insurer and/or credit support provider may, therefore, reject certain receivables or require that the Sponsor establish certain Issuer reserve accounts as a condition of including these receivables. Virtually all Issuers which have Insurers or other credit support providers are structured to give such veto rights to these parties. The percentage of Issuers that have Insurers and/or credit support providers, and accordingly feature such veto rights, varies.

15. The Trustee of a Trust (or the Issuer if it is not a Trust) is the legal owner of the obligations held by the Issuer and would hold a security interest in the collateral securing such obligations. The Trustee is also a party to or beneficiary of all the documents and instruments transferred to the Issuer, and as such is responsible for enforcing all the rights created thereby in favor of Securityholders, including those rights arising in the event of default by the Servicer. The Trustee generally will be an independent entity, although the Trustee may be related to the Applicant.[18] The Applicant represents that the Trustee will be a substantial financial institution or trust company experienced in trust activities. The Trustee receives a fee for its services, which will be paid from cash flows in the Trust. The method of compensating the Trustee, which is specified in the Pooling and Servicing Agreement, will be disclosed in the prospectus or private placement memorandum relating to the offering of the Securities.

The rights and obligations of the Indenture Trustee are no different than those of the Trustee of an Issuer which is a Trust. The Indenture Trustee is obligated to oversee and administer the activities of all of the ongoing parties to the transaction and possesses the authority to replace those entities, sue them, liquidate the collateral and perform all necessary acts to protect the interests of the debt holders. If debt is issued in a transaction, there may not be a Pooling and Servicing Agreement. Instead, there is a sales agreement and servicing agreement (or these two agreements are sometimes combined into a single agreement). The agreement(s) set(s) forth, among other things, the duties and responsibilities of the parties to the transaction relating to the administration of the Issuer. The Indenture Trustee is often a party to these agreements. At a minimum, the Indenture Trustee acknowledges its rights and responsibilities in these agreements or they are contractually set forth in the indenture agreement pursuant to which the Indenture Trustee is appointed.

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

A Servicer's default is treated in the same manner whether or not the Issuer is a Trust. The original Servicer can be replaced, and the entity replacing the Servicer varies from transaction to transaction. In certain cases, it may be the Trustee (or Indenture Trustee if the Issuer is not a Trust) or it may be a third party satisfactory to the Rating Agencies and/or credit support provider. In addition, there are transactions where the Trustee or Indenture Trustee will assume the Servicer's responsibilities on a temporary basis until the permanent replacement takes over. In all cases, the replacement entity must be capable of satisfying all of the duties and responsibilities of the original Servicer and must be an entity that is satisfactory to the Rating Agencies.

If, after the initial issuance of Securities, a Servicer of receivables held by an Issuer which has issued Securities in reliance upon the Underwriter Exemptions (or an Affiliate thereof) merges with or is acquired by (or acquires) the Trustee of such Trust (or an Affiliate thereof), and thereby becomes an Affiliate of the Trustee, the requirement that the Trustee not be an Affiliate of the Restricted Group (other than the Underwriter) will not be violated, provided that: (a) 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 (b) 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.

The Underwriter will be a U.S. registered broker-dealer that acts as Underwriter or placement agent with respect to the Sale of the Securities. Public offerings of Securities are generally made on a firm commitment basis. Private placements of Securities may be made on a firm commitment or agency basis. It is anticipated that the lead and co-managing Underwriters will make a market in Securities offered to the public.

In most cases, the originator and Servicer of receivables to be held in an Issuer and the Sponsor of the Issuer (although they may themselves be related) will be unrelated to Harris Nesbitt. In other cases, however, Affiliates of Harris Nesbitt may originate or service receivables held by an Issuer or may Sponsor a Trust.

Certificate Price, Interest Rate and Fees

17. In some cases, the Sponsor will obtain the receivables from various originators pursuant to existing contracts with such originators under which the Sponsor continually buys receivables. In other cases, the Sponsor will purchase the receivables at fair market value from the originator or a third party pursuant to a purchase and Sale agreement related to the specific offering of Securities. In other cases, the Sponsor will originate the receivables, itself.

As compensation for the receivables transferred to the Issuer, the Sponsor receives Securities representing the entire beneficial interest in the Issuer, or the cash proceeds of the sale of such Securities. If the Sponsor receives Securities from the Issuer, the Sponsor sells all or a portion of these Securities for cash to investors or securities underwriters.

18. The price of the Securities, both in the initial offering and in the secondary market, is affected by market forces, including investor demand, the specified interest rate on the Securities in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The interest rate for Securities is typically equal to the interest rate on receivables included in the Issuer minus a specified servicing fee.[19] This rate is

[18] See PTE 2002–41 (67 FR 54487, August 22, 2002), an amendment to the prior individual exemptions granted for mortgage-backed and other asset-backed securities (the Underwriter Exemptions), which permits the trustee of the trust to be an affiliate of the Underwriter of the certificates.

[19] The interest rate on Securities representing interests in Issuers holding leases is determined by breaking down lease payments into ''principal'' and ''interest'' components based on an implicit interest

generally determined by the same market forces that determine the price of a Security. The price of a Security and its interest, or coupon, rate together determine the yield to investors. If an investor purchases a Security at less than par, that discount augments the stated interest rate; conversely, a Security purchased at a premium yields less than the stated coupon.

19. As compensation for performing its servicing duties, the Servicer (who may also be the Sponsor or an Affiliate thereof, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables held by an Issuer and payments payable (at the interest rate) to Securityholders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support.

The Servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the Servicer and the time they are due to the Issuer (which time is set forth in the Pooling and Servicing Agreement). The Servicer typically will be required to pay the administrative expenses of servicing the Issuer, including in some cases the Trustee's fee, out of its servicing compensation.

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

The Servicer may be entitled to retain certain administrative fees paid by a third party, usually the Obligor. These administrative fees fall into three categories: (a) Prepayment fees; (b) late payment and payment extension fees; and (c) expenses, fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation. Compensation payable to the Servicer will be set forth or referred to in the Pooling and Servicing Agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the Securities.

21. Payments on receivables may be made by Obligors to the Servicer at various times during the period preceding any date on which pass-through payments to the Issuer are due. In some cases, the Pooling and Servicing Agreement may permit the Servicer to place these payments in non-interest bearing accounts maintained with itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the Servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the Servicer in the event of the Servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the Servicer's own funds, the Servicer is required to deposit these payments by a date specified in the Pooling and Servicing Agreement into an account from which the Issuer makes payments to Securityholders.

22. The Underwriter will receive a fee in connection with the Securities underwriting or private placement of Securities. In a firm commitment underwriting, this fee would consist of the difference between what the Underwriter receives for the Securities that it distributes and what it pays the Sponsor for those Securities. In a private placement, the fee normally takes the form of an agency commission paid by the Sponsor. In a best efforts underwriting in which the Underwriter would sell Securities in a public offering on an agency basis, the Underwriter would receive an agency commission rather than a fee based on the difference between the price at which the Securities are sold to the public and what it pays the Sponsor. In some private placements, the Underwriter may buy Securities as principal, in which case its compensation would be the difference between what it receives for the Securities that it sells and what it pays the Sponsor for these Securities.

Purchase of Receivables by the Servicer

23. As the principal amount of the receivables held in an Issuer is reduced by payments, the cost of administering the Issuer generally increases, making the servicing of the Issuer prohibitively expensive at some point. Consequently, the Pooling and Servicing Agreement generally provides that the Servicer may purchase the receivables remaining in the Issuer when the aggregate unpaid balance payable on the receivables is reduced to a specified percentage (usually 5 to 10 percent) of the initial aggregate unpaid balance. The purchase price of a receivable is specified in the Pooling and Servicing Agreement and generally will be at least equal to: (a) The unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the Servicer; or (b) the greater of (i) the amount in (a) or (ii) the fair market value of such obligations in the case of a REMIC, or the fair market value of the receivables in the case of an Issuer that is not a REMIC.

Securities Ratings

24. The Securities for which exemptive relief is requested will have received one of the three highest ratings (four, in the case of Designated Transactions) available from the Rating Agency. Insurance or other credit support (such as surety bonds, letters of credit, guarantees, or overcollateralization) will be obtained by the Sponsor to the extent necessary for Securities to attain the desired rating. The amount of this credit support is set by the Rating Agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the Issuer.

Subordination

25. The Applicant explains that the market has now evolved to the point where asset-backed securities/mortgage-backed securities (ABS/MBS) offerings typically include multiple tranches of senior and subordinated investment-grade securities.

The Applicant believes that Rating Agencies can rate subordinated classes of securities with a high level of expertise, thereby ensuring the safety of these investments for plans through the use of other credit support (including increased levels of non-investment-grade securities). The subordination of a Security, while factored into the evaluation made by the Rating Agencies in their assessment of credit risk, is not indicative of whether a Security is more or less safe for investors. In fact, there are ''AAA'' rated subordinated Securities.[20] Subordination is simply another form of credit support. The Rating Agencies, after determining the level of credit support required to achieve a given rating level, are essentially indifferent as to how these credit support requirements are implemented—whether through subordination or other means. If

rate. Securities issued by Issuers that are classified as REMICs for Federal income tax purposes may use different formulas for setting the specified interest rate with respect to Securities.

[20] For example, a transaction may have two classes of ''AAA'' rated Securities and one is subordinated to the other. The subordinated class would be required to have more credit support to qualify for the ''AAA'' rating than the more senior ''AAA'' rated class.

subordination is used, however, the subordinated class will have no greater credit risks or fewer legal protections in comparison with other credit-supported classes that possesses the same rating.

26. The Applicant represents that there is much benefit to plan investors in having subordinated Securities eligible for exemptive relief. First, credit support provided through third-party credit providers is more expensive than an equal amount of credit support provided through subordination. As a result, the ability to use subordinated tranches to provide credit support for the more senior classes (which may or may not themselves be subordinated) creates economic savings for all the parties to the transaction which, in turn, can allow greater returns to investors. In addition, if the credit rating of a third-party credit support provider is downgraded, the rating of the Securities is also downgraded. Second, the yields available on subordinated Securities are often higher than those paid on comparably rated non-subordinated Securities because investors expect to receive higher returns for subordinated Securities. Third, subordinated Securities are usually paid after other more senior Securities, which results in their having longer terms to maturity. This is appealing to many investors who are looking for medium-term fixed income investments to diversify their portfolios. The combination of these factors benefits investors by making available Securities which can provide higher yields for longer periods. It should be noted that as the rating of a Security generally addresses the probability of all interest being timely paid and all principal being paid by maturity under various stress scenarios, the Rating Agencies are particularly concerned with the ability of the pool to generate sufficient cash flow to pay all amounts due on subordinated tranches, and several features of the credit support mechanisms discussed below are designed to protect subordinated classes of Securities.

Provision and Types of Credit Support

27. Credit support consists of two general varieties: external credit support and internal credit support. The Applicant notes that the choice of the type of credit support depends on many factors. Internal credit support, which is generated by the operation of the Issuer, is preferred because it is less expensive than external credit support which must be purchased from outside third parties. In addition, there is a limited number of appropriately rated third-party credit support providers available. Further, certain types of credit support are not relevant to certain asset types. For example, there is generally little or no Excess Spread available in residential or CMBS transactions because the interest rates on the obligations being securitized are relatively low. Third, the Ratings Agencies may require certain types of credit support in a particular transaction. In this regard, the selection of the types and amounts of the various kinds of credit support for any given transaction are usually a product of negotiations between the Underwriter of the securities and the Ratings Agencies. For example, the Underwriter might propose using Excess Spread and subordination as the types of credit support for a particular transaction and the Rating Agency might require cash reserve accounts funded up front by the Sponsor, Excess Spread and a smaller sized subordinated tranche than that proposed by the Underwriter. In addition, market forces can affect the types of credit support. For example, there may not be a market for subordinated tranches because the transaction cannot generate sufficient cash flow to pay a high enough interest rate to compensate investors for the subordination feature, or the market may demand an insurance wrap on a class of securities before it will purchase certain classes of securities. All of these considerations interact to dictate which particular combination of credit support will be used in a particular transaction.

External Credit Support

28. The Applicant represents that in the case of external credit support, credit enhancement for principal and interest repayments is provided by a third party so that if required collections on the pooled receivables fall short due to greater than anticipated delinquencies or losses, the credit enhancement provider will pay the Securityholders the shortfall. Examples of such external credit support features include: Insurance policies from ''AAA'' rated monoline [21] insurance companies (referred to as ''wrapped'' transactions), corporate guarantees, letters of credit and cash collateral accounts. In the case of wrapped or other credit supported transactions, the Insurer or other credit provider will usually take a lead role in negotiating with the Sponsor concerning levels of overcollateralization and selection of receivables for inclusion into the pool as it is the Insurer or credit provider that will bear the ultimate risk of loss. As mentioned above, one disadvantage of insurance, corporate guarantees and letters of credit is that they are relatively expensive in comparison with other types of credit support. The Applicant also notes that, if the credit rating of the insurance company or other credit provider is downgraded, the rating of the Securities is correspondingly downgraded because the Rating Agencies will only rate the Securities as highly as the credit rating of the credit support provider. However, there are only a handful of ''AAA'' monoline insurance providers, and investors do not want to have too high a concentration of Securities which are backed by such insurers. There are also few providers of letters of credit or corporate guarantees that have sufficiently high long-term debt credit ratings. These disadvantages are some of the reasons why subordination is often used as an alternative form of credit support. Cash collateral accounts include reserve accounts which are funded, usually by the Sponsor, on the Closing Date and are available to cover principal and/or interest shortfalls as provided in the documents.

Internal Credit Support

29. The Applicant explains that internal credit support relies upon some combination of utilization of excess interest generated by the receivables, specified levels of overcollateralization and/or subordination of junior classes of Securities. Transactions that look almost exclusively to the underlying pooled assets for cash payments (or ''senior/subordinated'' transactions) will contain multiple classes of Securities, some of which bear losses prior to others and, therefore, support more senior Securities. A subordinate Security will absorb realized losses from the asset pool, and have its principal amount ''written down'' to zero, before any losses will be allocated to the more senior classes. In this way, the more senior classes will receive higher rating classifications than the more subordinate classes. However, the Rating Agencies require cash flow modeling of all senior/subordinated structures. These cash flows must be sufficient so that all rated classes, including the subordinated classes, will receive timely payment of interest and ultimate repayment of principal by the maturity date. The cash flow models are tested assuming a variety of stressed prepayment speeds, declining weighted average interest payments and loss assumptions. Other structural mechanisms to assure payment to subordinated classes are to allow collections held in the reserve account for the next payment date to be used if necessary to pay current interest to the

[21] The term ''monoline'' is used to describe such insurance companies because writing these types of insurance policies is their sole business activity.

subordinated class or to create a separate interest liquidity reserve. The collections held in the reserve account are from principal and interest paid on the underlying mortgages or other receivables held in the Issuer and are not from the Securities issued by the Issuer.[22] Also, some structures allow both principal and interest to be applied to all payments to Securityholders, and in others, principal can be used to pay interest to the subordinate tranches.

Interest which is received but is not required to make monthly payments to Securityholders (or to pay servicing or other administrative fees or expenses) can be used as credit support. This excess interest is known as ''Excess Spread'' or ''excess servicing'' and may be paid out to holders of certain Securities, returned to the Sponsor or used to build up overcollateralization or a loss reserve. The credit given to Excess Spread is conservatively evaluated to ensure sufficient cash flow at any one point in time to cover losses. The Rating Agencies reduce the credit given to Excess Spread as credit support to take into account the risk of higher coupon loans prepaying first, higher than expected total prepayments, timing mismatching of losses with Excess Spread collections and the amounts allowed to be returned to the Sponsor once minimum overcollateralization targets are met (thereby reducing the amounts available for credit support).

''Overcollateralization'' is the difference between the outstanding principal balance of the pool of assets and the outstanding principal balance of the Securities backed by such pool of assets. This results in a larger principal balance of underlying assets than the amount needed to make all required payments of principal to investors. In all senior/subordinated transactions, the requisite level of overcollateralization and the amount of principal that may be paid to holders of the more subordinated Securities before the more senior Securities are retired (since once such amounts are paid, they are unavailable to absorb future losses) is determined by the Rating Agencies and varies from transaction to transaction, depending on the type of assets, quality of the assets, the term of the Securities and other factors.

The senior/subordinated structure often combines the use of subordinated tranches with overcollateralization that builds over time from the application of excess interest to pay principal on more senior classes. This is often referred to as a ''turbo'' structure. The credit enhancement for each more senior class is provided by the aggregate dollar amount of the respective subordinated classes, plus overcollateralization that results from the payment of principal to the more senior classes using Excess Spread prior to payment of any principal to the more subordinated classes. As overcollateralization grows, the pool of loans can withstand a larger dollar amount of losses without resulting in losses on the senior Securities. This also has the effect of increasing the amount of funds available to pay the more subordinated classes as an ever-decreasing portion of the principal cash flow is needed to pay the more senior classes. Excess interest is used to pay down the more senior Securities balances until a specific dollar amount of overcollateralization is achieved. This is referred to as the overcollateralization target amount required by the Rating Agencies. Typically, the targeted amount is set to ensure that even in a worst-case loss scenario commensurate with the assigned rating level, all Securityholders, including holders of subordinated classes, will receive timely payment of interest and ultimate payment of principal by the applicable maturity date. In these transactions, the targeted amount is usually set as a percentage of the original pool balance. It may be reduced after a fixed number of years after the Closing Date, subject to the satisfaction of certain loss and delinquency triggers. These triggers ensure that overcollateralization continues to be available if pool performance begins to deteriorate. In a senior/subordinated structure, every investment-grade class (whether or not subordinated) is protected by either a lower rated subordinated class or classes or other credit support.

Provision of Credit Support Through Servicer Advancing

30. In some cases, the Master Servicer, or an Affiliate of the Master Servicer, may provide credit support to the Issuer. In these cases, the Master Servicer, in its capacity as Servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (a) out of late payments by the Obligors, (b) from the credit support provider (which may be the Master Servicer or an Affiliate thereof) or (c) in the case of an Issuer that issues subordinated Securities, from amounts otherwise distributable to holders of subordinated Securities; and the Master Servicer will advance such funds in a timely manner. When the Servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the Trustee, or on its own initiative on behalf of the Trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism. In some cases, however, the Master Servicer may not be obligated to advance funds but instead would be called upon to provide funds to cover defaulted payments to the full extent of its obligations as Insurer. Moreover, a Master Servicer typically can recover advances either from the provider of credit support or from future payments on the affected assets. If the Master Servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover delinquent payments, or otherwise fails in its duties, the Trustee would be required and would be able to enforce the Securityholders' rights, as both a party to the Pooling and Servicing Agreement and the owner of the Trust estate where the Issuer is a Trust (or as holder of the Security interest in the receivables), including rights under the credit support mechanism. Therefore, the Trustee, who is independent of the Servicer, will have the ultimate right to enforce the credit support arrangement.

When a Master Servicer advances funds, the amount so advanced is recoverable by the Master Servicer out of future payments on receivables held by the Issuer to the extent not covered by credit support. However, where the Master Servicer provides credit support to the Issuer, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations held by the Issuer as

[22] A collections reserve account is established for almost all transactions to hold interest and principal payments on the mortgages or receivables as they are collected until the necessary amounts are paid to Securityholders on the next periodic distribution date. In some transactions, the Rating Agencies or other interested parties may require, in order to protect the interests of the Securityholders, that excess interest in amount(s) equal to a specified number of future period anticipated collections be retained in the collection account. This protects both senior and subordinated Securityholders in situations where there are shortfalls in collections on the underlying obligations because it provides an additional source of funds from which these Securityholders can be paid their current distributions before the holders of the residual or more subordinated Securities receive their periodic distributions, if any. Accordingly, any reference to ''collections'' from principal and interest paid on the mortgages is intended to describe such excess interest or principal not required to cover current payments to the senior and subordinated class eligible to be purchased by plans. Thus, this mechanism is not harmful to the interests of senior Securityholders.

payments on receivables are passed through to investors.[23]

Description of Designated Transactions

31. The Applicant requests relief for senior and/or subordinated investment-grade Securities with respect to a limited number of asset categories: Motor vehicles, residential/home equity, manufactured housing and commercial mortgage backed Securities. Accordingly, set forth below are separate profiles of a typical transaction for each asset category. Each profile describes specifically how each type of transaction generally is structured. Information on the due diligence that the Rating Agencies conduct before assigning a rating to a particular class of such securities, the calculations that are performed to determine projected cash flows, loss frequency and loss severity and the manner in which credit support requirements are determined for each rating class is not included because such information has been provided previously to the Department in connection with PTE 2000–58. The motor vehicle, residential/home equity, manufactured housing and commercial mortgage backed transactions, as described in this section, are collectively referred to herein as ''Designated Transactions.''

(a) Motor Vehicle Loan Transactions

In a typical motor vehicle transaction, ''AAA'' rated senior Securities are issued that might represent approximately 90% or more of the principal balances of the Securities, with ''A'' rated subordinated Securities issued that might represent the remaining 10% or less of the principal balance of the Securities. The total level of credit enhancement from all sources, including Excess Spread, typically averages approximately 7% of the initial principal balance of Securities issued by prime issuers and 14% for subprime Issuers in order to obtain an ''AAA'' rated Securities. Credit support equaling 3% for prime issuers is usually required in order to obtain an ''A'' or better rating on the subordinated Securities. Typical types of credit support used in auto transactions are subordination, reserve accounts, Excess Spread and financial guarantees from ''AAA'' rated monoline insurance companies. Transactions with subprime Sponsors generally use surety bonds as credit enhancement, so there is no subordinated class.

[23] See PTE 2000–58, an amendment to PTE 97–34 Morgan Stanley & Co., for a discussion on the credit support safeguards.

(b) Residential/Home Equity Mortgage Transactions

In a typical prime residential mortgage transaction, ''AAA'' rated senior Securities might be issued which represent approximately 95% of the principal balances of the Securities; ''AA'' rated subordinated Securities might comprise 2%; ''A'' rated subordinated 1%; ''BBB'' rated subordinated 1% and junior subordinated Securities might constitute 1%. The total level of credit enhancement from all sources averages about 4% in order to obtain ''AAA'' rated Securities, 2% for an ''AA'' rating, 1.5% for an ''A'' rating and 1% for a ''BBB'' rating. Subordination is the predominant type of credit support used in traditional prime residential mortgage transactions.

In a typical ''B&C home/equity loan'' transaction (loans made primarily to B and C quality borrowers for consolidating credit card and other consumer debt or refinancing mortgage loans), ''AAA'' rated senior Securities might be issued which represent 80% of the principal balances of the Securities; ''AA'' rated subordinated Securities might comprise 11%; ''A'' rated subordinated 6%; ''BBB'' or lower rated subordinated Securities might constitute 3%. The total level of credit enhancement from all sources averages about 13% in order to obtain ''AAA'' rated Securities, 10% for an ''AA'' rating, 7% for an ''A'' rating and 3% for a ''BBB'' rating.

In a typical high LTV ratio (i.e., above 100%) second-lien loan transaction, ''AAA'' rated senior Securities might be issued which represent approximately 76% of the principal balances of the Securities; ''AA'' rated subordinated Securities might comprise 10%; ''A'' rated subordinated 3%; ''BBB'' rated subordinated 4% and junior subordinated Securities might constitute 7%. The total level of credit enhancement from all sources averages about 24% in order to obtain ''AAA'' rated Securities, 14% for an ''AA'' rating, 10% for an ''A'' rating and 7% for a ''BBB'' rating.

Typical types of credit support used in home equity transactions are subordination, reserve accounts, Excess Spread, overcollateralization and in transactions which do not use subordination, financial guarantees from ''AAA'' rated monoline insurance companies or highly rated Sponsors.

(c) Manufactured Housing Transactions

In a typical manufactured housing transaction, ''AAA'' rated senior Securities might be issued which represent approximately 80% of the principal balances of the Securities; ''AA'' rated subordinated Securities might comprise 6%; ''A'' rated subordinated 5%; ''BBB'' rated subordinated 5% and junior subordinated Securities might constitute 4%. The total level of credit enhancement from all sources including Excess Spread averages about 15%–16% in order to obtain ''AAA'' rated Securities, 10%–11% for an ''AA'' rating, 7.5%–8.5% for an ''A'' rating and 3.5%–9% for a ''BBB'' rating. Typical types of credit support used in manufactured housing transactions are subordination, reserve accounts, Excess Spread, overcollateralization and financial guarantees from ''AAA'' rated monoline insurance companies or highly rated sponsors.

Overcollateralization is also used as credit support for the subordinated Securities once the seniors have been paid. Because the coupon rate on manufactured housing loans is substantially higher than that charged on traditional residential mortgages, there is a large amount of Excess Spread (typically more than 300 bps) that can be used for credit support of both senior and subordinated tranches. In other structures, the Excess Spread is trapped into a reserve fund which provides the credit support for the subordinated tranches. In still other cases, credit support is provided to an investment-grade subordinated tranche through a junior subordinated tranche which receives principal only after the more senior subordinated tranches are paid. Sponsor guarantees are also used as credit support.

(d) Commercial Mortgage-Backed Securities (CMBS)

In a typical CMBS transaction, two classes of ''AAA'' rated Securities might be issued which represent approximately 78% of the principal balances of the Securities (one such ''AAA'' class will be issued with a shorter, and the other ''AAA'' class with a longer, expected maturity); ''AA'' rated subordinated Securities might represent 5%; ''A'' rated subordinated 5%; ''BBB'' rated subordinated 5% and junior subordinated Securities 7%. The total level of credit enhancement from all sources averages about 23% in order to obtain ''AAA'' rated Se, 18% for an ''AA'' rating, 13% for an ''A'' rating and 7% for a ''BBB'' rating. Subordination is generally the only type of credit support used in CMBS transactions.

The Servicer function in a CMBS transaction is particularly important because not only does the Servicer or Servicers fulfill the normal functions of collecting and remitting loan payments from borrowers to Securityholders and advancing funds for such purposes, but the Servicer may also become responsible for activities relating to defaulted or potentially defaulting loans (which are more likely to be restructured than in non-commercial transactions where the loans are usually liquidated). If a Servicer advances funds, its credit rating cannot be more than one rating category below the highest rated tranche in the securitization and no less than ''BBB'' unless it has a qualifying back-up advancer. All entities servicing CMBS transactions must be approved by the Rating Agencies.

An additional responsibility of the Servicer is ensuring that insurance is maintained by each borrower covering each mortgaged property in accordance with the applicable mortgage documents. Insurance coverage typically includes, at a minimum, fire and casualty, general liability and rental interruption insurance but may include flood and earthquake coverage depending on the location of a particular mortgaged property. If a borrower fails to maintain the required insurance coverage or the mortgaged property defaults and becomes an asset of the trust, the Servicer is obligated to obtain insurance which, in pool transactions, may be provided by a blanket policy covering all pool properties. Generally, the blanket policy must be provided by an insurance provider with a rating of at least ''BBB.''

Each Servicer, special Servicer and Subservicer is required to maintain a fidelity bond and a policy of insurance covering loss occasioned by the errors and omissions of its officers and employees in connection with its servicing obligations unless the Rating Agency allows self-insurance. All fidelity bonds and policies of errors and omissions insurance must be issued in favor of the Trustee or other Issuer by insurance carriers which are rated by the Rating Agency with a claims-paying ability rating no lower than two categories below the highest rated Securities in the transaction but no less than ''BBB.'' Subservicers may not make important servicing decisions (such as modifications of the mortgage loans or the decision to foreclose) without the involvement of the Master Servicer or special Servicer, and the Trustee or any successor Servicer may be permitted to terminate the subservicing agreement without cause and without cost or further obligation to the Issuer or the holders of the rated Securities.

Loans secured by credit tenant leases require special analysis. Credit enhancement for credit tenant loans is based on an analysis of the probability that the lessee will file bankruptcy, and the likelihood that the lessee will disaffirm the lease and loan structures that may present a risk other than that of the lessee filing bankruptcy.

Environmental reports for each property are generally required. A reserve is usually required for any reported remediation costs, and any actions covenanted must be completed within a specified period. Risks that cannot be quantified or that have not been mitigated through either remediation or reserves are assumed to pose a risk to the Trust and are reflected in the credit enhancement requirements. Properties with certain types of asbestos problems, or those that are assumed to have such problems given their date of construction, are assumed to have higher losses due to the clean-up costs and increased difficulty or cost in leasing or selling the asset. Seasoned or acquired pools that may not have current reports for each property are also assumed to have higher environmental losses.

In general, although there are other types of credit support available, subordination is the only type of credit support used in CMBS. However, protection is also provided to subordinated classes through the concept of a ''directing class'' which has evolved to give those holders of rated subordinated Securities in the first loss position some control over the servicing and realization on defaulted mortgage loans. In a typical transaction, the Servicer might be required to obtain the consent of the directing class before proceeding with any of the following: Any modification, consent or forgiveness of principal or interest with respect to a defaulted mortgage loan; any proposed foreclosure or acquisition of a mortgaged property by deed-in-lieu of foreclosure; any proposed sale of a defaulted mortgage loan and any decision to conduct environmental clean up or remediation. The directing class might also have the right to remove a Servicer, with or without cause, subject to the Rating Agency's confirmation that appointment of the successor Servicer would not result in a qualification, withdrawal or downgrade of the then-applicable rating assigned to the rated Securities, compliance with the terms and conditions of the Pooling and Servicing Agreement and payment by the directing class of any and all termination or other fees relating to such removal. Holders of CMBS enjoy additional protection, in that the Master Servicer or Servicer occupies a first-loss position and usually holds an equity stake in the offering, which gives it an incentive to maximize recoveries on defaulted loans. The Master Servicer and Servicer are in a first loss position because they hold the most subordinated equity position interest(s) in the Trust. Accordingly, they absorb losses before any other classes of Securityholders.

Additional cash flow stability is created through call protection features on the commercial mortgages held in the Issuer. Call protection prevents the borrowers from prepaying the mortgage loans during a fixed ''lock-out period.'' In certain transactions, under the terms of the mortgage agreement, the borrower is only allowed to prepay the loan at the end of the lock-out period if it provides ''yield maintenance'' [24] whereby it is required to contribute a cash payment derived from a formula which is calculated based on current interest rates and is intended to offset the borrower's refinancing incentive. This amount also effectively compensates the Issuer for the loss of interest payable on the mortgage loan.

Another mechanism, referred to as ''defeasance'', assures stability of cash flow and operates as follows. If a borrower wishes to have the mortgage lien released on the property (for example, where it is being sold), the original obligation either remains an asset of the Issuer and is assumed by a third party, or a new obligation with the same outstanding principal balance, interest rate, periodic payment dates, maturity date and default provisions is entered into with such third party. The new obligation replicates the cash flows over the remaining term of the original Obligor's obligation. In either case, the property or assets originally collateralizing the obligation are replaced by collateral consisting of United States Treasury securities or any other security guaranteed as to principal and interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States (referred to herein as ''Government Securities''). Defeasance generally operates so that, pursuant to an assumption and release or similar arrangement valid under applicable state law, the original Obligor is replaced with a new Obligor.

The new Obligor is generally a bankruptcy-remote special purpose entity (SPE), the assets of which consist of Government Securities. In the

[24] The Applicant represents that the yield maintenance provision in the mortgage agreement would meet the definition of a ''Yield Supplement Agreement'' currently permitted under section III.B.(3)(b) of the Underwriter Exemptions.

defeasance of a mortgage loan held in a CMBS pool, a new entity must be created (the SPE) which becomes the Obligor on the mortgage loan and holds the Government Securities being substituted for the original collateral securing the mortgage loan. This newly formed entity is required by the Rating Agencies to be an SPE in order to assure that the owner of the securities to be pledged has no liabilities or creditors other than the CMBS pool Trustee, has no assets or business other than the ownership of the Government Securities and is not susceptible to substantive consolidation with the original mortgage borrower in the event of the original mortgage borrower's bankruptcy. Such an SPE is purely passive and does not engage in any activities other than the ownership of securities. Although there is no prescribed market requirement as to ownership of the SPE, the securitization sponsor (e.g., the original mortgage lender) is usually its owner, except that in certain circumstances the original mortgage borrower may own the SPE for a variety of reasons; e.g., to be entitled to any excess value of securities pledged as collateral at maturity of the new defeasance note over the amount due at such time. As a condition to defeasance, all fees and expenses are paid at the substitution of the government securities for the mortgage lien. Mechanically, the Government Securities are transferred to a custodian, which holds then as collateral for the securitization trust. The payments on the Government Securities are actually made directly to the Issuers so that the SPE does not receive any payments or make any payments.

Whether the original mortgage obligation is replaced with a new securitized obligation or the original obligation remains an asset of the Issuer, is usually dictated by how the transaction is treated for mortgage recording tax purposes under state law. Both call protection and defeasance are intended to protect investors from the risk of prepayments of the loans.

Disclosure

32. In connection with the original issuance of Securities, the prospectus or private placement memorandum will be furnished to investing plans. The prospectus or private placement memorandum will contain information material to a fiduciary's decision to invest in the Securities, including:

(a) Information concerning the payment terms of the Securities, the rating of the Securities, any material risk factors with respect to the Securities and the fact that principal amounts left in the Pre-Funding Account at the end of the Pre-Funding Period will be paid to Securityholders as a repayment of principal;

(b) A description of the Issuer as a legal entity and a description of how the Issuer was formed by the seller/Servicer or other Sponsor of the transaction;

(c) Identification of the Independent Trustee;

(d) A description of the receivables contained in the Issuer, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects and a description of any Pre-Funding Account used or Capitalized Interest Account used in connection with a Pre-Funding Account;

(e) A description of the Sponsor and Servicer;

(f) A description of the Pooling and Servicing Agreement, including a description of the Sponsor's principal representations and warranties as to the Issuer's assets, including the terms and conditions for eligibility of any receivables transferred during the Pre-Funding Period, and the Trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; a description of permitted investments for any Pre-Funding Account or Capitalized Interest Account; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the Trustee, and provided to or made available to investors by the Trustee; and a description of the events that constitute events of default under the Pooling and Servicing Agreement and a description of the Trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the Securities by a typical investor;

(i) A description of the Underwriters' plan for distributing the Securities to investors;

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

(k) A statement as to the duration of any Pre-Funding Period and the Pre-Funding Limit for the Trust.

Reports indicating the amount of payments of principal and interest are provided to Securityholders at least as frequently as distributions are made to Securityholders. Securityholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

In the case of an Issuer that offers and sells Securities in a registered public offering, the Issuer, the Servicer or the Sponsor will file periodic reports in the form and to the extent required under the Securities Exchange Act of 1934 and current interpretations thereof.

At or about the time distributions are made to Securityholders, a report will be delivered to the Trustee as to the status of the Issuer and its assets, including underlying obligations. Such report will typically contain information regarding the Issuer's assets (including those purchased by the Trust from any Pre-Funding Account), payments received or collected by the Servicer, the amount of prepayments, delinquencies, Servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the Servicer. Such report also will be delivered to or made available to the Rating Agency or agencies that have rated the Securities.

In addition, promptly after each distribution date, Securityholders will receive a statement prepared by the Servicer, paying agent or Trustee summarizing information regarding the Issuer and its assets. Such statement will include information regarding the Issuer and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

Forward Delivery Commitments

33. To date, no Forward Delivery Commitments have been entered into by Harris Nesbitt in connection with the offering of any Securities, but Harris Nesbitt may contemplate entering into such commitments. The utility of Forward Delivery Commitments has been recognized with respect to offering similar Securities backed by pools of residential mortgages, and Harris Nesbitt may find it desirable in the future to enter into such commitments for the purchase of Securities.

Secondary Market Transactions

34. It is Harris Nesbitt's normal policy to attempt to make a market for

Securities for which it is lead or co-managing Underwriter, and it is Harris Nesbitt's intention to make a market for any Security for which Harris Nesbitt is a lead or co-managing Underwriter, although it will have no obligation to do so. At times Harris Nesbitt will facilitate Sales by investors who purchase Securities if Harris Nesbitt has acted as agent or principal in the original private placement of the Securities and if such investors request Harris Nesbitt's assistance.

Retroactive Relief

35. Harris Nesbitt represents that it has not assumed that retroactive relief would be granted prior to the date of its application, and therefore has not engaged in transactions related to mortgage-backed and asset-backed securities based on such an assumption. Nevertheless, Harris Nesbitt requests that any exemptive relief granted be retroactive to the date of its application.

Summary

36. In summary, Harris Nesbitt represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The Issuers contain ''fixed pools'' of assets. There is little discretion on the part of the Sponsor to substitute receivables contained in the Issuer once the Issuer has been formed;

(b) In the case where a Pre-Funding Account is used, the characteristics of the receivables to be transferred to the Issuer during the Pre-Funding Period must be substantially similar to the characteristics of those transferred to the Issuer on the Closing Date thereby giving the Sponsor and/or originator little discretion over the selection process, and compliance with this requirement will be assured by the specificity of the characteristics and the monitoring mechanisms contemplated under the exemptive relief proposed. In addition, certain cash accounts will be established to support the Security interest rate and such cash accounts will be invested in short-term, conservative investments; the Pre-Funding Period will be of a reasonably short duration; a Pre-Funding Limit will be imposed; and any Internal Revenue Service requirements with respect to pre-funding intended to preserve the passive income character of the Issuer will be met. The fiduciary of the plans making the decision to invest in Securities is thus full apprised of the nature of the receivables which will be held in the Issuer and has sufficient information to make a prudent investment decision;

(c) Securities for which exemptive relief is requested will have been rated in one of the three highest rating categories (or four in the case of Designated Transactions) by a Rating Agency. The Rating Agency, in assigning a rating to such Security, will take into account the fact that Issuers may hold interest rate swaps or yield supplement agreements with notional principal amounts or, in Designated Transactions, Securities may be issued by Issuers holding residential and home equity loans with LTV ratios in excess of 100%. Credit support will be obtained to the extent necessary to attain the desired rating;

(d) Securities will be issued by Issuers whose assets will be protected from the claims of the Sponsor's creditors in the event of bankruptcy or other insolvency of the Sponsor, and both equity and debt Securityholders will have a beneficial or Security interest in the receivables held by the Issuer. In addition, an independent Trustee will represent the Securityholders' interests in dealing with other parties to the transaction;

(e) All transactions for which Harris Nesbitt seeks exemptive relief will be governed by the Pooling and Servicing Agreement, which is summarized in the prospectus or private placement memorandum and distributed to plan fiduciaries for their review prior to the plan's investment in Securities; exemptive relief from sections 406(b) and 407 for Sales to plans is substantially limited; and

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

FOR FURTHER INFORMATION CONTACT: Ms. Silvia Quezada of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

Fortunoff Fine Jewelry and Silverware, Inc. Cash Balance Pension Plan (the FFJS Cash Balance Plan), M. Fortunoff of Westbury Corp. Cash Balance Pension Plan (the MFW Cash Balance Plan), and Fortunoff Fine Jewelry and Silverware, Inc. Profit Sharing Plan (the FFJS Profit Sharing Plan, Collectively, the Plans) Located in Westbury, NY

[Application Nos. D–11307, D–11308 and D–11309, respectively]

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 (or ERISA) 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).[25] 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(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply (1) effective November 26, 2003 until February 28, 2005, to the leasing of certain improved real property (the Property) by the Plans directly and then through One MH Plaza Realty LLC (the Plans' LLC), a special purpose entity designed to hold the Plans' interests in the Property, to Fortunoff Fine Jewelry and Silverware, Inc. (FFJS) under the provisions of a written lease (the Interim Lease); and (2) effective March 1, 2005 through August 31, 2006, the 18 month extension of the Interim Lease (the Interim Lease Extension) between the Plans[26] through the Plans' LLC and FFJS and its successors in interest, Fortunoff Fine Jewelry and Silverware, LLC (FFJS LLC) and M. Fortunoff of Westbury, LLC (MFW LLC), provided that the following conditions are satisfied:

(a) Since November 26, 2003, the Plans have been and continue to be represented for all purposes under the Interim Lease, by Independent Fiduciary Services (IFS), a qualified, independent fiduciary, which also represents the interests of the Plans under the Interim Lease Extension.

(b) IFS has (1) reviewed and approved the continued adherence by the Plans and the Plans' LLC with the terms and conditions of the Interim Lease under the facts and circumstances in existence on and after November 26, 2003; (2) negotiated, reviewed, and expressly approved the terms and conditions of the Interim Lease Extension on behalf of the Plans; and (3) determined that the leasing of the Property since November 26, 2003 pursuant to the Interim Lease and, since March 1, 2005, pursuant to the Interim Lease Extension, (i) complies with the relevant provisions of Prohibited Transaction Exemption (PTE) 93–8 (58 FR 7258, February 5, 1993), as amended by PTE 98–22 (63 FR 27329, May 18, 1998), (except as modified by this proposed exemption); (ii) continues to be an appropriate investment for the

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

[26] As of January 1, 2006, all references to the Plans shall mean the Fortunoff, the Source, Cash Balance Plan (the Merged Cash Balance Plan), which resulted from the merger of the FFJS Cash Balance Plan and the MFW Cash Balance Plan, and the FFJS Profit Sharing Plan.

Plans on and after November 26, 2003, consistent with each Plan's investment policies and liquidity needs; and, (iii) is in the best interests of each Plan and its respective participants and beneficiaries on and after November 26, 2003.

(c) The rent paid to the Plans under the Interim Lease and the Interim Lease Extension is no less than the fair market rental value of the Property, as established by a qualified, independent appraiser. Effective March 1, 2006, the rent is adjusted to the greater of the current annualized rental of $656,400 or the then-current, fair market rental value, as determined by IFS on the basis of an appraisal conducted by the independent appraiser selected by IFS.

(d) The base rent has been adjusted or is adjusted annually by IFS based upon an independent appraisal of the Property.

(e) Under both the Interim Lease and the Interim Lease Extension, FFJS pays for property and liability insurance on the Property, property taxes, utility costs, other costs for maintaining the Property including environmental assessments, engineering inspection reports, as well as all other expenses that are incident to such agreements.

(f) IFS has monitored, and continues to monitor, compliance with the terms of the Interim Lease since November 26, 2003 and the terms of the Interim Lease Extension throughout the duration of these agreements.

(g) IFS is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of FFJS and its successors in interest, FFJS LLC and MFW LLC, under the terms of such agreements.

(h) IFS makes determinations, on behalf of the Plans, with respect to any sale or future leasing of the Property.

(i) IFS has determined that (1) the leasing of the Property pursuant to the Interim Lease on and after November 26, 2003 was no less favorable to the Plans than similar leasing arrangements between unrelated parties; (2) the then-prevailing rent received by the Plans was no less favorable to the Plans than the rent the Plans would have received under similar circumstances if the rent had been negotiated at arm's length with unrelated third parties and (3) the terms and conditions of the Interim Lease Extension were no less favorable to the Plans than those obtainable by the Plans under similar circumstances when negotiated at arm's length with unrelated third parties.

(j) With respect to the Interim Lease Extension, FFJS (1) has made a two-month security deposit pursuant to the agreement; and (2) is required to pay an additional four-month security deposit (Additional Deposit) after the expiration of the first 12 months of the Interim Lease Extension, calculated at the rental amount to be effective March 1, 2006.

(k) Over the last six months of the Interim Lease Extension, one-sixth of the Additional Deposit is applied to the rent each month, so long as there is no uncured default.

Effective Date: If granted, this proposed exemption will be effective November 26, 2003 until February 28, 2005 with respect to the Interim Lease and from March 1, 2005 until August 31, 2006 with respect to the Interim Lease Extension.

Summary of Facts and Representations

The Plans

1. The FFJS Cash Balance Plan was established in September 1976 as a trusteed defined benefit plan for eligible employees of FFJS and its affiliates.[27] Employees who were at least 21 years of age and who had completed one year of service (1,000 hours) were eligible to participate in the FFJS Cash Balance Plan on the January 1 or July 1 coincident with or next following completion of such eligibility requirements.

As of January 1, 2005, there were 880 active participants, 316 vested terminees, and 318 retirees receiving benefits under the FFJS Cash Balance Plan. The assets of the FFJS Cash Balance Plan were held by Wachovia Bank, as custodian. As of December 31, 2005, the total assets of the FFJS Cash Balance Plan were $22,753,815.

The trustees (the Trustees) of the FFJS Cash Balance Plan were Andrea Fortunoff, David Fortunoff, Esther Fortunoff, Louis Fortunoff, Ruth Fortunoff, Helene Fortunoff and Leonard Tabs. With the exception of Leonard Tabs, each of the Trustees of the FFJS Cash Balance Plan had an ownership interest in FFJS.

The FFJS Cash Balance Plan administrator was FFJS. PriceWaterhouseCoopers (PWC) acted as investment adviser to the Trustees with respect to investments other than the Property.

2. The MFW Cash Balance Plan was established in September 1976 as a trusteed defined benefit plan for eligible employees of MFW and its affiliates.[28] Employees who were at least 21 years of age and who had completed one year of service (1,000 hours) were eligible to participate in the MFW Cash Balance Plan on the January 1 or July 1 coincident with or next following the completion of such eligibility requirements.

As of January 1, 2005, there were 1,319 active participants, 363 vested terminees and 40 retirees receiving benefits under the MFW Cash Balance Plan. The assets of the MFW Cash Balance Plan were held by M&T Trust Co. (M&T Trust), as custodian. As of December 31, 2005, the total assets of the MFW Cash Balance Plan were $17,626,550.

The Trustees of the MFW Cash Balance Plan were Isidore Mayrock, Elliot Mayrock, Rachel Sands, Martin Merkur and Leonard Tabs. Each of the Trustees of the MFW Cash Balance Plan, other than Leonard Tabs and Martin Merkur, had an ownership interest in MFW.

The MFW Cash Balance Plan administrator was MFW. PWC acted as investment adviser to the Trustees with respect to investments other than the Property.

3. The FFJS Profit Sharing Plan was established in 1976 as a trusteed defined contribution plan for eligible employees of FFJS and its affiliates.[29] As with the FFJS Cash Balance Plan and the MFW Cash Balance Plan, an employee's attainment of the eligibility requirements are also age 21 and completion of one year of service (1,000 hours). Employees completing such requirements may begin to participate in the FFJS Profit Sharing Plan on the January 1 or July 1 coinciding with or next following the completion of such eligibility requirements.

As of January 31, 2005, there were 646 active participants, approximately 183 vested terminees and approximately 13 retirees receiving benefits under the FFJS Profit Sharing Plan. The assets of the FFJS Profit Sharing Plan are held by Fleet Bank, as custodian, and are managed by Deutsche Bank Private Wealth Management. As of January 31, 2005, the total assets of the FFJS Profit Sharing Plan were $5,010,813.

The Trustees of the FFJS Profit Sharing Plan are Andrea Fortunoff, David Fortunoff, Helene Fortunoff, Esther Fortunoff, Louis Fortunoff, Ruth Fortunoff and Leonard Tabs. With the exception of Leonard Tabs, each of the Trustees currently has an ownership interest in FFJS. The FFJS Profit Sharing Plan administrator is FFJS.

4. The Merged Cash Balance Plan is a defined benefit retirement plan

[27] At present, participating affiliates are Fortunoff Information Services and Fortunoff Shopping Center, Inc.

[28] At present, participating affiliates are Woodbridge Service Company, MFW & Fortunoff Silver of New Jersey and White Plains Service Co.

[29] At present, participating affiliates are Fortunoff Shopping Center, Inc. and Fortunoff Information Services.

resulting from the merger of the FFJS Cash Balance Plan with and into the MFW Cash Balance Plan, effective January 1, 2006. The Merged Cash Balance Plan has been established for eligible employees of Source Financing Corp. (Source Financing), FFJS LLC, MFW LLC and any participating affiliates. Employees who participated in either of the prior cash balance plans and continue to be employed by the prior plan sponsor entities or their affiliates are eligible for continued participation in the Merged Cash Balance Plan. Employees who are at least 21 years of age and who complete one year of service (1,000 hours) are eligible to participate in the Merged Cash Balance Plan on the January 1 or July 1 coincident with or next following completion of such eligibility requirements.

As of January 1, 2005, there were a combined total of 2,199 active participants, 679 vested terminees, and 356 retirees and beneficiaries receiving benefits under the FFJS Cash Balance Plan and the MFW Cash Balance Plan. Although participant census data is not yet available for the plan year ending December 31, 2005, it is anticipated that there should be no significant changes in participant information as compared to the prior plan year.

The assets of the Merged Cash Balance Plan are held by M&T Trust as custodian and directed Trustee. PWC acts as investment adviser with respect to investments other than the Property described herein. As of December 31, 2005, the total combined assets of the two prior cash balance plans were $40,380,365.

In addition to M&T Trust acting as the directed trustee, the individual Trustees of the Merged Cash Balance Plan are Leonard Tabs, Patrick Shanley and Robert Fioretti. The Trustees of the Merged Cash Balance Plan do not have an ownership interest in Source Financing or any of its affiliates. The Plan administrator of the Merged Cash Balance Plan is Source Financing's compensation committee.

Sponsors of the Plans

5. FFJS, the sponsor of the former FFJS Cash Balance Plan and the FFJS Profit Sharing Plan, is engaged in the retail business of selling fine jewelry, high quality silverware, china, glass and crystal items. FFJS is located in Westbury, New York.

MFW, the sponsor of the former MFW Cash Balance Plan, is engaged in the business of selling rugs, furniture, lamps, linens, draperies, hardware, kitchenware and other similar household items. MFW is also located in Westbury, New York.[30]

Source Financing, the sponsor of the Merged Cash Balance Plan, is engaged in the business of selling fine jewelry, high quality silverware, china, glass, crystal items, rugs, furniture, lamps, linens, draperies, hardware, kitchenware and other similar household items, in its role as the sole managing member of FFJS LLC and MFW LLC. Source Financing and the two LLC entities are located in Westbury, New York.

The Property

6. The Property is a 4.6 acre parcel located at 1 MH Plaza, Axinn Avenue, Garden City, New York. The Property is improved with a 100,991 square foot building that is used as a warehouse facility and also contains a parking area. The Property was originally acquired by MFW in May 1977 from Ciara Investors, an unrelated party, and then acquired by the Plans from MFW, a party in interest to the Plans, in 1993. The FFJS Cash Balance Plan, the MFW Cash Balance Plan and the FFJS Profit Sharing Plan originally acquired 40%, 40% and 20% ownership interests in the Property, respectively. FFJS was the original tenant of the Property. The Property is not encumbered by a mortgage.

Currently, the Plans hold fee simple title to the Property through the Plans' LLC, a special purpose entity designed to hold the Plans' interests in the Property and to protect the Plans from liability. Title to the Property was transferred from the Plans to the Plans' LLC on May 18, 2005.

The Plans' LLC was established on April 5, 2005 by IFS, the independent fiduciary. The Plans are the sole members of the Plans' LLC and therefore are its sole owners holding membership interests in the Property. IFS is the non-member Manager of the Plans' LLC with sole authority to run it pursuant to such LLC's Operating Agreement.

The Prior Exemptions

7. On February 5, 1993, the Department granted PTE 93–8 at 58 FR 7258. PTE 93–8 permitted the Plans to purchase undivided interests in the Property, for the total cash consideration of $6 million, from MFW. In addition, PTE 93–8 allowed the Plans to commence leasing the Property to FFJS, under the provisions of an amended lease (the Amended Lease). Further, PTE 93–8 permitted the use of space in the Property by Fortunoff Information Services (FIS), a partnership providing data processing services to FFJS and MFW pursuant to the terms of a license agreement (the License) between FFJS and FIS.

At the time PTE 93–8 was granted, the Property consisted of a one story office and warehouse building containing approximately 116,000 square feet of gross building area on a site of approximately 4.0663 acres of land. There was also a parking area. The Property was originally leased by MFW to FFJS for its warehouse and data processing services under the provisions of a written, triple net lease (the Original Lease) that commenced on March 1, 1989. The annual rental under the Original Lease was $554,232. Such rent was payable in monthly installments of $46,186. In addition to the Original Lease, FFJS gave FIS an exclusive right to use, for $3,850 per month, approximately 8,041 square feet in the building area for FIS's information systems and data processing operations. The term of the License coincided with the term of the Original Lease.

Upon the granting of PTE 93–8, the Plans purchased the Property from MFW for the total cash consideration of $6 million, which was less than the independently appraised value of the Property. The Property was then allocated among the Plans such that the FFJS Cash Balance Plan and the MFW Cash Balance Plan each acquired 40 percent interests in the Property with each Plan paying $2.4 million. The FFJS Profit Sharing Plan acquired the remaining 20 percent interest in the Property for $1.2 million. At the time of acquisition, the Property represented approximately 19 percent of the FFJS Cash Balance Plan's assets, 22 percent of the MFW Cash Balance Plan's assets and 13 percent of the assets of the FFJS Profit Sharing Plan. With the exception of mandatory title insurance charges, no Plan paid any real estate fees or commissions in connection with its acquisition of an interest in the Property.

8. Following the purchase transaction, the Original Lease and the License were assigned to the Plans. As modified by the Lease Assignment and Assumption Agreement, the Amended Lease between the Plans and FFJS had a twelve year term with an initial expiration date of February 28, 2005. The annual rental under the Amended Lease, which was the same as that paid under the Original Lease, was $554,232 (the Base Rent). The Base Rent was payable in monthly installments of $46,186. Commencing on March 1, 1993

[30] For purposes of this proposed exemption FFJS and MFW are together referred to herein as Fortunoff.

and including the year ending February 28, 2005, FFJS was required to pay, in addition to the Base Rent, an annual Escalation Amount based upon the fair market rental value of the Property as determined by a qualified, independent appraiser. Effective October 1, 1997, FFJS commenced paying an annual Escalation Amount of $35,048 on a monthly basis in equal installments of $2,920.67. Therefore, the total rental amount being paid was set at $589,280 annually or $49,107 monthly. In the event that the fair market rental value of the Property declined to an amount which was less than the Base Rent, the Amended Lease provided that the Plans would be paid the Base Rent. The Amended Lease was also a triple net lease.

The License between FFJS and FIS, which was similarly modified by the Lease Assignment and Assumption Agreement, required FIS to pay its proportionate share of utilities as well as repair and maintain that portion of space that it occupied, also on a triple net basis. Although the License had a term that was commensurate with that of the Amended Lease and required that FIS pay FFJS a base fee that was proportional to the amount that FFJS paid the Plans under the Amended Lease, it was terminated on or about January 1, 1995 after FIS vacated the Property. Currently, FFJS occupies that space.

9. To secure its obligations under the Amended Lease, FFJS obtained a one year, irrevocable letter of credit (the Letter of Credit) in favor of the Plans. The Letter of Credit, which was in the face amount of $550,000, provided that Mr. Sanford Browde, the independent fiduciary for the Plans with respect to the transactions, could draw upon amounts available thereunder if FFJS ever defaulted in its rental payments under the Amended Lease and the default continued for more than ten days after notice of the default had been given. On February 25, 1994, the Letter of Credit expired.

To further secure FFJS's obligations to the Plans under the Amended Lease, MFW entered into an escrow agreement (the Escrow Agreement) with the Plans whereby at least one year's rental under the Amended Lease would be maintained through the sixth anniversary date of the Property's assignment to the Plans. In this regard, on February 23, 1993, MFW established a $1.65 million special escrow account (the Escrow Account) over which it would have no withdrawing power or authority. If, at any time funds in the Escrow Account were depleted, MFW would be required to make up the shortfall. The Escrow Agreement also provided for periodic payouts to MFW from the Escrow Account over the six year term.

10. On May 18, 1998, the Department issued PTE 98–22 at 63 FR 27329. This exemption, which amended and superseded PTE 93–8, permitted the Plans to lease another parcel of real property (the Substitute Property) to FFJS under the provisions of the Amended Lease. The Plans acquired the Substitute Property, which was contiguous to the Property along the northern border, from Corporate Property Investors (CPI), an unrelated party. The Plans and CPI exchanged the "pole" portion of the Property for nearly equivalent portions of two lots owned by CPI in accordance with the like-kind exchange provisions of section 1031 of the Code. The purpose of the exchange was to make the Property regular in shape and more suitable for expansion. Once reconfigured, it was intended that the Property would provide additional parking for employees of FFJS and for others using the warehouse facility.

Because of the nature of the modification discussed above, the Department determined that the exemptive relief provided under PTE 93–8 was no longer available. Therefore, the Department granted PTE 98–22, which allowed the Plans to lease the Substitute Property to FFJS along with the remaining Property under the provisions of the Amended Lease. In effect, PTE 98–22 incorporated by reference many of the facts, representations and continuing conditions that were contained in PTE 93–8. However, PTE 98–22 did not cover FIS's use of space in the Property pursuant to the terms of the License as such arrangement had been terminated. As with PTE 93–8, the transaction was approved and monitored on behalf of the Plans by Mr. Browde, the independent fiduciary.

Renovations to the Property

11. In 1998, the Plans, as landlord, paid for renovations to the warehouse comprising the Property. The renovations cost approximately $500,000. These renovations were permanent in nature. In part, the renovations transformed the vacated office space into additional storage space. This alteration resulted in a 15,009 square foot reduction in the overall square footage of the Property, from 116,000 square feet to 100,991 square feet. However, the Amended Lease was not modified at the time to reflect the reduced square footage of the Property, even though FFJS continued to lease space from the Plans.

Field Investigation and Independent Fiduciary Appointment

12. In early 2003, the New York Regional Office of the Department (the Regional Office) conducted an audit of the Plans. By letter dated April 14, 2003, the Regional Office alleged that the Trustees of the Plans violated certain provisions of the Act as a result of, among other things: (a) Failure to obtain annual Property appraisals; (b) failure to implement and collect annual rent increases; and (c) payment by the Plans for a renovation of the Property in 1998.

The Plans' Trustees submitted a formal response to the Department on September 30, 2003, and, by letter agreement (the Original IFS Agreement) dated November 26, 2003, engaged IFS to act as the sole independent fiduciary of the Plans with respect to certain functions associated with the Plans' ownership of the Property.

13. IFS, with offices located in Washington, DC and Newark, New Jersey, is an independent investment advisory firm with experience acting as an independent fiduciary. Among other things, IFS structures and monitors pension and welfare fund investment programs, advises plan fiduciaries concerning investment risk and expense, measures and evaluates investment returns and decides whether proposed transactions and arrangements are in the interests of a plan and its participants.

With respect to its qualifications, IFS states that it specializes in acting as a fiduciary to ERISA-covered plans and that the firm is highly experienced as a fiduciary in making and evaluating investment decisions. IFS further states that, as an investment adviser registered with the Securities and Exchange Commission, it has acted in a variety of independent fiduciary roles, including independent fiduciary, named fiduciary, investment manager and adviser or special consultant. Specifically, IFS represents that it has acted as independent fiduciary with respect to several transactions, including real estate transactions, which required and received prohibited transaction exemptions from the Department. IFS confirms that it is not affiliated with the Employer, and derives less than two percent of its gross annual income from FFJS and MFW and their affiliates.

By voluntarily engaging IFS to act on behalf of the Plans, at Fortunoff's expense, it is represented that Fortunoff and the Plans' Trustees implemented an independent process to assist in investigating and resolving the issues raised by the Regional Office. IFS hired a qualified, independent appraiser, Integra Realty Resources ‘‘ Northern New Jersey of Morristown, New Jersey (Integra), to conduct retrospective and current appraisals of the Property, so that IFS could assess: (a) The current and retrospective fair market rental and valuations of the Property; and (b) the commercial reasonableness of the Plans' payment for the renovations of the Property in 1998. After evaluating all material factors, including, among other things, reviewing and analyzing (with the assistance of legal counsel retained by IFS) the Interim Lease, PTEs 93–8 and 98–22, and the Integra appraisals, IFS concluded that a payment of $669,660 by Fortunoff, including interest, should be made to the Plans.

Shortly thereafter, the Regional Office advised Fortunoff of their determination that a payment of $706,740, i.e., $7,080 more than the amount determined by IFS, should be made to the Plans. On August 31, 2004, Fortunoff made a $706,740 payment to the Plans in order to resolve the issues raised by the Regional Office and to carry out the process inherent in the retention of IFS.[31] IFS continues to act as the independent fiduciary of the Plans with respect to the Property.

Interim Lease

14. The Interim Lease between FFJS and the Plans began on November 26, 2003, the date IFS was engaged to act as the Plans' independent fiduciary. The Interim Lease had a 15 month term with an expiration date of February 28, 2005 and it included the same terms (see Representation 7) as the Amended Lease, which it superseded. The Interim Lease was modified (the Interim Lease Modification) by an agreement between FFJS and the Plans executed in October 2004 by FFJS and IFS on behalf of the Plans. The Interim Lease Modification reflected the 1998 renovation and reconfiguration of the Property, which reduced the square footage from 106,362 square feet, as recited in the Original Lease, to 100,991 square feet. The Interim Lease Modification also referenced the November 26, 2003 agreement between the Trustees of the Plans and IFS, in which the Trustees engaged IFS to perform certain duties on behalf of the Plans with respect to the Property.

A. Interim Lease Extension

15. Pursuant to the Interim Lease Extension agreement executed on February 28, 2005, between the Plans and FFJS, the parties agreed to abide by the terms of the Interim Lease subject to certain modifications. Specifically, the expiration date of the Interim Lease was extended from February 28, 2005 until August 31, 2006. In addition, the rent was modified so that commencing on March 1, 2005 and ending on February 28, 2006, the rent will be $656,400 per annum, payable in equal monthly installments of $54,700. Further, the tenant is required to pay rent for the six month period commencing March 1, 2006 and ending August 31, 2006 in an amount which is equal to the greater of (a) $656,400 per annum (*i.e.*, equal monthly installments of $54,700) or (b) the annual fair market rental value of the Property as determined by an independent appraisal (performed by an independent appraiser reasonably selected by IFS on behalf of the Plans) dated on or before December 31, 2005.

In addition, FFJS is required to make a two-month security deposit of $109,400 and pay an Additional Deposit applicable to the period commencing on March 1, 2006 after the expiration of the first 12 months of the Interim Lease Extension, calculated at the rental amount to be effective March 1, 2006. During the last six months of the Interim Lease Extension period, one-sixth of the Additional Deposit will be applied against the monthly rent, so long as there is no uncured default. Also, a two-month security deposit will remain at the end of the Interim Lease Extension.

FFJS will maintain increased levels of property and liability insurance coverage for the Property. In addition, FFJS will pay the cost of an environmental assessment and engineering inspection report on the Property for the benefit of the Plans, to be performed by environmental and engineering firms IFS will select on behalf of the Plans.

Finally, if FFJS (or any of its shareholders or family members of shareholders) wished to purchase the Property or to enter into a long-term lease with respect to the Property, it was required to provide, by August 31, 2005, written notice of its intent to (a) purchase the Property at a purchase price of no less than $7,500,000 or the fair market value as determined by a qualified, independent appraiser, or (b) rent the Property pursuant to a long-term lease with rental price of no less than the current fair market rental amount. IFS would have 90 days in which to decide whether to accept the offer, but would not be obligated to accept it. Although these options were never exercised, the applicants represent that a separate, administrative exemption would have been requested from the Department.

Sale of Controlling Interest in Fortunoff (the Sale)

16. In November 2004, the Fortunoff owners, the Fortunoff and Mayrock families (the Families), announced that they had agreed to sell a controlling interest in Fortunoff to Trimaran Capital Partners, LLC (Trimaran) and Kier Group (K Group), two New York-based private equity firms that are unrelated parties. Since 1995, Trimaran has invested over $1.2 billion of equity in more than 50 portfolio companies in transactions totaling in excess of $10 billion. Since 1993, K Group has completed more than $3 billion in transactions.

Trimaran and K Group have previously made investments in the consumer products and services industry and their principals have been involved as senior executive management or investors, in among other things, traditional and direct-to-consumer retailers, including, for example, retailers of fine diamonds and jewelry (Harry Winston/K Group), housewares (Rubbermaid/K Group) and apparel products (Urban Brands/Trimaran).

The Sale occurred on July 22, 2005 for approximately $140 million. Approximately 60% of the Sale proceeds were allocated to MFW and approximately 40% of the Sale proceeds were allocated to FFJS, subject in each case to post-closing adjustments, if any. Following the completion of the Sale, the Families hold a 25% interest and continue to be involved in the management and operations of Fortunoff. Trimaran and K Group hold the 75% majority stake in Fortunoff.

In connection with the Sale, FFJS LLC and MFW LLC were created to succeed to the operating business of FFJS and MFW, respectively, with common ownership through Source Financing, a holding company that acts as the sole managing member of each LLC. Source Financing is owned by Trimaran Capital and Kier Group with a combined interest of 75% (approximately 10% of Source Financing is held by Kier Group and 65% is held by Trimaran Capital), and the remaining 25% of Source Financing is owned by FFJS and MFW through which the Families hold an ownership interest.

Also as part of the Sale, a transfer of substantially all of the employees and substantially all of the business assets of FFJS and MFW were made to FFJS LLC and MFW LLC. In addition, FFJS LLC and MFW LLC succeeded to the obligations of FFJS as tenant under the

[31] In addition to making a payment to the Plans, Fortunoff also filed a Form 5330 with the Internal Revenue Service and paid all applicable excise taxes with respect to the violations alleged by the Regional Office.

Interim Lease and Interim Lease Extension. Prior to the Sale, FFJS and MFW operated as two separate controlled groups of corporations, and FFJS was the sole tenant under the Interim Lease and Interim Lease Extension. As a result of the Sale and common ownership, the interest of FFJS as tenant under the Interim Lease and the Interim Lease Extension was assigned to FFJS LLC and MFW LLC as of July 22, 2005, and consequently each LLC entity became a joint and several tenant under the Interim Lease and Interim Lease Extension. Thus, any reference to tenant herein (see Representation 15) means FFJS and its successors in interest, FFJS LLC and MFW LLC.

Further, consistent with the corporate consolidation, the FFJS Cash Balance Plan and the MFW Cash Balance Plan merged, effective January 1, 2006, and Source Financing became the new sponsor as described above. The Merged Cash Balance Plan and the FFJS Profit Sharing Plan currently hold 80% and 20% membership interests in the Plans' LLC, respectively, as tenants in common.

There are no parties in interest with respect to the Plans acting as service providers to the Plans' LLC except that (a) M&T Bank, which served as custodian to the MFW Cash Balance Plan and currently serves as custodian and directed trustee of the Merged Cash Balance Plan, also provides commercial banking services for the Plans' LLC independently pursuant to arrangements made by IFS on behalf of the Plans' LLC as such LLC's non-member manager; and (b) FFJS and its assignees, FFJS LLC and MFW LLC, as tenants under the Interim Lease, as further amended and extended by the Interim Lease Extension described herein, have performed or will perform repairs and maintenance of the Property.

Request for Exemptive Relief

17. Fortunoff and IFS, on behalf of the Plans, request an administrative exemption from the Department to cover the past and current leasing of the Property under relevant provisions of the Interim Lease and Interim Lease Extension. If granted, the exemption would apply retroactively from November 26, 2003, the date Fortunoff retained IFS to act as the sole independent fiduciary of the Plans with respect to the Property, through August 31, 2006. The applicants state that issuing this exemption is in the best interests of the Plans in the context of the sale of the controlling interest in Fortunoff by the Families. The applicants state that with the revised ownership structure of Fortunoff, a business review process will be undertaken with respect to Fortunoff's long-term strategic planning and its accompanying real estate needs, and IFS, with assistance from its legal counsel and own appraiser, will have the opportunity to evaluate and explore alternatives regarding the use of the Property. These alternatives may include finding another tenant, deciding to sell the Property or negotiating a new lease with FFJS. Further, the applicants believe that extension of the Amended Lease ensures that the Plans will continue to receive the fair market rental value of the Property for another 18 months while IFS considers the Plans' options.

Independent Appraisal of the Property

18. In an independent appraisal report dated May 18, 2004 (the 2004 Appraisal), Raymond T. Cirz, MAI, CRE, a qualified independent real estate appraiser with Integra, placed the Property's fair market value and annual fair market rental value at $7,300,000 and $656,400, respectively, as of December 31, 2003. Mr. Cirz updated the 2004 Appraisal with an independent appraisal report dated February 18, 2005 (the 2005 Appraisal), which placed the Property's fair market value and annual fair market rental value at $7,500,000 and $656,400, respectively, as of December 31, 2004. This was the rental amount being paid by FFJS under the Interim Lease at the time of the 2005 Appraisal and it is currently the rental amount being paid by FFJS under the Interim Lease Extension.

Mr. Cirz states that he is Managing Director of Integra and is actively engaged in real estate appraisals and consulting, including acquisition and disposition analyses, portfolio valuations for major public and private institutions, financial analyses, market and feasibility studies and other advisory services. In addition, Mr. Cirz represents that his experience is concentrated in major urban properties including such developments as the Pacific Design Center in Los Angeles, International Place in Boston, the Willard Hotel in Washington DC, and the World Trade Center in New York City. Mr. Cirz further represents that he was the first president of Valuation International, Ltd., a full service international valuation and consulting firm with affiliated offices located throughout the world. He also certifies that Integra does not have any relationship with Fortunoff and that it did not receive more than two percent of its annual income from the party in interest or its affiliates.

Role of the Independent Fiduciary

19. At the time of its appointment, IFS evaluated the adequacy of the rents previously paid to the Plans, relative to the fair market rental value of the Property at each applicable point in time taking into account Mr. Cirz's appraisals on behalf of Integra. IFS concluded that the amount of rent previously paid was insufficient and thus, that certain additional payments were due (which payments to the Plans were subsequently made) and that the rent, as so supplemented, was no less favorable than the rent that would have been paid by a third party in similar circumstances when negotiated at arm's length with unrelated third parties. Given the facts and circumstances in existence and the retrospective evaluation of the rent, IFS considered the following alternatives: (1) Whether to continue the Interim Lease in accordance with its existing terms and conditions; (2) whether to void the Interim Lease; and (3) whether to renegotiate the terms and conditions of the Interim Lease. IFS analyzed the three alternatives and concluded that the interests of the Plans' participants and beneficiaries would best be served by continuing to operate under the Interim Lease in accordance with its existing terms and conditions. Given that the Interim Lease was already in place and pursuant to its contract with the Plans, IFS did not seek to determine whether all of the terms and conditions of the Interim Lease as of November 26, 2003 were similar to a lease with a third party. However, IFS did conclude on the basis of its retrospective review that the rent being received for the balance of the Interim Lease after August 31, 2004, on which date all retrospective corrective payments were made, was no less favorable than the rent that would be payable in similar circumstances when negotiated at arm's length with unrelated third parties.

20. IFS, acting as the Plans' independent fiduciary, represents that it has examined each Plan's overall investment portfolio, liquidity needs and diversification requirements [32] in

[32] While IFS has concluded that the Plans' ownership of the Property is not detrimental to the Plans' current and anticipated cash flow needs, IFS remains concerned with the significant concentration to a single real estate asset with a single tenant that the Property represents for each Plan. This concern is heightened in the case of the FFJS Profit Sharing Plan, where the interest in the Property at January 1, 2005 represented almost 30% of the Plan's assets. In this regard, IFS notes that PTE 93–8 and PTE 98–22 states in the operative language that, ''the value of the proportionate

light of the exemption transactions. IFS states that it has also extensively analyzed the Plans' interests in the Property from the investment perspective of the Plans in view of the condition of the Property, its appraised value, the terms of the Interim Lease and the Interim Lease Extension and the Plans' financial and actuarial conditions. IFS explains that this analysis has included a critical review of retrospective and current appraisals of the Property by Mr. Cirz on behalf of Integra; on-site inspection of the Property; interviews with FFJS personnel involved with the operation of the Property; and a review of the Plans' financial and actuarial reports and investment policies. Based on this analysis, IFS has concluded that the Plans' ownership and leasing of the Property is consistent with each Plan's investment policies and liquidity needs and that the leasing of the Property to FFJS, both retroactive to November 26, 2003 and March 1, 2005 under the Interim Lease Extension, is in the interest of each Plan and its respective participants and beneficiaries. Further, IFS represents that the Plans' interests are protected by the terms of the Interim Lease Extension. Finally, IFS has concluded that under the circumstances, the Interim Lease Extension was no less favorable to the Plans than would be a comparable arm's length transaction with an unrelated third party.

IFS certifies that (a) the continued leasing of the Property pursuant to the terms and conditions of the Interim Lease under the facts and circumstances in existence on and after November 26, 2003 was no less favorable to the Plans than the continued leasing of the Property under similar facts and circumstances between unrelated parties, and (b) that the then-prevailing rent received by the Plans was no less favorable than the rent the Plans would have obtained under similar circumstances when negotiated at arm's length with unrelated third parties.

IFS also determined that the terms and conditions of the Interim Lease Extension were no less favorable to the Plans than those obtainable by the Plans under similar circumstances when negotiated at arm's length with unrelated third parties. In reaching this conclusion, IFS represents that it utilized the experience of the IFS professional staff who has been involved in the performance of IFS'' duties as independent fiduciary for the Plans, and it engaged independent real estate legal counsel, Morgan, Lewis & Bockius LLP (Morgan Lewis), experienced in the negotiation and drafting of similar leases between unrelated parties, to advise IFS in connection with the negotiation, review and approval of the terms and conditions of the Interim Lease Extension. IFS relied on Morgan Lewis's legal analysis and advice in negotiating, reviewing and approving the terms and conditions of the Interim Lease Extension. Morgan Lewis advised IFS that the terms of the Interim Lease Extension are no less favorable to the Plans than those they have negotiated and/or reviewed between unaffiliated entities in similar arms-length transactions.

Moreover, IFS represents that it has the authority to monitor and enforce the Plans' rights throughout the term of the Interim Lease Extension.

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

(a) Since November 26, 2003, the Plans have been and will continue to be represented for all purposes under the Interim Lease by IFS, a qualified, independent fiduciary, which also represents the interests of the Plans under the Interim Lease Extension.

(b) IFS has (1) reviewed and approved the continued adherence by the Plans and the Plans' LLC with the terms and conditions of the Interim Lease under the facts and circumstances in existence on and after November 26, 2003; (2) negotiated, reviewed, and expressly approved the terms and conditions of the Interim Lease Extension on behalf of the Plans; and (3) determined that the leasing of the Property since November 26, 2003 pursuant to the Interim Lease and, since March 1, 2005, the Interim Lease Extension, (i) has complied, and will continue to comply, with the relevant provisions of PTE 93–8 as amended by PTE 98–22 (except as modified by this proposed exemption); and (ii) will continue to be an appropriate transaction for the Plans on and after November 26, 2003, consistent with each Plan's investment policies and liquidity needs, and (iii) is in the best interests of each Plan and its respective participants and beneficiaries on and after November 26, 2003.

(c) The rent paid to the Plans under the Interim Lease and the Interim Lease Extension has been and will be no less than the fair market rental value of the Property, as established by a qualified, independent appraiser.

(d) The base rent has been adjusted or will be adjusted annually by IFS based upon an independent appraisal of the Property.

(e) Under both the Interim Lease and the Interim Lease Extension, FFJS has paid or will pay for property and liability insurance on the Property, property taxes, utility costs, other costs for maintaining the Property including environmental assessments, engineering inspection reports, as well as all other expenses that are incident to such agreements.

(f) IFS has monitored and will continue to monitor compliance with the terms of the Interim Lease since November 26, 2003 and the terms of the Interim Lease Extension throughout the duration of these agreements.

(g) IFS has been responsible or will be responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of FFJS and its successors in interest, FFJS LLC and MFW LLC, under the terms of such agreements.

(h) IFS has made or will make determinations, on behalf of the Plans, with respect to any sale or future leasing of the Property.

(i) IFS has determined that (1) the leasing of the Property pursuant to the Interim Lease on and after November 26, 2003 has been, and will continue to be, no less favorable to the Plans than similar leasing arrangements between unrelated parties; (2) the then-prevailing rent received by the Plans has been, and will continue to be, no less favorable to the Plans than the rent the Plans would have received under similar circumstances if the rent had been negotiated at arm's length with unrelated third parties; and (3) the terms and conditions of the Interim Lease Extension have been, and will continue to be, no less favorable to the Plans than those obtainable by the Plans under similar circumstances when negotiated at arm's length with unrelated third parties.

(j) With respect to the Interim Lease Extension, FFJS (1) has made a two-month security deposit on signing the agreement and; (2) will be required to pay an Additional Deposit after the expiration of the first 12 months of the Interim Lease Extension, calculated at the rental amount to be effective March 1, 2006.

(k) Over the last six months of the Interim Lease Extension, one-sixth of

interests in the Property that are acquired by each Plan does not exceed 25 percent of the Plan's assets.'' However, IFS does not believe there is a market for any individual Plan's minority interest in the Property, other than possibly to a party in interest. Under the terms of the Original IFS Agreement, IFS explains that it did not have the authority to consider a sale of the Property until the Interim Lease Extension was executed. However, IFS states that it will explore the prospects of selling all of the Plans' interests in the Property.

the Additional Deposit will be applied to the rent each month, so long as there is no uncured default.

FOR FURTHER INFORMATION CONTACT: Anna M. N. Mpras of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 6th day of February, 2006.

Ivan Strasfeld,

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

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