Federal Register

Wednesday,
October 6, 2010

# Part III

# Department of Labor

## Employee Benefits Security Administration

## Proposed Exemptions From Certain Prohibited Transaction Restrictions; Notice

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

### Proposed Exemptions From Certain Prohibited Transaction Restrictions

**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 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

*This notice includes the following proposed exemptions:* D–11576, Bank of America, NA *et al.;* D–11591, Citigroup Inc. and its affiliates (Citigroup), the Citigroup 401(k) Plan, the Citibuilder 401(k) Plan for Puerto Rico the (Citibuilder Plan) and collectively with the Citigroup 401(k) Plan, the Participant Directed Plans, the Citigroup Pension Plan (and collectively with the Participant Directed Plans, the Plans) (the Applicants); and D–11611, The West Coast Bancorp 401(k) Plan (the Plan); *et al.*

**DATES:** 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.

**ADDRESSES:** 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.

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–5700, 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.

*Warning:* If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

**SUPPLEMENTARY INFORMATION:**

**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).

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.

Bank of America, NA et al. Located in Charlotte, North Carolina. Exemption Application Number D–11576

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[1]

*Section I. Covered Transactions*

If the proposed exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply: (a) Effective January 1, 2009: (1) To the operation of the RPT Stable Value Agreements, pursuant to the terms thereof, and to the receipt of a fee by BANA in connection therewith; and (2) to transactions under the RPT Stable Value Agreements (the RPT Wrap-Related Transactions); (b) effective April 23, 2009: (1) To the execution of the RPT Special Purpose Wrap Agreement; (2) to the operation of the RPT Special Purpose Wrap Agreement, pursuant to the terms thereof, and to the receipt of a fee by BANA in connection therewith; and (3) to transactions under the RPT Special Purpose Wrap Agreement (the Special Purpose Wrap-Related Transactions); and (c) effective January 1, 2009: (1) To the operation of the Separately Managed Account Wrap Agreements, pursuant to the terms thereof, and to the receipt of a fee by BANA in connection therewith; and (2) to transactions under the Separately Managed Account Wrap Agreements (the Separately Managed Account Wrap-Related Transactions), provided that the following conditions, as applicable, have been met.

*Section II. Conditions Applicable to Transactions Described in Section I(a)*

(a) Effective June 1, 2009, B1ackRock Advisors may change the formula for calculating the Crediting Rate with respect to the Global Wrap Account or the Global Buy and Hold Account (either, a Global Account) only after obtaining prior approval from:

(1) Each financial institution that has entered into a wrap agreement covering assets included in the applicable Global Account; and

[1] For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

(2) The Independent Fiduciary, after BlackRock Advisors has provided the Independent Fiduciary with any information that the Independent Fiduciary has reasonably requested in determining whether to approve the proposed change in the Crediting Rate formula;

(b) BANA may not reset a Crediting Rate attributable to a Global Account more frequently than on a monthly basis unless:

(1) A crediting rate attributable to a non-BANA wrap agreement covering assets in the same Global Account is reset more frequently than on a monthly basis; and

(2) BANA resets the Crediting Rate at the same time, and in the same manner, as such other non-BANA wrap agreement crediting rate;

(c) Each financial institution entering into a wrap agreement covering assets included in a Global Account obtains information from BlackRock Advisors on a monthly basis regarding the investments included in such Global Account. This information must be sufficiently detailed to enable the financial institution to independently verify that the applicable Crediting Rate was calculated properly;

(d) The fee received by BANA in connection with the BANA RPT Global Wrap Agreement or the BANA RPT Buy and Hold Wrap Agreement will be reasonable relative to market conditions and risks, as determined annually by the Independent Fiduciary. Notwithstanding the above, in no event shall the fee received by BANA under the BANA RPT Global Wrap Agreement or the BANA RPT Buy and Hold Wrap Agreement exceed the maximum percentage fee paid to any other financial institution pursuant to a wrap agreement covering assets in the applicable Global Wrap Account or the Global Buy and Hold Account, as relevant;

(e) The Trustee may trigger immunization with respect to the BANA RPT Global Wrap Agreement only if:

(1) The Trustee triggers immunization with respect to another wrap agreement covering assets in the Global Wrap Account immediately prior to, or at the same time as, the Trustee triggers immunization with respect to the BANA RPT Global Wrap Agreement; or

(2) A financial institution not affiliated with BANA triggers immunization with respect to assets in the Global Wrap Account immediately prior to, or at the same time as, the Trustee triggers immunization with respect to the BANA RPT Global Wrap Agreement; or

(3) The Trustee determines that BANA is no longer financially responsible and the Independent Fiduciary determines that immunization is in the interests of Plans invested in RPT;

(f) Assets held in RPT will be valued at their current fair market value on a daily basis utilizing the following BlackRock firm-wide approved valuation process:

(1) Valuations will be performed without regard to whether the security is held in RPT or another account or commingled vehicle advised by BlackRock;

(2) Valuations will be based on the price that may be obtained in a current arm's-length sale to an unrelated third party;

(3) BlackRock will first obtain prices for securities from independent third-party sources, including index providers, broker-dealers and independent pricing services. BlackRock will maintain a hierarchy that prioritizes pricing sources by asset class or type and will value securities based on the price generated by the highest priority source. The hierarchy may vary by asset class or type, but not for a particular security;

(4) If no third-party sources are available to value a security or the price generated by the third-party falls outside specified statistical norms and after review BlackRock determines that such price is not reliable, BlackRock will value the security using an analytic methodology in accordance with its written valuation policy. If BlackRock values a security using such analytic methodology, the Independent Fiduciary will review that methodology and valuation and will obtain its own valuation if it deems appropriate; and

(5) Values determined in accordance with (1) through (4) above will be provided to each financial institution that has entered into a wrap agreement covering assets in the Global Wrap Account or the Global Buy and Hold Account, as the case may be;

(g) Each financial institution that has entered into a wrap agreement covering assets in the Global Wrap Account and/or the Global Buy and Hold Account, including BANA, may raise an objection regarding a particular security's valuation, regardless of the source of such valuation. Once an objection is raised, wrap providers other than BANA may determine a new valuation for such security and BANA must accept this new valuation, provided that BANA is given reasonably satisfactory documentation supporting the new valuation;

(h) Prior to a Plan sponsor's decision to include RPT as an investment option for its Plan's participants, the Trustee will provide the Plan sponsor with the following:

(1) RPT's Declaration of Trust (as amended and restated as of April 23, 2009, and as may be further amended from time to time);

(2) A purchase agreement to be entered into by the Plan fiduciary and the Trustee;

(3) Upon request, a copy of the Annual Report for RPT and a fact sheet describing RPT's investment objective and strategy and a performance analysis; and

(4) A copy of this proposed exemption or, if granted, a copy of the final exemption;

(i) The Trustee will provide the following ongoing disclosures to Plan fiduciaries regarding a Plan's investment in RPT:

(1) The Annual Report for RPT; and

(2) The Plan's Investment Summary and Accounting;

(j) Plan participants will be provided the following disclosures regarding their investment in RPT:

(1) Prior to and following their initial investment, information describing the investment objectives and performance of RPT; and

(2) A statement, delivered at least quarterly, that sets forth the value of the participant's account contributions, withdrawals, distributions, loans and change in value since the prior statement;

(k) The Independent Fiduciary must receive a copy of any RPT Stable Value Agreement amendment prior to the effective date of such amendment. The Independent Fiduciary must review and approve the amendment prior to its implementation, except that no such review and approval shall be required for an amendment that is purely ministerial in nature;

(l) The dollar amount of Global Wrap Account assets covered by the BANA RPT Global Wrap Agreement shall not exceed 50% of the total assets held in such Account, and the terms associated with the BANA RPT Global Wrap Agreement at the time such Agreement was entered into, amended, modified or renewed shall be no less favorable to RPT than the terms associated with comparable agreements with unrelated parties;

(m) The dollar amount of Global Buy and Hold Account assets covered by the BANA RPT Buy and Hold Wrap Agreement shall not exceed 60% of the total assets held in such Account, and the terms associated with the BANA RPT Buy and Hold Wrap Agreement at

the time such Agreement was entered into, amended, modified or renewed shall be no less favorable to RPT than the terms associated with comparable agreements with unrelated parties; and

(n) Any RPT Wrap-Related Transaction that involves: (1) the exercise by BANA, the Trustee, or BlackRock Advisors of their rights under the RPT Stable Value Agreements; or (2) the performance by BANA, the Trustee, or BlackRock of their obligations under the RPT Stable Value Agreements, shall be subject to prior review and approval by the Independent Fiduciary if such exercise or performance affects the Crediting Rate or would otherwise have an adverse impact on the book value of a participant's or beneficiary's investment in RPT.

*Section III. Conditions Applicable to Transactions Described in Section I(b)*

(a) Below Investment Grade Securities will be transferred automatically to a RPT account (the Type D1 Account) and covered by the RPT Special Purpose Wrap Agreement. The RPT Special Purpose Wrap Agreement shall cover up to in the aggregate $200 million of the following:

(1) Book value of Downgraded Securities that have not been sold; and/or

(2) Aggregate unamortized realized losses with respect to sold Downgraded Securities;

(b) The Minimum Ratio shall be maintained;

(c) The total book value of the assets included in the Type D1 Account and covered by the RPT Special Purpose Wrap, including the Permitted Securities, will not exceed $700 million without the prior written consent of the Trustee, BlackRock Advisors, BANA and the Independent Fiduciary;

(d) The crediting rate with respect to the Type D1 Account (the Type D1 Account Crediting Rate) shall be 0.00% at times when there are unamortized losses (whether realized or unrealized) attributable to Downgraded Securities in the Type D1 Account, calculated in accordance with the provisions of the RPT Special Purpose Wrap Agreement. In the event there are no unamortized losses (*i.e.,* neither realized nor unrealized) recorded to the Type D1 Account which relate to Downgraded Securities, the Type D1 Account Crediting Rate shall be determined in accordance with a formula that has been reviewed by the Independent Fiduciary;

(e) Effective June 1, 2009, BlackRock Advisors may change the formula for calculating the Type D1 Account Crediting Rate only after obtaining prior approval from BANA and the Independent Fiduciary. BlackRock Advisors shall provide the Independent Fiduciary with any information it may reasonably request in determining whether to approve a proposed change in the Type D1 Account Crediting Rate formula;

(f) The Type D1 Account Crediting Rate will not be reset more frequently than on a monthly basis;

(g) Permitted Securities will have a maximum duration of 3.5 years at the time of purchase;

(h) The fee charged by BANA for the RPT Special Purpose Wrap will be reasonable relative to market conditions and risks, as determined annually by the Independent Fiduciary. Notwithstanding the above, in no event shall the fee received by BANA under the BANA RPT Global Wrap Agreement or the BANA RPT Buy and Hold Wrap Agreement exceed the maximum percentage fee paid to any other financial institution pursuant to a wrap agreement covering assets in the applicable Global Wrap Account or the Global Buy and Hold Account, as relevant, as determined annually by the Independent Fiduciary. Notwithstanding the above, in no event shall such fee exceed 15 basis points per annum of the total book value of assets included in the Type D1 Account;

(i) Assets covered by the RPT Special Purpose Wrap Agreement will be valued in accordance with the methodology specified in section II(f) above, provided, however, that if the Independent Fiduciary obtains a valuation, such valuation will be binding on BANA;

(j) The Trustee has the right to immunize the portfolio of securities included in the Type D1 Account only if BANA elects to terminate the RPT Special Purpose Wrap Agreement, or if BANA defaults under the RPT Special Purpose Wrap Agreement. If an immunization election becomes effective (the RPT Special Purpose Immunization Date), the RPT Special Purpose Wrap Agreement would terminate on the later of: (1) The date that is the number of years after the RPT Special Purpose Immunization Date which does not extend beyond the modified duration (as defined in the RPT Special Purpose Wrap Agreement) of the underlying assets on the RPT Special Purpose Immunization Date; or (2) the first date on which the market value of the underlying assets equals or exceeds the book value under the wrap agreement;

(k) No Below Investment Grade Securities will be added to the RPT Special Purpose Wrap Agreement after April 23, 2011, unless otherwise agreed by BANA, the Trustee, and the Independent Fiduciary. No party to the RPT Special Purpose Wrap Agreement is obligated to amend or extend the RPT Special Purpose Wrap Agreement;

(l) The tasks performed by the Independent Fiduciary will include:

(1) Determining whether the RPT Special Purpose Wrap Agreement and the portfolio arrangement for the Type D1 Account (including the wrap fee payable to BANA, the Minimum Ratio, the prefunding of the RPT Special Purpose Wrap Agreement and the formula for resetting the Type D1 Account Crediting Rate) are prudent and in the best interest of participants and beneficiaries of Plans investing in RPT;

(2) Reviewing valuations generated by BlackRock (in connection with the RPT Special Purpose Wrap Agreement) in any situation where BlackRock is unable to obtain a reliable valuation from independent third party sources. If, after such review, the Independent Fiduciary deems appropriate, the Independent Fiduciary will obtain an independent valuation which will be binding on the parties;

(3) Reviewing and monitoring whether the Type D1 Account Crediting Rate is calculated correctly;

(4) Monitoring the addition and removal of Below Investment Grade Securities and any changes in Permitted Securities in the Type D1 Account, and opining, in a written report, whether such addition, removal or change is appropriate;

(5) If BANA objects to the calculation by the Trustee or its designee of the Type D1 Account Crediting Rate or the information used to calculate the Type D1 Account Crediting Rate, the Independent Fiduciary will make a conclusive and binding determination regarding such calculation or information;

(6) Determining whether to approve any proposed change to the Type D1 Account Crediting Rate formula, including any proposed adjustment to the duration component of the Type D1 Account Crediting Rate formula;

(7) No later than April 30, 2011, working with BANA, BlackRock, and the Trustee to review and determine whether additional Below Investment Grade Securities may be transferred to the Type D1 Account and be covered by the RPT Special Purpose Wrap Agreement;

(8) Making an initial and, thereafter, annual determination regarding whether the fee described in paragraph (h) of this section is reasonable relative to the specific attributes of the RPT Special Purpose Wrap Agreement;

(9) Making an annual determination regarding whether the continued maintenance of the RPT Special Purpose Wrap Agreement is appropriate and in the interest of Plans;

(10) Making a monthly determination regarding whether the appropriate Type D1 Crediting Rate formula is being used; and

(11) Reviewing and approving any amendment to a RPT Special Purpose Wrap Agreement consistent with paragraph (n) of this section;

(m) Any Special Purpose Wrap-Related Transaction that involves: (1) The exercise by BANA, the Trustee, or BlackRock Advisors of their rights under the RPT Special Purpose Wrap Agreement; or (2) the performance by BANA, the Trustee, or BlackRock of their obligations under the RPT Special Purpose Wrap Agreement, shall be subject to prior review and approval by the Independent Fiduciary if such exercise or performance affects the Type D1 Crediting Rate or otherwise would have an adverse impact on the book value of a participant's or beneficiary's investment in RPT; and

(n) The Independent Fiduciary must receive a copy of any RPT Special Purpose Wrap Agreement amendment prior to the effective date of such amendment. The Independent Fiduciary must review and approve the amendment prior to its implementation, except that no such review and approval shall be required for an amendment that is purely ministerial in nature.

*Section IV. Conditions Applicable to Transactions Described in Section I(c)*

(a) Effective June 1, 2009, BlackRock Advisors may change the formula for calculating the Crediting Rate with respect to each Separately Managed Account Wrap Agreement only after obtaining prior approval from BANA and the Independent Fiduciary. BlackRock Advisors shall provide the Independent Fiduciary with any information it may reasonably request in determining whether to approve a proposed change in the Crediting Rate formula;

(b) Effective June 1, 2009, the Crediting Rate will be reset no more frequently than on a monthly basis;

(c) BANA will not receive a fee under the BANA Wal-Mart Separately Managed Wrap Agreement in excess of the maximum percentage fee received by any other Tier 3 Wrap Provider in the Wal-Mart Separately Managed Account; and BANA will not receive a fee under the BANA Hertz Separately Managed Wrap Agreement in excess of the maximum percentage fee received by any other financial institution that has entered into a wrap agreement covering assets in the Hertz Separately Managed Account;

(d) Assets covered under each Separately Managed Account Wrap Agreement will be valued in accordance with the same methodology specified in section II(f) above; provided, however, that if BANA objects to the valuation of any asset, the Independent Fiduciary will make a binding determination of the value of the asset;

(e) The tasks performed by the Independent Fiduciary will include:

(1) Conducting a monthly review of the Crediting Rate, including, confirming: (A) The book value of the portfolio of assets wrapped by each Separately Managed Account Wrap Agreement; (B) the valuation of securities; (C) the duration of securities; (D) the market yield of securities; and (E) that the Crediting Rate formula was calculated properly;

(2) Reviewing and approving any proposed amendment to a Separately Managed Wrap Agreement consistent with paragraph (i) below;

(3) Reviewing any exercise of contract provisions by any of BANA, BlackRock Advisors or, in the case of the BANA Wal-Mart Separately Managed Wrap Agreement, the Trustee, and analyze its potential impact on investors;

(4) Evaluating any changes to the fees paid to BANA under each Separately Managed Account Wrap Agreement to determine reasonableness relative to market conditions and risks; and

(5) Providing quarterly reports to BlackRock Advisors and to the named fiduciaries of the Wal-Mart Plan and the Hertz Plan. These reports must certify that the Independent Fiduciary has reviewed the factors described above and state whether BlackRock Advisors has complied with all requirements of the contract. The Independent Fiduciary will inform the named fiduciaries of a Plan if it believes that BANA or BlackRock Advisors has taken any actions that are not in the best interests of the participants and beneficiaries in the Wal-Mart Plan or the Hertz Plan, as relevant;

(f) The Separately Managed Account Wrap Agreements shall authorize the Independent Fiduciary to:

(1) Review and approve any proposed changes in the formula for calculating the Crediting Rate, prior to implementation of any such change;

(2) If BlackRock Advisors generates its own valuation, review the valuation, and if the Independent Fiduciary deems appropriate, obtain an independent valuation, which shall be binding on the parties, subject to BANA's right to raise an objection to any valuation;

(3) If BANA objects to the valuation of any asset, make a binding determination of the value of the asset;

(g) The named fiduciaries (or their authorized representatives) for the Wal-Mart Plan have the right to terminate BlackRock Advisors, as investment manager for the Wal-Mart Separately Managed Account, on 90 days' written notice. The named fiduciaries (or their authorized representatives) for the Hertz Plan have the right to terminate B1ackRock Advisors as investment manager for the Hertz Separately Managed Account, on 30 days' written notice;

(h) Any Separately Managed Account Wrap-Related Transaction that involves: (1) The exercise by BANA, the Trustee, or BlackRock Advisors of their rights under a Separately Managed Account Wrap Agreement; or (2) the performance by BANA, the Trustee, or BlackRock of their obligations under a Separately Managed Wrap Agreement: shall be subject to prior review and approval by the Independent Fiduciary if such exercise or performance affects the Crediting Rate or otherwise would have an adverse impact on the book value of a participant's or beneficiary's investment in RPT;

(i) The Independent Fiduciary must receive a copy of any amendment contemplated for a Separately Managed Wrap Agreement. The Independent Fiduciary must review and approve the amendment prior to its implementation, except that no such review and approval shall be required for an amendment that is purely ministerial in nature; and

(j) BlackRock may not terminate a Separately Managed Account Wrap Agreement without the prior approval of the Independent Fiduciary.

*Section V. General Conditions*

(a) BlackRock Advisors shall maintain in the United States the records necessary to enable the persons described in (b) below to determine whether the conditions of this exemption, if granted, were met, except that:

(1) If the records necessary to enable the persons described in (b) below to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of BlackRock Advisors, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest other than BlackRock Advisors shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by sections 4975(a) and

(b) of the Code if the records have not been maintained or are not available for examination as required by paragraph (b) below;

(b) Except as provided in paragraph (c) of this section V and notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in section V(a) are unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

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

(2) Any fiduciary of a Plan participating in RPT or the Hertz Plan or the Wal-Mart Plan;

(3) Any participant or beneficiary of a Plan participating in RPT or the Hertz Plan or the Wal-Mart Plan; or

(4) The Independent Fiduciary.

(c) None of the persons described above in paragraphs (2), (3), and (4) of paragraph (b) of this section V shall be authorized to examine trade secrets of BlackRock, BANA, the Trustee or any of their Affiliates, or any commercial or financial information which is privileged or confidential. Should BlackRock Advisors refuse to disclose information on the basis that such information is exempt from disclosure, BlackRock Advisors shall, by the close of the thirtieth (30th) day following the request, provide written notice advising that person of the reason for the refusal and that the Department may request such information; and

(d) Promptly following any publication of a final exemption in the **Federal Register**, the Trustee or BlackRock Advisors will provide a copy of the final exemption to the Plan sponsor of each Plan invested in RPT, and to the Plan sponsor of the Hertz Plan, and to the Plan sponsor of the Wal-Mart Plan.

*Section VI. Definitions*

(a) The term Act means: The Employee Retirement Income Security Act of 1974, as amended;

(b) The term Affiliate means: Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such person;

(c) The term BANA means: Bank of America, N.A. and its Affiliates;

(d) The term BANA Hertz Separately Managed Wrap Agreement means: The agreement dated as of July 27, 2007 (and amended effective as of December 31, 2008) among BANA, BlackRock Advisors (as investment manager for a portion of the assets of the Hertz Plan), and the Bank of New York Mellon (the successor by operation of law to Mellon Bank N.A., and the trustee of the trust created pursuant to the Hertz Plan), as such agreement may be amended from time to time, pursuant to which BANA provides a book value benefit responsive facility with respect to a portion of the assets held in the Hertz Separately Managed Account;

(e) The term BANA RPT Buy and Hold Wrap Agreement means: The agreement dated as of October 16, 1996, between Barclays Bank PLC and the Trustee (as assigned to BANA as of April 1, 1998, and amended effective as of December 31, 2008), as such agreement may be amended from time to time, pursuant to which BANA provides a book value benefit responsive facility with respect to an undivided portion of the assets held in the Global Buy and Hold Account;

(f) The term BANA RPT Global Wrap Agreement means: The agreement dated as of May 1, 2004 (and amended effective as of December 31, 2008) between BANA and the Trustee, as such agreement may be amended from time to time, pursuant to which BANA provides a book value benefit responsive facility with respect to an undivided portion of the assets held in the Global Wrap Account;

(g) The term BANA Wal-Mart Separately Managed Wrap Agreement means: The agreement dated as of August 19, 2003 (and amended effective as of December 31, 2008) between BANA and the Trustee, as such agreement may be amended from time to time, pursuant to which BANA provides a book value benefit responsive facility with respect to a portion of the assets held in the Wal-Mart Separately Managed Account;

(h) The term Below Investment Grade Security means: Securities that cease to be covered by a benefit responsive contract in RPT (other than by the RPT Special Purpose Wrap Agreement) solely as a result of a downgrade in the credit rating of the security to below Baa3, BBB- or BBB- by Moody's Investors Services, Inc., Standard & Poor's Rating Group, or Fitch Ratings, respectively; provided, however, that a Below Investment Grade Security shall not include any security that is an Impaired Security;

(i) The term BlackRock means: BlackRock, Inc.;

(j) The term BlackRock Advisors means: BlackRock Investment Management, LLC and its Affiliates;

(k) The term Code means: The Internal Revenue Code of 1986, as amended;

(l) The term Crediting Rate means: The crediting rate described in sections II and IV that is used for purposes of determining the accrued interest to be added to the book value of an individual's account within RPT or the Separately Managed Accounts;

(m) The term Downgraded Security means: A Below Grade Investment Security that is held in the Type D1 Account and covered by the RPT Special Purpose Wrap Agreement;

(n) The term Global Buy and Hold Account means: The book account or sub-account maintained within RPT for purposes of identifying certain assets relating to the BANA RPT Buy and Hold Wrap Agreement;

(o) The term Global Wrap Account means: The book account or sub-account maintained within RPT for purposes of identifying certain assets relating to the BANA RPT Global Wrap Agreement;

(p) The term Hertz Plan means: The Hertz Corporation Income Savings Plan;

(q) The term Hertz Separately Managed Account means: The separately managed stable value account advised by BlackRock Advisors on behalf of the Hertz Plan;

(r) The term Impaired Security means: (i) A security with respect to which the issuer or guarantor has failed to make one or more payments of principal or interest (after giving effect to any applicable grace period under the terms of such security or prescribed by any change in law, regulation, ruling or other governmental action); (ii) a security with respect to which the principal or interest has become due and payable before it otherwise would have been due or payable other than: (x) By reason of a call or other prepayment of such security made in accordance with its terms that does not constitute a default under such security, or (y) solely on account of any change in law, regulation, ruling or other governmental action; (iii) a security where the rate of interest thereon has been reset other than: (x) Pursuant to the original terms of such security, or (y) solely on account of any change in law, regulation, ruling or other governmental action; or (iv) a security with respect to which the issuer becomes insolvent or institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditor's rights;

(s) The term Independent Fiduciary means an entity that is: (1) Experienced and knowledgeable in ERISA and the transactions and arrangements described herein; (ii) independent of and unrelated to BANA, Merrill,

BlackRock, and their Affiliates; and (iii) appointed to act on behalf of Plans investing in RPT or the Separately Managed Accounts with respect to the matters described herein. The Independent Fiduciary will not be deemed to be independent of and unrelated to BANA, Merrill, BlackRock, and their Affiliates if: (i) Such fiduciary directly or indirectly controls, is controlled by or is under common control with BANA, Merrill, or BlackRock; (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption, if granted, other than for acting as an Independent Fiduciary in connection with the transactions described herein, provided that the amount or payment of such compensation is not contingent upon, or in any way affected by, the Independent Fiduciary's ultimate decision; and (iii) the annual gross revenue received by the Independent Fiduciary, during any year of its engagement, from BANA, Merrill, BlackRock, and any of their Affiliates, exceeds five percent (5%) of the Independent Fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year;

(t) The term Minimum Ratio means: A ratio of 2.5 to 1.0 of market value of Permitted Securities to the total unamortized unrealized and realized losses with respect to Downgraded Securities;

(u) The term Permitted Securities means any security that: (i) Is a U.S. Treasury debenture, a security issued by the Government National Mortgage Association or a security guaranteed by the Federal Deposit Insurance Corporation; and (ii) has a modified duration on the date of purchase by RPT of 3.5 years or less;

(v) The term Plan means: An employee benefit plan within the meaning of and subject to Title I of the Act or an individual retirement account within the meaning of section 4975 of the Code;

(w) The term RPT means: The Merrill Lynch Retirement Preservation Trust maintained by the Trustee;

(x) The term RPT Special Purpose Wrap Agreement means: The agreement dated as of April 23, 2009, as amended, between BANA and the Trustee, pursuant to which BANA provides a book value benefit responsive facility with respect to an undivided portion of the assets held in the Type D1 Account;

(y) The term RPT Stable Value Agreements means: The BANA RPT Global Wrap Agreement and the BANA RPT Buy and Hold Wrap Agreement;

(z) The term Separately Managed Accounts means: The Hertz Separately Managed Account and the Wal-Mart Separately Managed Account;

(aa) The term Separately Managed Account Wrap Agreements means: The BANA Wal-Mart Separately Managed Wrap Agreement and the BANA Hertz Separately Managed Wrap Agreement;

(bb) The term Type D1 Account means: The book account maintained within RPT for purposes of identifying Downgraded Securities, including unamortized losses with respect to Downgraded Securities that have been sold, and Permitted Securities covered by the RPT Special Purpose Wrap Agreement;

(cc) The term Tier 3 Wrap Provider means: A financial institution that has entered into a wrap agreement with respect to assets held in the Wal-Mart Separately Managed Account that will not be accessed for purposes of making benefit payments until after two tiers of buffer assets are accessed;

(dd) The term Trustee means: Bank of America, N.A.;

(ee) The term Wal-Mart Plan means: The Wal-Mart Profit Sharing and 401(k) Plan and the Wal-Mart Puerto Rico Profit Sharing and 401(k) Plan;

(ff) The term Wal-Mart Separately Managed Account means: The separately managed stable value account advised by BlackRock Advisors on behalf of the Wal-Mart Plan;

(gg) The term Merrill means: Merrill Lynch & Co., Inc. and its Affiliates;

(hh) The term RPT Wrap-Related Transaction means: (1) The determination, calculation of and adjustments to the Crediting Rate, and any changes to the Crediting Rate formula; (2) valuations of securities covered by the BANA RPT Stable Value Agreements; (3) payment of wrap fees and any changes to wrap fees; (4) the purchase and sale of any security covered by the RPT Stable Value Agreements; (5) BANA's or the Trustee's exercise of its right to immunize or terminate the RPT Stable Value Agreements; (6) amendments to the RPT Stable Value Agreements; and (7) any other exercise by BANA, the Trustee, or BlackRock Advisors of their rights, or any performance by BANA, the Trustee, or BlackRock of their obligations, under the Stable Value Agreements;

(ii) The term Special Purpose Wrap-Related Transaction means: (1) The transfer of Below Investment Grade Securities to the Type D1 Account; (2) the sale or transfer of Downgraded Securities out of the Type D1 Account; (3) the purchase and sale of certain other securities permitted to be held in the Type D1 Account; (4) transactions relating to maintenance of a minimum ratio of Permitted Securities and Downgraded Securities; (5) the determination, calculation of and adjustments to the Type D1 Account Crediting Rate and any changes to the Type D1 Account Crediting Rate formula; (6) valuations of securities covered by the RPT Special Purpose Wrap Agreement; (7) payment of and any changes to wrap fees; (8) BANA's or the Trustee's exercise of its right to immunize or terminate the RPT Special Purpose Wrap Agreement; (9) the entering into and amendment of the RPT Special Purpose Wrap Agreement; and (10) any exercise by BANA, the Trustee, or BlackRock Advisors of their rights, or any performance by BANA, the Trustee, or BlackRock of their obligations, under the RPT Special Purpose Wrap Agreement;

(jj) The term Separately Managed Account Wrap-Related Transaction means: (1) The determination, calculation of and adjustments to the Crediting Rate, and any changes to the Crediting Rate formula; (2) valuations of securities covered by the Separately Managed Account Wrap Agreements; (3) payment of wrap fees and any changes to wrap fees; (4) the purchase and sale of any security covered by the Separately Managed Account Wrap Agreements; (5) BANA's or the Trustee's exercise of its right to terminate the Separately Managed Wrap Agreements; (6) amendments to the Separately Managed Wrap Agreements; and (7) any other exercise by BANA, the Trustee, or BlackRock Advisors of their rights, or any performance by BANA, the Trustee, or BlackRock of their obligations, under the Separately Managed Wrap Agreements.

**Summary of Facts and Representations**

*1. Applicants*

A. Bank of America, NA (BANA). BANA is a wholly-owned indirect subsidiary of Bank of America Corporation (BAC). BANA is engaged in a general consumer banking, commercial banking and trust business, offering a wide range of commercial, corporate, international, financial market, retail and fiduciary banking services.

B. Merrill Lynch & Co., Inc. (Merrill). Merrill is a holding company that, through its affiliates, provides broker-dealer, investment banking, financing, advisory, wealth management, insurance, lending and related products and services. Merrill's subsidiaries included Merrill Lynch Bank & Trust Co., FSB (MLTC). MLTC merged into BANA during the fourth quarter of 2009.

C. BlackRock, Inc. (BlackRock). BlackRock is an investment management firm that, as of December 31, 2008, had approximately $1.307 trillion in assets under management.

D. Merrill/BAC Merger. On September 15, 2008, BAC and Merrill entered into an agreement and plan of merger pursuant to which, effective as of the closing of the transactions contemplated thereby, a new, wholly-owned subsidiary of BAC merged with and into Merrill (the Merrill/BAC Merger). The Merrill/BAC Merger closed on January 1, 2009, at which time Merrill became a wholly-owned subsidiary of BAC and an affiliate of BANA.

E. Merrill/BlackRock Transaction. On September 29, 2006, Merrill contributed Merrill Lynch Investment Managers, LLC and various other assets and subsidiaries that comprised its investment management business to BlackRock. As a result of that transaction (the Merrill/BlackRock Transaction), from September 29, 2006, though December 26, 2008, Merrill held an approximate 49% ownership interest in BlackRock and held 45% of the outstanding voting securities of BlackRock. Pursuant to an exchange agreement between Merrill and BlackRock, dated as of December 26, 2008, Merrill reduced its voting interest in BlackRock to 4.9%. However, Merrill retained an approximate 49.5% equity interest in BlackRock.

F. BlackRock/Barclays Acquisition. On December 1, 2009, BlackRock acquired Barclays Global Investors. As part of this transaction, Merrill Lynch's economic ownership of BlackRock was reduced to 34.2%. Merrill Lynch currently has a 3.4% voting interest in BlackRock.

*2. The Application*

The application submitted by the Applicants includes the following: An overview of stable value funds; a description of the Retirement Preservation Trust (RPT) stable value fund; a request for retroactive and prospective exemptive relief for the operation of, and certain transactions under, two stable value wrap agreements entered into between MLTC and BANA with respect to certain assets of the RPT; a request for retroactive and prospective exemptive relief for the execution and operation of, and certain transactions under, a "special purpose" wrap agreement entered into between MLTC and BANA with respect to certain assets of RPT; a request for retroactive and prospective exemptive relief for the operation of and transactions under two stable value wrap agreements entered into by BANA with respect to single plan separately managed accounts advised by BlackRock Advisers, a BlackRock affiliate, on behalf of the Hertz Plan and the Wal-Mart Plan; and numerous representations by Fiduciary Counselors Inc., who is currently the independent fiduciary (the Independent Fiduciary) responsible for representing the interests of the Hertz Plan, the Wal-Mart Plan, and employee benefit plans (Plans) investing in RPT for purposes of the transactions described in this proposed exemption, if granted.

Paragraphs 3–9. Applicants' Overview of Stable Value Funds

3. Stable value funds are intended as conservative investment options that provide preservation of principal, liquidity and current income at levels that are typically higher than those provided by money market funds. To achieve this objective, stable value funds invest in traditional and synthetic guaranteed investment contracts (GICs). A traditional GIC is an investment contract that guarantees payments on deposits at a specified rate and is typically purchased through an insurance company. In a synthetic GIC structure, the plan or plan asset fund retains title to an underlying portfolio of fixed income assets and purchases a "wrap agreement" from a bank, insurance company or other financial institution. Synthetic GICs permit diversification away from the credit risk of an insurance company and provide an opportunity to achieve higher returns through an actively managed portfolio.

4. Under the terms of standard wrap agreements, the wrap provider agrees that payments to participants upon retirement, death, disability, employment termination, hardship or transfer to a non-competing investment alternative (generally referred to as "benefit responsive payments") will be made based on "book value," regardless of fluctuations in the market value of the underlying portfolio of assets. Book value generally represents the value of deposits (*i.e.,* the principal amount invested) plus interest (accumulated at a "credited rate") minus withdrawals and minus adjustments for assets that become impaired.[2] This provision of book value accounting at the participant level is the core feature of a stable value fund. However, not all payments to participants are made at book value. For example, withdrawals arising from a plan's decision to transfer to a competing investment alternative, or certain actions initiated by a plan sponsor, may be paid at market value, which could be less than book value depending on the performance of the underlying investment portfolio.

5. A wrap agreement does not guarantee that the book value of the wrapped assets will increase by a specified rate of return. Rather, interest is credited to the underlying portfolio based on a formula that is designed to equal the actual total rate of return on the underlying portfolio over time, while smoothing the gains and losses. To achieve this smoothing, the difference between the market value of the underlying portfolio and the book value of the underlying portfolio is amortized through periodic adjustments to the rate at which interest is credited to the book value of the underlying portfolio. The rate at which interest is credited is determined by means of a formula (the crediting rate formula) which takes into account the yield to maturity and the duration of the underlying portfolio as well as the ratio of the market value of the underlying portfolio to the book value.

6. Stable value funds generally include: (1) a liquidity fund that may or may not be covered by a wrap agreement; and (2) multiple portfolios of assets, each covered by a different wrap agreement. The wrap agreements include rules establishing the priority for obtaining cash for withdrawals from the assets included in the stable value fund. Generally, these rules require that withdrawals be first met from new cash and then from the liquidity fund. Once these sources are exhausted, withdrawals are funded by selling securities in wrapped portfolios. Thus, for example, in the event there are significant participant withdrawals during a bond-market downturn (an environment in which there could be a significant difference between the wrap contract book value and the market value of the wrapped assets) the stable value fund would first access liquid assets in the fund in an attempt to make book value payments. Once those are exhausted, wrapped assets would be sold in a pre-specified order to provide liquidity needed to make book value payments. If all of the assets covered by a particular wrap contract were sold, and if the proceeds were insufficient to meet the book value payment, the wrap provider would pay the difference between the sale proceeds and the book value under the wrap contract before securities in the next lower tier would be sold to fund withdrawals.

7. Wrap agreements can generally be terminated by either party (*i.e.,* the

[2] The Applicants describe an impaired security as including a security with respect to which the issuer or guarantor has failed to make one or more payments of principal or interest.

trustee of the stable value fund or the wrap provider) at market value. However, most wrap agreements have immunization provisions whereby if the wrap agreement is terminated: (1) More conservative investment guidelines (*i.e.,* more conservative than the guidelines in effect before the immunization) will apply to the underlying portfolio; and (2) the wrap provider will continue to provide book value coverage until a date that is generally determined by reference to the underlying portfolio. If wrap contracts were terminable by the wrap provider on short notice at a time when the market value of the wrapped assets was below the wrapped contract book value, and another wrap provider could not be found as a substitute, the unwrapped assets would be immediately revalued down to their fair market value. Immunization is a "middle ground," and provides a means of winding down and terminating a contract that otherwise would be "evergreen." Immunization effectively permits an open-ended contract to be converted to a contract with a deferred termination date. During the immunization period, the wrapped contract continues to be "benefit responsive" and investors continue to receive payments at book value.

8. Fees for wrap agreements are generally based on a percentage of the book value of assets covered by a wrap agreement. The fee is frequently paid from the assets of the Plan or Plan asset fund. The amount of the fee will vary depending upon the risk taken and the market conditions when the wrap agreement is negotiated. Since book value payments generally could occur when investments are moved to another non-competing investment option, when retirees or other inactive participants withdraw money from a plan and when participants take in-service withdrawals, book value payments are neither predictable nor controllable by the wrap provider. Notwithstanding that wrap contracts are structured in a manner that is intended to mitigate the risk of higher than expected or untimely participant withdrawals, the risk remains greater than zero. Fees for wrap agreements would be significantly higher if the wrap provider guaranteed the actual performance of the assets wrapped in circumstances beyond those described above.

9. In the current distressed economic climate, the number of financial institutions that are willing to enter into wrap agreements has declined. To the extent wrap coverage can be obtained, the fees for providing such coverage have significantly increased from the fees generally available during the past ten years.

Paragraphs 10–22. Applicants' Description of RPT

10. RPT is a "stable value" fund with approximately $11.7 billion book value of assets as of December 31, 2008. Payments to participants (or beneficiaries) upon retirement, death, disability, employment termination, hardship or transfer to a non-competing investment alternative are generally based on book value, such that a participant in RPT will receive his invested principal and interest at a crediting rate, as described in further detail below, even if the actual market value of the underlying assets is less.

11. Bank of America, N.A. (hereinafter, either BANA or the Trustee) is the trustee of RPT. BlackRock Advisers, a wholly-owned subsidiary of BlackRock, is an investment adviser to RPT. The assets of RPT are divided into several portfolios, which include an actively managed portfolio with approximately $2.8 billion book value of assets (the Actively Managed Account) and a buy and hold portfolio with approximately $1.6 billion book value of assets (the Global Buy and Hold Account).

12. In connection with the operation of RPT, the Trustee has entered into stable value wrap agreements with banks and other financial institutions to provide benefit responsive facilities with respect to certain assets of RPT. BANA is one of several financial institutions that have entered into stable value wrap agreements with the Trustee under RPT. In this regard, prior to the Merrill/BAC Merger, BANA had entered into two separate wrap agreements with the Trustee under RPT. One agreement, dated May 1, 2004, provides a benefit responsive facility with respect to the Actively Managed Account (the BANA RPT Global Wrap Agreement). The other agreement, dated October 16, 1996 (assigned by Barclays Bank PLC to BANA effective April 1, 1998, and amended effective as of December 31, 2008), provides a benefit responsive facility with respect to the Global Buy and Hold Account (the BANA RPT Buy and Hold Wrap Agreement).

13. The BANA RPT Global Wrap Agreement is one of four wrap agreements covering assets in a global wrap account (the Global Wrap Account). The Global Wrap Account represents approximately 24% of the total book value of the assets of RPT. The assets in the Global Wrap Account are actively managed. Under this wrap agreement, which RPT and BANA entered into prior to the Merrill/BAC Merger, BANA provide benefit responsive coverage for approximately 27% of the book value of the assets credited to the Global Wrap Account. Banks and financial institutions unaffiliated with BANA have entered into wrap agreements with the Trustee providing coverage for approximately 73% of the book value of the assets in the Global Wrap Account. The assets in the Global Wrap Account covered by the BANA RPT Global Wrap Agreement are not segregated from the assets in the Global Wrap Account covered by the other wrap agreements. Each wrap agreement covers a specified percentage of the book value of the assets in the Global Wrap Account as a whole. In this regard, the BANA RPT Global Wrap Agreement provides a benefit responsive wrap with respect to approximately 5.5% of the total book value of the assets of RPT.

14. Under the BANA RPT Buy and Hold Wrap Agreement, prior to December 31, 2008, BANA provided a benefit responsive facility with respect to a segregated "buy and hold" portfolio of assets of RPT, with no other wrap provider providing a benefit responsive facility with respect to this portfolio. Effective as of December 31, 2008, the Applicants amended the BANA RPT Buy and Hold Wrap Agreement in a manner that: (a) Combined the "buy and hold" portfolio covered by the BANA RPT Buy and Hold Wrap Agreement with a portfolio of assets of RPT covered by a "buy and hold" benefit responsive wrap agreement between the Trustee and another unaffiliated wrap provider (Global Buy and Hold Wrap Provider 2) to form the Global Buy and Hold Account; and (b) provides that BANA will provide coverage for 50% of the book value of the assets held in the Global Buy and Hold Account. Global Buy and Hold Wrap Provider 2's wrap agreement with the Trustee was amended similarly to provide that it will provide coverage for 50% of the book value of the assets held in the Global Buy and Hold Account. As is the case with the BANA RPT Global Wrap Agreement, the assets in the Global Buy and Hold Account covered by the BANA RPT Buy and Hold Wrap Agreement are not segregated from the assets in the Global Buy and Hold Account covered by the other wrap agreement. Each wrap agreement covers a specified percentage of the book value of the assets in the Global Buy and Hold Account as a whole. The Global Buy and Hold Account as a whole represents approximately 13.6% of the book value of the assets of RPT, and the BANA RPT Buy and Hold Wrap Agreement

provides a benefit responsive wrap with respect to approximately 6.8% of the total book value of the assets of RPT.[3]

15. The BANA RPT Global Wrap Agreement and the BANA RPT Buy and Hold Wrap Agreement (the RPT Stable Value Agreements) provide for "buffer" assets that would be liquidated to fund withdrawals from RPT before the assets held under the Global Wrap Account or the Global Buy and Hold Account are used to fund withdrawals. Under the RPT Stable Value Agreements, liquidity requirements for withdrawals would be satisfied in the following order:

(1) Netting withdrawals from deposits whenever possible;

(2) Simple interest payments and maturing proceeds;

(3) Type "A" assets which include money market and other short-term investments as well as any short-term benefit responsive floaters;

(4) Type "B" buffer contracts, which will generally be accessed on a *pro rata* basis;

(5) Level "C" contracts on a *pro rata* basis; and

(6) Level "D" contracts.

The RPT Stable Value Agreements cover Level C assets which, subject to a limited temporary exception for certain Plan level withdrawals from RPT, will not be accessed until assets in a higher category have all been accessed.[4] A minimum of 8% of RPT's assets must be held as Type A and Type B combined. As of June 10, 2009, Type A and Type B assets accounted for approximately 13% of the assets of RPT. These "buffer" assets significantly reduce the likelihood that payments will be triggered for any of the wrap providers that wrap assets in the Global Wrap Account or the Global Buy and Hold Account.

16. The BANA RPT Stable Value Agreements effectively function to protect Plans that invest in RPT if there are significant withdrawals during negative market conditions. RPT has been structured with the expectation that RPT liquidity requirements can be satisfied without resort to the assets covered by the wrap contracts. Since RPT was established in 1989, the Trustee has never been required to access the wrap contracts. Eligible investments made by RPT are generally conservative and the buffer assets reduce the likelihood that a payment would need to be made under a wrap contract.[5] Each of the RPT Stable Value Agreements also has strict investment guidelines regarding the investments that can be held under those contracts. Only in the event that there are substantial withdrawals from RPT at a time when the assets of RPT are significantly underperforming would there be any risk that the assets covered by the wrap contracts would need to be liquidated to satisfy withdrawals and a payment from a wrap provider would be required. Moreover, in the current distressed economic environment, participants in employee benefit plans have generally moved assets into conservative investments, such as stable value funds. RPT had a net inflow (*i.e.,* contributions in excess of withdrawals) of approximately $300 million during the fourth quarter of 2008.

17. The crediting rate under a wrap agreement is the rate of interest that is used for purposes of determining the accrued interest to be added to the book value of the assets covered by the agreement. Under either RPT Stable Value Agreement, such crediting rate (the Crediting Rate) was set at the inception of the wrap agreement by agreement between BANA and the Trustee and has been, and will continue to be, reset periodically based on an objective formula. The Crediting Rate formula is designed to amortize the difference between the market value and the book value of assets covered by the wrap agreement over the approximate duration of the covered assets. The Crediting Rate formula used in the BANA RPT Global Wrap Agreement and the BANA RPT Buy and Hold Wrap Agreement, effective as of March 1, 2009, is:

$$\text{Crediting Rate} = [(PMV/PBV)^{1/(F*DUR)} * (1 + AYTM)] - 1$$

Where:

*PMV* is the market value of the covered assets;

*PBV* is the book value of the covered assets;

*ATYM* is the dollar duration weighted annualized yield to maturity of the covered assets;

*DUR* is the modified duration (Macaulay duration of the asset or assets * 1/1 + dollar duration weighted annualized yield to maturity of the covered assets); and

*F* is the factor, if any, agreed upon by the Trustee or its designee, BANA and the other wrap providers covering assets in the Global Wrap Account or the Global Buy and Hold Account, and approved by the Independent Fiduciary for purposes of modifying the duration component of the Crediting Rate.[6]

18. In the current economic environment, it has become standard stable value industry practice to vary the duration component of the Crediting Rate formula to more quickly amortize the difference between the book value and the market value of assets covered by a wrap agreement. BlackRock Advisors and the Trustee believe that having flexibility to vary the duration component of the Crediting Rate formula applicable to the BANA RPT Stable Value Agreements is in the best interests of participants and beneficiaries because it will greatly enhance BlackRock Advisors' ability to react to low market to book ratios, the risk that securities will be downgraded, low Crediting Rates and volatile cash flows.[7]

19. The assets in RPT are valued by BlackRock on a daily basis using a BlackRock-approved process that applies to all client securities held by BlackRock. Valuations are performed without regard to whether the security is held in RPT or another account or commingled vehicle advised by BlackRock. When valuing securities in RPT, in all cases, BlackRock looks first to external third-party pricing sources,

[3] The Applicants represent that the conversion of the BANA RPT Buy and Hold Wrap Agreement into a "global" arrangement will not affect the Crediting Rate (referenced above and described in further detail below) applicable to a participant's account in RPT. In this regard, the Applicants state that the conversion involved a purely internal adjustment, based upon an objective mathematical formula, among BANA and the other wrap provider to reflect the different market to book ratios of assets wrapped by BANA and Global Buy and Hold Wrap Provider 2 at the time of conversion into the Global Buy and Hold Account. The Applicants represent that this adjustment is relevant only if the wrap contracts must be accessed to make benefit responsive payments and will have no effect on the participants.

[4] The Applicants represent that, to address liquidity concerns under RPT, the wrap providers covering assets in RPT have agreed to permit the Trustee and BlackRock Advisers to sell a vertical slice of securities held in RPT, other than securities covered by the Special Purpose Wrap Agreement (discussed below), to fund certain Plan-level withdrawals. In this regard, BAC will provide direct capital contributions to fund the difference between the market value and the book value of the assets attributable to the withdrawing Plans in an amount of up to $175 million. BAC's commitment to provide liquidity will be in effect for a maximum period of two years.

[5] The Department has not considered the issue, and is expressing no opinion herein, regarding whether RPT assets have been invested on a conservative basis or in a manner consistent with RPT guidelines.

[6] According to the Applicants, prior to March 2009, a slightly different Crediting Rate (to the one above) was set forth in the RPT Stable Value Agreements and the Separately Managed Account Wrap Agreements (described below), and a simplified version of that formula was used to calculate the Crediting Rate. The Applicants note further that, in at least one instance, the Crediting Rate was increased in the middle of a month. The Applicants do not believe these modifications, which are described in further detail below, adversely affected Plan participants and beneficiaries.

[7] The Department notes that the Trustee's ability to shorten the duration component of the Crediting Rate formula may also benefit BANA by reducing the likelihood that BANA will have to make a payment to RPT during the immunization period (as described below).

including index providers, broker-dealers and independent pricing services. BlackRock has a hierarchy for prioritizing third-party pricing sources, based on availability and reliability of the price obtained. The pricing source may vary by asset class or type, but not for a particular security. Over time, the hierarchy used for a particular asset class may change due to a decrease in accuracy or consistency or a drop in coverage for a particular security. Currently, BlackRock's third-party pricing hierarchy generally works in the following order: (i) Index providers; (ii) broker-dealers (structured products); [8] and (iii) third-party pricing services (currently FT Interactive and Reuters Pricing Services).

20. BlackRock Solutions (BRS), a financial modeling group, would generate its own valuation only when it exhausts the third-party sources for a valuation. This could occur when there are no market quotations available for a security, or if a security were to break a control, which means that it is identified by the computer system because the price provided by a third-party source does not fall within certain statistical norms.[9] Historically, BRS has been able to rely exclusively on third-party sources to price securities of the type held in RPT and, to date, has never generated its own price for such securities. However, as a result of the current market instability, BRS has enhanced and formalized its process for valuing securities when third-party sources are not available. With respect to assets covered by the RPT Stable Value Wrap Agreements, any valuation generated by BRS will be subject to the limitations described below.

21. BANA and the Trustee each have the right to terminate the BANA RPT Global Wrap Agreement through an "immunization" process set forth in the BANA RPT Global Wrap Agreement.[10] If an immunization period occurs, the wrapped assets will be managed in accordance with investment guidelines that are more conservative than the investment guidelines applicable under the wrap contract before the immunization period, with the intent of closing any gap between the market value of the wrapped assets and the wrap contract book value. The BANA RPT Global Wrap Agreement has what is referred to as a "pull to par" provision, so that the agreement will not terminate (absent the application of another termination provision, such as an event of default) until the gap between the market value of the wrapped assets and the wrap contract book value is closed, however long that takes. This "pull to par" provision has become a market standard provision and was included in the BANA RPT Global Wrap agreement prior to December 31, 2008. During the immunization period, if all wrapped assets were liquidated to fund book value payments, and market value had not converged with contract book value, BANA would be obligated to pay the remainder of the book value of the contract.

22. According to the Applicants, immunization of a wrap contract is more protective of Plan participants and beneficiaries than immediate termination, if a substitute wrap provider is not available. In this regard, the Applicants state that if a substitute wrap provider is not available, immediate termination of the BANA RPT Global Wrap Agreement or any other wrap contract covering assets in the Global Wrap Account at a time when the book value exceeded the market value would likely result in RPT "breaking the buck" (*i.e.,* the value of participants' accounts would reflect the market value, rather than the book value, of assets that are no longer covered by the BANA RPT Global Wrap Agreement). If all or a portion of the Global Wrap Account is immunized, the returns would be reduced over time, but participants would still receive the book value of their account. In any event, because immunization could result in participants or Plan sponsors changing investment alternatives and loss of assets under management, BlackRock Advisors would work to find a substitute wrap provider as quickly as reasonably possible.

Paragraphs 23–29. Applicants' Representations and Request for Relief Regarding the Execution and Operation of the RPT Stable Value Wrap Agreements

23. The Applicants seek exemptive relief for: The operation of the RPT Stable Value Wrap Agreements, pursuant to the terms of; and for transactions under the RPT Stable Value Wrap Agreements. The Applicants describe the operation of the RPT Stable Value Agreements as including, among other things, the following transactions (the RPT Wrap-Related Transactions): (1) The determination, calculation of, and adjustments to, the Crediting Rate and any changes to the Crediting Rate formula; (2) valuations of securities covered by the RPT Stable Value Agreements; (3) payment of wrap fees and any changes to wrap fees; (4) the purchase and sale of any security covered by the RPT Stable Value Agreements; (5) BANA's or the Trustee's exercise of its right to immunize or terminate the RPT Stable Value Agreements; and (6) amendments to the RPT Stable Value Agreements.

24. According to the Applicants, the provision of wrap coverage by BANA to RPT could be considered an extension of credit under section 406(a) of ERISA. The Applicants state also that, because BANA and Merrill are under common control by BAC, and Merrill has an approximate 34% equity ownership interest in BlackRock, the maintenance of and transactions under the BANA RPT Stable Value Agreements could give rise to self-dealing concerns under section 406(b) of ERISA. In particular, BlackRock Advisor's role as investment adviser raises a concern that it could make investment decisions that are designed to benefit BANA, to the detriment of Plan participants and beneficiaries.

25. The Applicants request that the exemptive relief sought herein be retroactive to January 1, 2009 (the date of the Merrill/BAC Merger). The Applicants state that retroactive relief is appropriate because terminating the BANA RPT Global Wrap Agreement prior to the Merger could have caused significant disruption to Plans and participants and beneficiaries investing in RPT. In this regard, if a substitute wrap provider was not available to replace BANA, immediate termination of the BANA RPT Global Wrap

[8] The Applicants state that, as a practical matter, in many instances broker-dealers will be the first pricing source for securities, including non-agency mortgage backed securities, in stable value products, because no index provider is available.

[9] The Applicants state that a security breaking a control does not necessarily mean that BRS will independently value the security. When a security breaks a control, BRS first contacts the external third-party pricing source that generated the value, provides that third-party source with additional information regarding the issue and asks the third-party source to review its price. The independent pricing source will verify or change its price based on the information provided. BRS will use the third party's valuation of a particular security, unless a determination has been made that the price is unreliable. If the price is deemed unreliable, it will be valued in accordance with this paragraph 20, subject to Independent Fiduciary oversight, as described below.

[10] The Applicants state that, because the BANA RPT Buy and Hold Wrap Agreement covers a "buy and hold" portfolio, instead of an actively managed portfolio as covered by the BANA RPT Global Wrap Agreement, immunization is not a feature of the BANA RPT Buy and Hold Wrap Agreement. In this regard, the Trustee may elect to terminate the BANA RPT Buy and Hold Wrap Agreement by giving BANA seven business day's notice of such election. Absent a default by the Trustee, if BANA wants to terminate the BANA RPT Buy and Hold Wrap Agreement, BANA would not agree to future additions to, or substitution of assets in, the "buy and hold" portfolio covered by the agreement. In that event, the BANA RPT Buy and Hold Wrap Agreement generally would terminate on the maturity date of the latest maturing asset covered by the agreement.

Agreement or any other wrap agreement covering assets in the Global Wrap Account could have resulted in RPT "breaking the buck" (*i.e.,* the value of the participants' accounts would have reflected the market value (rather than the higher book value) of assets no longer covered by the BANA RPT Global Wrap Agreement).

26. The Applicants propose a number of conditions with respect to covered transactions involving the RPT Stable Value Agreements. In this regard, effective June 1, 2009, BlackRock Advisors may only change the formula for calculating the Crediting Rate after obtaining prior approval of BANA, the other financial institutions that have entered into wrap agreements covering the same assets in the Global Wrap Account or the Global Buy and Hold Account, as the case may be, and the Independent Fiduciary. BlackRock Advisors shall provide the Independent Fiduciary with any information it may reasonably request in determining whether to approve any proposed change in the Crediting Rate formula. Additionally, the Crediting Rate with respect to a RPT Stable Value Wrap Agreement may not be reset more frequently than on a monthly basis, unless: (1) Prior to such resetting, the crediting rate with respect to a non-BANA wrap agreement covering assets in the same Global Account as such RPT Stable Value Wrap Agreement is reset more frequently than on a monthly basis; and (2) the Crediting Rate is reset at the same time, and in the same manner, as such other crediting rate. Each financial institution entering into a wrap agreement covering assets included in a Global Account will obtain information from BlackRock Advisors on a monthly basis regarding the investments that are included in those accounts sufficient to enable the financial institution to independently verify that the Crediting Rate was calculated properly. In addition, the dollar amount of Global Wrap Account assets covered by the BANA RPT Global Wrap Agreement shall not exceed 50% of the total assets held in such Account, and the terms associated with the BANA RPT Global Wrap Agreement at the time such Agreement was entered into, amended, modified or renewed shall be no less favorable to RPT than the terms associated with comparable agreements with unrelated parties. Similarly, the dollar amount of Global Buy and Hold Account assets covered by the BANA RPT Buy and Hold Wrap Agreement shall not exceed 60% of the total assets held in such Account, and the terms associated with the BANA RPT Buy and Hold Wrap Agreement at the time such Agreement was entered into, amended, modified or renewed shall be no less favorable to RPT than the terms associated with comparable agreements with unrelated parties. Further, any RPT Wrap-Related Transaction that involves: (1) The exercise by BANA, the Trustee, or BlackRock Advisors of their rights under the RPT Stable Value Agreements; or (2) the performance by BANA, the Trustee, or BlackRock of their obligations under the RPT Stable Value Agreements, shall be subject to prior review and approval by the Independent Fiduciary if such exercise or performance affects the Crediting Rate or would otherwise have an adverse impact on the book value of a participant's or beneficiary's investment in RPT. Additionally, the Independent Fiduciary must receive a copy of any amendment contemplated for the RPT Stable Value Agreements (other than amendments that are purely ministerial in nature), and must thereafter review and approve the amendment prior to its implementation.

27. The Applicants represent that the fee BANA will receive under the BANA RPT Global Wrap Agreement or the BANA RPT Buy and Hold Wrap Agreement will be reasonable relative to market conditions and risks, as determined and approved annually by the Independent Fiduciary. Notwithstanding this, in no event shall the fee exceed the maximum percentage fee paid to any other financial institution that has entered into a wrap agreement covering the same assets in the Global Wrap Account or the Global Buy and Hold Account, as the case may be. Additionally, the Trustee will not trigger immunization with respect to the BANA RPT Global Wrap Agreement unless: (i) The Trustee triggers immunization with respect to another wrap agreement (*i.e.,* not provided by BANA) covering the same assets in the Global Wrap Account, immediately prior to, or at the same time as, immunization is triggered with respect to the BANA RPT Global Wrap Agreement; (ii) another financial institution that has entered into a wrap agreement with respect to assets in the Global Wrap Account triggers immunization immediately prior to, or at the same time as, immunization is triggered with respect to the BANA RPT Global Wrap Agreement; or (iii) the Trustee determines that BANA is no longer financially responsible and the Independent Fiduciary determines that the immunization is in the interests of investing Plans.

28. The Applicants represent that assets held in RPT will be valued at their current fair market value on a daily basis. Valuations will be based on the price that may be obtained in a current arm's-length sale to a third party. In this regard, BlackRock will first obtain prices for securities from independent third-party sources, including index providers, broker-dealers and independent pricing services. To do this, BlackRock will maintain a hierarchy that prioritizes pricing sources by asset class or type and will value securities based on the price generated by the highest priority source. If no third-party sources are available to value a security (or the price generated by the third-party falls outside specified statistical norms, and, after review, BlackRock determines that such price is not reliable), BlackRock will value the security using an analytic methodology. The Independent Fiduciary will thereafter review that methodology and valuation, and obtain its own valuation if it deems appropriate. Each financial institution that has entered into a wrap agreement covering assets in the Global Wrap Account and the Global Buy and Hold Account, including BANA, has the right to object to the valuation of a particular security, regardless of the source of the valuation. If such an objection is made, wrap providers that are not affiliated with BANA may thereafter determine a new valuation for the security, and BANA will be bound by this new valuation notwithstanding that BANA did not participate in the determination of such valuation, provided that BANA is provided with reasonably satisfactory documentation supporting the valuation.

29. Prior to a Plan sponsor's decision to include RPT as an investment option for participants in the Plans it sponsors, the Trustee will provide the Plan sponsor with the following: The RPT Declaration of Trust (as amended and restated as of April 23, 2009, and as may be further amended from time to time); a purchase agreement to be entered into by the Plan fiduciary and the Trustee; upon request, a copy of the Annual Report for RPT and a fact sheet describing RPT's investment objective and strategy and a performance analysis; and a copy of the proposed exemption or the final exemption, if granted. Additionally, on an ongoing basis, Plan fiduciaries will receive the Annual Report for RPT and the Plan's Investment Summary and Accounting. Plan participants will also receive information describing the investment objectives and performance of RPT; and a statement, delivered at least quarterly, that sets forth the value of the participant's account contributions,

withdrawals, distributions, loans and change in value since the prior statement.

Paragraphs 30–40. Applicants' Representations and Request for Relief Regarding the Execution and Operation of the RPT Special Purpose Wrap Agreement

30. The Applicants represent that, in the current market environment, there is a significantly increased risk that the credit rating of securities of the type included in RPT will be downgraded, including downgrades to below Baa3, BBB− or BBB− by Moody's Investors Services, Inc., Standard & Poor's Rating Group, or Fitch Ratings, respectively (Below Investment Grade Securities). However, several wrap agreements in RPT do not "cover" Below Investment Grade Securities.[11] If a security held by RPT is no longer covered by a wrap agreement, participant accounts (with respect to Plans that invest in RPT) will reflect the lower market value, rather than the book value, with respect to the portion of their account attributable to the unwrapped security. This could cause RPT to effectively "break the buck."

31. To reduce the risk that Below Investment Grade Securities would cause RPT to "break the buck," MLTC and BANA entered into the RPT Special Purpose Wrap Agreement on April 23, 2009. The RPT Special Purpose Wrap Agreement is designed to cover securities which cease to be covered by a RPT wrap solely as a result of a downgrade in the security's credit rating to below "investment grade." Under the RPT Special Purpose Wrap Agreement, BlackRock Advisors will automatically transfer each Below Investment Grade Security to a new portfolio (the Type D1 Account), and that security will be covered by the RPT Special Purpose Wrap Agreement (hereafter, a Below Grade Investment Security held in the Type D1 Account and covered by the RPT Special Purpose Wrap Agreement shall be referred to as a Downgraded Security). As described in paragraph 34 below, the RPT Special Purpose Wrap Agreement is designed to rapidly amortize the difference between the amortized cost of a Downgraded Security and the market value of the Downgraded Security.[12]

32. The proposed exemption, if granted, would permit certain transactions in connection with the operation of the RPT Special Purpose Wrap Agreement. These transactions (the Special Purpose Wrap-Related Transactions) include: (1) The transfer of Below Investment Grade Securities to the Type D1 Account; (2) the sale or transfer of Downgraded Securities out of the Type D1 Account; (3) the purchase and sale of certain other securities permitted to be held in the Type D1 Account (the Permitted Securities, as described below); (4) transactions relating to maintenance of a minimum ratio of Permitted Securities and Downgraded Securities (the Minimum Ratio, as described below); (5) the determination, calculation of and adjustments to the Type D1 Account Crediting Rate (described below) and any changes to the Type D1 Account Crediting Rate formula; (6) valuations of securities covered by the RPT Special Purpose Wrap Agreement; (7) payment of and any changes to wrap fees; (8) BANA's or the Trustee's exercise of its right to immunize or terminate the RPT Special Purpose Wrap Agreement; and (9) the entering into and amendment of the RPT Special Purpose Wrap Agreement.

33. Certain limits apply to the amount of Below Investment Grade Securities that may be transferred to the Type D1 Account. Specifically, the Type D1 Account may consist of up to a maximum of $200 million in: (1) Book value of Downgraded Securities that have not been sold; and/or (2) aggregate unamortized realized losses with respect to Downgraded Securities. BlackRock Advisors expects to sell Downgraded Securities as market conditions permit. Any remaining unamortized losses associated with the sale of the Downgraded Securities will continue to be amortized under the RPT Special Purpose Wrap Agreement.

34. In addition to Downgraded Securities, the Type D1 Account will be funded with Permitted Securities. Permitted Securities are U.S. Treasury debentures, Government National Mortgage Association (GNMA) securities and securities guaranteed by the Federal Deposit Insurance Corporation (FDIC). The Applicants state that these purchases have been made, and the Type D1 Account currently holds approximately $500 million in Permitted Securities. The maximum modified duration of a Permitted Security will be 3.5 years at the time of purchase. The RPT Special Purpose Wrap Agreement requires a minimum ratio of 2.5 to 1.0 of market value of Permitted Securities to the total unamortized unrealized and realized losses with respect to the Downgraded Securities (the Minimum Ratio).[13] This Minimum Ratio is designed to ensure that the Type D1 Account receives sizeable investment gains, which, in turn, would enable a more rapid amortization of the losses included in the RPT Special Purpose Wrap Agreement. The Minimum Ratio will be monitored on a daily basis, and if it drops below 2.5 to 1.0, BlackRock Advisors will correct the ratio within 10 business days either by moving additional Permitted Securities into the Type D1 Account or by selling Downgraded Securities and using the proceeds of those sales to reinvest in Permitted Securities. Notwithstanding the above, if the ratio is not corrected within 10 business days of a breach of the Minimum Ratio, BANA reserves the right to terminate the RPT Special Purpose Wrap Agreement immediately without payment obligation.

35. The total book value of the assets included in the D1 Account and covered by the RPT Special Purpose Wrap will not exceed $700 million without the prior written consent of the Trustee, BANA, and the Independent Fiduciary. Additionally, the Type D1 Account Crediting Rate will be 0.00% as of the next following reset date at any time when the book value under the wrap agreement includes any unamortized losses (realized or unrealized) on Downgraded Securities. The reason for using a 0.00% Crediting Rate is to amortize losses as quickly as possible and to maintain as much capacity as possible to move additional Below Investment Grade Securities into the Type D1 Account to be covered by the RPT Special Purpose Wrap Agreement. If the book value under the RPT Special Purpose Wrap Agreement does not include any unamortized losses on Downgraded Securities, the Type D1 Account Crediting Rate will be

[11] In other words, these wrap agreements either do not permit a cure period (*i.e.,* a period of time during which a downgraded security may be sold), or have a cure period that is of a limited duration.

[12] The Applicants state that securities that are "impaired" will not be transferred to the RPT Special Purpose Wrap Agreement. The Applicants generally describe an "impaired" security as: (a) A security with respect to which the issuer or guarantor has failed to make one or more payments of principal or interest; (b) a security with respect to which the principal or interest has become due and payable before it otherwise would have been due or payable; (c) a security where the rate of interest thereon has been reset; or (d) a security with respect to which the issuer becomes insolvent or institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy. The Applicant states that an "impaired security" would remain in RPT and the Trustee would decide whether to hold or sell such security.

[13] The Applicants state that the RPT Special Purpose Wrap Agreement permits the Trustee to reduce the amount of Permitted Securities (provided the Minimum Ratio is maintained) if the ratio of the market value of Permitted Securities to the total unamortized unrealized and realized losses with respect to Downgraded Securities is greater than 2.5 to 1.0.

determined on a monthly basis using the following formula:

$$\text{Crediting Rate} = [(PMV/PBV)^{1/(F*DUR)} * (1 + AYTM)] - 1$$

Where:

AYTM = dollar duration weighted annualized yield to maturity.

PMV = fair market value of assets in the Type D1 Account (as reduced by accrued but unpaid fees).

PBV = book value of the Type D1 Account.

DUR = modified duration (Macaulay duration of the asset or assets * 1/(1 + the dollar weighted annualized yield to maturity of the asset)).

F = factor, if any, agreed upon by BlackRock Advisors and BANA and approved by the Independent Fiduciary.

36. The Applicants state that the Type D1 Account Crediting Rate formula would likely generate a higher return for Participants on the assets applied to purchase the Permitted Securities than the approximately 40 basis point return currently received if these assets continued to be held in Type A cash-equivalent investments. Effective June 1, 2009, BlackRock Advisors will not change the Type D1 Account Crediting Rate formula unless BANA and the Independent Fiduciary agree to the adjustment before it is made. BlackRock Advisors must first provide the Independent Fiduciary with any information it may reasonably request in determining whether to approve a proposed change in the formula. Additionally, the Type D1 Account Crediting Rate itself will not be reset more frequently than monthly.

37. Downgraded Securities and Permitted Securities will be valued using the same process applicable to assets in the Global Wrap Account and the Global Buy and Hold Account, as described in paragraph 19 above, except that the Independent Fiduciary will review valuations of Downgraded Securities and Permitted Securities where BlackRock is unable to obtain a reliable valuation from third party sources and, if it deems appropriate, the Independent Fiduciary will obtain an independent valuation, which will be binding upon BANA. Further, if BANA objects to a valuation provided by BlackRock, the Independent Fiduciary will review the valuation and, if it deems appropriate, the Independent Fiduciary will thereafter obtain an independent valuation. In that situation, BANA will be bound by the valuation determined by the Independent Fiduciary.

38. The fee paid by RPT to BANA under the RPT Special Purpose Wrap Agreement was initially set at 15 basis points per annum, payable quarterly.[14] The fee must be reviewed annually for reasonableness relative to market conditions and risks, and approved by the Independent Fiduciary in the manner described in paragraph 47 below. Notwithstanding this, in no event shall the fee exceed 15 basis points. The fee will be based on the total book value of assets included in the Type D1 Account, including both the Downgraded Securities and the Permitted Securities.

39. The RPT Special Purpose Wrap Agreement will not have a specified term, but will be an "evergreen" contract. However, unless otherwise agreed by BANA, the Trustee, and the Independent Fiduciary, no Below Investment Grade Securities will be added to the RPT Special Purpose Wrap Agreement after April 23, 2011. The Trustee has the right to immunize the portfolio of securities included in the Type D1 Account only if BANA elects to terminate the RPT Special Purpose Wrap Agreement, or if BANA defaults under the RPT Special Purpose Wrap Agreement. If an immunization election becomes effective (the RPT Special Purpose Immunization Date), the RPT Special Purpose Wrap Agreement would terminate on the later of: (1) The date that is the number of years after the RPT Special Purpose Immunization Date which does not extend beyond the modified duration (as defined in the RPT Special Purpose Wrap Agreement) of the underlying assets on the RPT Special Purpose Immunization Date; or (2) the first date on which the market value of the underlying assets equals or exceeds the book value under the wrap agreement. From the RPT Special Purpose Immunization Date to the termination date, the underlying assets would be managed by BlackRock Advisors in accordance with immunization guidelines set forth in the RPT Special Purpose Wrap Agreement. This Agreement has a "pull to par" provision, as described above, and may be terminated by the Trustee at market value at any time, but the Trustee would only do so if alternative wrap coverage was available. According to the Applicants, the Trustee generally would not take this action unless the market value of the assets in the Type D1 Account exceeded the book value of those assets and another wrap provider agreed to provide a benefit responsive facility with respect to those assets.

40. The Trustee has engaged the Independent Fiduciary to monitor the performance of BlackRock Advisors and the Trustee with respect to the Type D1 Account and the RPT Special Purpose Wrap Agreement. Under the terms of this engagement, and as described in part above, the Independent Fiduciary must, among other things: (1) Determine whether the RPT Special Purpose Wrap Agreement and the Type D1 Account arrangement are prudent and in the best interest of participants and beneficiaries of the Plans that have invested in RPT; (2) make an initial and, thereafter, annual determination regarding whether the fee paid by RPT to BANA under the Special Purpose Wrap Agreement is reasonable relative to the specific attributes of the RPT Special Purpose Wrap Agreement; (3) make an annual determination regarding whether the continued maintenance of the RPT Special Purpose Wrap Agreement is appropriate and in the interest of Plans; and (4) make a monthly determination regarding whether the appropriate Type D1 Account Crediting Rate formula is being used and a monthly determination regarding whether such appropriate formula is being applied in proper manner. Further, the Independent Fiduciary must receive a copy of any amendment contemplated for the RPT Special Purpose Wrap Agreement (other than amendments that are purely ministerial in nature), and must thereafter review and approve the amendment prior to its implementation. Finally, the Independent Fiduciary must review and give prior approval for any RPT Special Purpose Wrap-Related Transaction that involves: (1) The exercise by BANA, the Trustee, or BlackRock Advisors of their rights under the RPT Special Purpose Wrap Agreement; or (2) the performance by BANA, the Trustee, or BlackRock of their obligations under the RPT Special Purpose Wrap Agreement, if such exercise or performance affects the Type D1 Crediting Rate or otherwise would have an adverse impact on the book value of a participant's or beneficiary's investment in RPT.

Paragraphs 41–49. Applicants' Request for Relief Involving the Separately Managed Account Wrap Agreements

41. The Applicants also seek exemptive relief for the provision and operation of certain wrap agreements applicable to two separately managed accounts. In this regard, BlackRock Advisors manages two separately managed accounts, one on behalf of the Hertz Plan (the Hertz Separately

[14] As described in further detail in paragraph 51 below, the Independent Fiduciary has submitted a written report (the Report) to the Department regarding the Special Purpose Wrap Agreement arrangement. In the Report, the Independent Fiduciary opined that a fee level of 15 basis points is reasonable and within the range of fees paid by RPT to other, unrelated wrap providers.

Managed Account) and the other on behalf of the Wal-Mart Plan (the Wal-Mart Separately Managed Account). These two separately managed accounts (the Separately Managed Accounts) operate in a manner that is substantially similar to RPT while being set up for individual employee benefit plans, rather than contained as part of a collective trust. MLTC is the directed trustee for the Wal-Mart Separately Managed Account. MLTC entered into an agreement with BANA, dated August 19, 2003, and amended effective as of December 31, 2008, pursuant to which BANA provides a book value benefit responsive facility with respect to a portion of the assets held in the Wal-Mart Separately Managed Account (BANA Wal-Mart Separately Managed Wrap Agreement). The Bank of New York Mellon, as successor by operation of law to Mellon Bank N.A. (Mellon) is the trustee for the Hertz Separately Managed Account, and Mellon entered into an agreement with BANA and BlackRock Advisors, as investment manager, dated July 27, 2007, and amended effective as of December 31, 2008, pursuant to which BANA provides a book value benefit responsive facility with respect to a portion of the assets held in the Hertz Separately Managed Account (the BANA Hertz Separately Managed Wrap Agreement).

42. The Applicants request that the exemptive relief sought with respect to the BANA Wal-Mart Separately Managed Wrap Agreement and the BANA Hertz Separately Managed Wrap Agreement (collectively, the Separately Managed Account Wrap Agreements) be retroactive to January 1, 2009 (*i.e.,* the date of the Merrill/BAC Merger). The Applicants state that retroactive relief is appropriate since terminating the Separately Managed Account Wrap Agreements prior to the Merrill/BAC Merger would have caused significant disruption to the Plans and participants and beneficiaries invested in the Separately Managed Accounts. In this regard, the Applicants represent that in the current distressed economic environment it is unlikely that a substitute wrap provider could have been found for BANA. If a substitute wrap provider was not available, immediate termination of the Separately Managed Account Wrap Agreements could have resulted in the Separately Managed Accounts "breaking the buck" (*i.e.,* the value of the participants' accounts would have reflected the market value (rather than the higher book value) of assets no longer covered by the Separately Managed Account Wrap Agreements.

43. According to the Applicants, the provision of wrap coverage by BANA to the Separately Managed Accounts could be considered an extension of credit under section 406(a) of ERISA. The Applicants state also that, because BANA and Merrill are under common control by BAC, and Merrill has an approximate 34% equity ownership interest in BlackRock, the operation of the Separately Managed Account Agreements, and certain transactions engaged in under such Agreements, could give rise to self-dealing concerns under section 406(b) of ERISA. In particular, BlackRock Advisor's role as investment adviser raises a concern that it could make investment decisions that are designed to benefit BANA, to the detriment of participants in the Hertz Plan and/or the Wal-Mart Plan.

44. The Applicants describe the provision and maintenance of the Separately Managed Account Wrap Agreements as including the following transactions (the Separately Managed Wrap-Related Transactions): (1) The determination, calculation of and adjustments to the Crediting Rate and any changes to the Crediting Rate formula; (2) valuations of securities covered by the Separately Managed Account Wrap Agreements; (3) payment of wrap fees and any changes to wrap fees; (4) the purchase and sale of any security covered by the Separately Managed Account Wrap Agreements; (5) BANA's or the Trustee's exercise of its right to terminate the Separately Managed Wrap Agreements; and (6) amendments to the Separately Managed Wrap Agreements.

45. The Separately Managed Account Wrap Agreements are "buy and hold" arrangements and do not cover actively-managed portfolios. The BANA Wal-Mart Separately Managed Wrap Agreement provides two levels of "buffers" which would be accessed before any assets covered by BANA would be used to provide benefit responsive payments. More than 64.3% of the assets in the Wal-Mart Separately Managed Account consist of investments held in these buffers, referred to as Tier 1 and Tier 2. The assets covered by the BANA Wal-Mart Separately Managed Wrap Agreement are included in the last tier to be accessed (Tier 3) and, when accessed, are only accessed on a pro-rata basis with the assets covered by the seven other Tier 3 Wrap Providers.[15] The BANA Hertz Separately Managed Wrap Agreement has one buffer which is accessed before any assets covered by the BANA Hertz Separately Managed Wrap Agreement would be accessed to provide benefit responsive payments. Sixty-three and a third percent of the assets in the Hertz Separately Managed Account are held in this buffer. After the initial buffer is depleted for benefit responsive payments, assets are sold using the last-in-first-out principle. Because the assets covered by the BANA Hertz Separately Managed Wrap Agreement are the assets in the Hertz Separately Managed Account that became subject to a benefit responsive facility most recently prior to the date of the Application, these assets will be the first assets sold to satisfy benefit responsive payments after the buffer is depleted.

46. The Applicants propose several conditions with respect to covered transactions involving the Separately Managed Wrap Agreements. In this regard, under each Agreement, the Crediting Rate was set at the inception of the wrap agreement by BANA and the counterparty and has been, and will continue to be, reset periodically based on a formula designed to amortize the difference between the market value and the book value of the assets covered by the wrap agreement over the approximate duration of the covered assets. The Crediting Rate formula used in the BANA Hertz Separately Managed Wrap Agreement, effective March 1, 2009, is: Crediting Rate = $[(PMV/PBV)^{I/(F*DUR)}*(1 + AYTM)] - 1$.

The Crediting Rate formula in the Wal-Mart Separately Managed Wrap Agreement, effective March 1, 2009,[16] is:

$$\text{Net Crediting Rate} = [((PMV/PBV)^{I/(F*DUR)} * (1 + AYTM)) - 1] - WF$$

Where:

PMV = market value of the covered assets.

PBV = book value of the covered assets.

AYTM = dollar duration weighted annualized yield to maturity of the covered assets.

DUR = modified duration {Macaulay duration of the asset or assets * 1/(1+ dollar weighted annualized yield to maturity of the asset or asset)).

F = factor, if any, agreed upon by BlackRock Advisors and BANA and approved by the Independent Fiduciary for purposes of modifying the duration component of the Crediting Rate.

WF = wrap fee rate.

[15] The Applicants describe a Tier 3 Wrap Provider as a financial institution that has entered into a wrap agreement with respect to assets held in the Wal-Mart Separately Managed Account that will not be accessed for purposes of making benefit payments until two tiers of buffer assets are accessed.

[16] See footnote 6.

Effective June 1, 2009, BlackRock Advisors may only change the formula for calculating the Crediting Rate after obtaining prior approval of BANA and the Independent Fiduciary.

47. BANA will not receive a fee under the either the BANA Wal-Mart Separately Managed Wrap Agreement or the BANA Hertz Separately Managed Wrap Agreement in excess of the maximum percentage fee received by any other Tier 3 Wrap Provider in the Wal-Mart Separately Managed Account or the BANA Hertz Separately Managed Wrap Agreement, as the case may be. Additionally, assets covered by the BANA Hertz Separately Managed Wrap Agreement and the BANA Wal-Mart Separately Managed Wrap Agreement will be valued in a similar fashion as assets covered by the BANA RPT Stable Value Agreements, except that, if BANA objects to the valuation of any asset, the Independent Fiduciary will make a binding determination of the value of the asset.

48. Pursuant to the investment management agreements relating to the Separately Managed Accounts, BlackRock Advisors provides the named fiduciaries of the Hertz Plan and the Wal-Mart Plan with information regarding investment performance and the assets held in the Separately Managed Accounts, including type of asset, crediting rate, duration and credit quality. In contrast with the BANA RPT Stable Value Agreements, the Separately Managed Account Wrap Agreements are not global arrangements. Each agreement provides coverage for 100% of the book value of the specified assets. Because the Separately Managed Account Wrap Agreements are not global arrangements, no wrap provider (other than BANA) is involved in these arrangements that, as an independent third party, could protect against potential conflicts of interests between BANA and BlackRock Advisors. For this reason, BlackRock Advisors and a named fiduciary of the Hertz Plan, and BlackRock Advisors and a named fiduciary of the WalMart Plan, have engaged the Independent Fiduciary to perform the following tasks (which are in addition to the duties described above): (1) Conduct a monthly review of the Crediting Rate; (2) analyze the purchase or sale of any security, including any change to the market to book ratio, duration or Crediting Rate; (3) review and approve any proposed amendment to the BANA Hertz Separately Managed Wrap Agreement or the BANA Wal-Mart Separately Managed Wrap Agreement; (4) review any exercise of contract provisions by any of BANA, BlackRock Advisors or, in the case of the BANA Wal-Mart Separately Managed Wrap Agreement, the Trustee, and analyze its potential impact on investors; (5) provide quarterly reports to BlackRock Advisors and to the named fiduciaries of the Wal-Mart Plan and the Hertz Plan stating, among other things, whether BlackRock Advisors has complied with all requirements of its contract. The Independent Fiduciary will also inform the named fiduciaries of a Plan if it believes that BANA or BlackRock Advisors has taken any actions that are not in the best interests of the participants and beneficiaries in the Wal-Mart Plan or the Hertz Plan, as relevant. Consistent with this, the Independent Fiduciary will review and must give prior approval for any Separately Managed Account Wrap-Related Transaction that involves: (1) The exercise by BANA, the Trustee, or BlackRock Advisors of their rights under the Separately Managed Account Wrap Agreements; or (2) the performance by BANA, the Trustee, or BlackRock of their obligations under the Separately Managed Account Wrap Agreements, if such exercise or performance affects the Crediting Rate or otherwise would have an adverse impact on the book value of a participant's or beneficiary's investment in the Separately Managed Accounts.

49. Each of the Separately Managed Account Wrap Agreements effectively may be terminated by terminating the appointment of BlackRock Advisors as investment manager. Under the Hertz Separately Managed Account, the named fiduciaries (or their authorized representatives) of the Hertz Plan may terminate BlackRock Advisors, as the investment manager, on 30 days' notice. Under the Wal-Mart Separately Managed Account, the named fiduciaries (or their authorized representatives) of the Wal-Mart Plan may terminate BlackRock Advisors, as the investment manager, on 90 days' notice. Because each of the Separately Managed Account Wrap Agreements covers a "buy and hold" portfolio, immunization is not a feature of either agreement. BlackRock Advisors may elect to terminate the Separately Managed Account Wrap Agreements by giving BANA seven business days' notice of such election. Absent a default by the counterparty, BANA may terminate the Separately Managed Account Wrap Agreements by failing to agree to future additions to, or substitution of assets in, the "buy and hold" portfolio covered by the agreement and then the agreement generally would terminate on the maturity date of the latest maturing asset covered by the agreement.

Paragraphs 50–51. The Independent Fiduciary

50. The Independent Fiduciary is Fiduciary Counselors Inc., located in Washington, DC. The Independent Fiduciary is experienced and knowledgeable in the transactions and arrangements described herein. The Independent Fiduciary is independent of and unrelated to BANA, Merrill, BlackRock and their Affiliates. In this regard, the Independent Fiduciary represents that, during any year of its engagement, its annual gross revenue from BANA, Merrill, and BlackRock has not, and will not, exceed five percent (5%) of the Independent Fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.

51. In a written report dated April 2, 2009, submitted to the Department (the Report), the Independent Fiduciary made a number of representations regarding the RPT Special Purpose Wrap Agreement. In the Report, the Independent Fiduciary stated that, among other things: the RPT Special Purpose Wrap Agreement is an innovative solution to the "breaking the buck" problem with a laudable objective that clearly is in the best interests of Plan participants; and it is likely that the 15 basis point annual wrap fee associated with the RPT Special Purpose Wrap Agreement will soon be industry average, if not lower than average. Regarding the Type D1 Account Crediting Rate, the Independent Fiduciary stated that such crediting rate arrangement is reasonable given that BANA has a limited capacity to absorb Below Investment Grade Securities, and that additional capacity is not available from anyone else. In the Report, the Independent Fiduciary states further that the investment management flexibility (regarding the sale of Below Investment Grade Securities) allowed by the Special Purpose Wrap Agreement benefits Plan participants because it will enable sales to occur when market conditions warrant, without the imposition of constraints from the wrapper contract. Additionally, the Independent Fiduciary stated in the Report that other provisions in the Special Purpose Wrap Agreement are within the norms for wrap contracts between unrelated parties.

52. In summary, the Applicants represent that the transactions described herein satisfy the statutory criteria set forth in section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things: in the current

distressed economic environment it is unlikely that a substitute wrap provider could be found for BANA; the interests of affected Plans have been, and will be, protected by the Independent Fiduciary; and the fee received by BANA pursuant to the arrangements described herein will be reasonable relative to market conditions and risks, as determined by the Independent Fiduciary.

**Notice to Interested Persons**

Written notice will be provided to a representative of each Plan invested in RPT, and the named fiduciaries of the Hertz Plan and the Wal-Mart Plan. The notice shall contain a copy of the proposed exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment regarding the proposed exemption. Such notice will be provided by personal or express delivery, or electronically if correspondence between the relevant parties is typically carried out electronically, within 15 days of the issuance of the proposed exemption. Any written comments must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Chris Motta of the Department, telephone (202) 693–8544. (This is not a toll-free number.)

Citigroup Inc. and its affiliates (Citigroup), the Citigroup 401(k) Plan, the Citibuilder 401(k) Plan for Puerto Rico (the Citibuilder Plan and collectively with the Citigroup 401(k) Plan, the Participant Directed Plans), the Citigroup Pension Plan (and collectively with the Participant Directed Plans, the Plans) (the Applicants), located in Greenwich, CT. [Application No. D–11591]

**Proposed Exemption**

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the U.S. Code) and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

*Section I: Transactions*

If the proposed exemption is granted:

(a) The restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act[17] shall not apply, effective June 22, 2009 (the Record Date), to:

(1) The acquisition of stock rights (the Rights) by certain plans, described below in Section I(a)(1)(A) through (C) of this exemption, in connection with holding shares of common stock of Citigroup Inc. (Citigroup Stock) on the Record Date established pursuant to an offering of such Rights (the Offering) in accordance with the Tax Benefits Preservation Plan (the Rights Plan) by Citigroup Inc. (Citigroup), a party in interest with respect to the following plans, and/or the acquisition of Citigroup Stock and the attached Rights by the plans in the future pursuant to the Offering:

(A) The Citigroup 401(k) Plan (the Citigroup 401(k) Plan);

(B) The Citibuilder 401(k) Plan for Puerto Rico (the Citibuilder Plan and collectively with the Citigroup 401(k) Plan, the Participant Directed Plans); and

(C) The Citigroup Pension Plan (the Citigroup Pension Plan and collectively with the Participant Directed Plans, the Plans);

(2) The holding of the Rights by the Plans until the date the Plans exercise or otherwise dispose of the Rights or the expiration of such Rights in accordance with the terms and conditions of the Rights Plan, whichever is earlier; and

(3) The exercise or other disposition of the Rights by the Plans;

provided that the conditions in Section II of this proposed exemption, as set forth below, are satisfied.[18]

(b) The sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (E) shall not apply, effective June 22, 2009, to the acquisition of the Rights by the Plans, described above in Section I(a)(1)(A), and Section I(a)(1)(C) of this proposed exemption; [19] provided that the conditions in Section II of this proposed exemption, as set forth below, are satisfied.

*Section II: Conditions*

The relief provided in this proposed exemption is conditioned upon adherence to the material facts and representations described herein and as set forth in the application file and upon compliance with the conditions, as set forth in this proposed exemption.

(a) The acquisition by each of the Plans of the Rights occurred or will occur in connection with the June 22, 2009 Offering made available by Citigroup on the same terms to all shareholders of the common stock of Citigroup (the Citigroup Stock), including the acquisition of the Rights at no cost to the Plans;

(b) The acquisition of the Rights by the Participant Directed Plans on the Record Date resulted from an independent act of Citigroup as a corporate entity. The acquisition of the Rights by the Plans in the future will occur either at the direction of individual participants (in the case of the Participant Directed Plans), at the direction of an Independent Fiduciary (in the case of the Citigroup Pension Plan), or in connection with in-kind contributions to a Plan by Citigroup of Citigroup Stock and attached Rights (a Stock/Right Contribution), in each case incidental to, and as a direct consequence of, the purchase or other acquisition of Citigroup Stock. All holders of Citigroup Stock, which include the Rights (other than an Acquiring Person, as defined in the Rights Plan), including the Plans, were, and will continue to be, treated in the same manner with respect to the acquisition of the Rights;

(c) All shareholders of Citigroup Stock, including the Plans acquired, or will acquire, the same proportionate number of Rights based on the number of shares of Citigroup Stock held by such shareholders, including the Plans;

(d) Except with respect to a Stock/Right Contribution where the determination to make the contribution will be made by Citigroup as a corporate entity, the acquisition of the Rights by the Participant Directed Plans was made, or will be made, pursuant to provisions of each such plan for individually-directed investment of participant accounts;

(e) All decisions regarding the Rights that will be made by the Participant Directed Plans will be made in accordance with the provisions of such Participant Directed Plans for individually-directed investment of participant accounts by the individual participants whose accounts in each such Participant Directed Plan acquired the Rights in connection with the Offering, and if no instructions are received, the Rights will expire in accordance with the terms and conditions of the Rights Plan;

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

[18] The Department's determination to propose relief for these transactions should not be viewed as an endorsement of the Rights Plan, nor is it offering any views as to whether such transactions satisfy any other requirements of ERISA, the Code or other relevant statutory provisions. Rather, this proposed exemption is designed to place the Plans and their participants and beneficiaries in the same position as other holders of Citigroup Stock with respect to the acquisition of the Rights and to prevent the possible dilution of the Plans' investment in the Citigroup Stock.

[19] The Applicants represent that, because the fiduciaries for the Citibuilder 401(k) Plan for Puerto Rico have not made an election under section 1022(i)(2) of the Act, whereby such plan would be treated as a trust created and organized in the United States for purposes of tax qualification under section 401(a) of the U.S. Code, jurisdiction under Title II of the Act does not apply. Accordingly, the Applicant is not seeking any relief for the prohibitions, as set forth in Title II of the Act, for the acquisition of the Rights by the Citibuilder Plan.

(f) All decisions regarding the Rights (except in the case of an acquisition as a result of a Stock/Right Contribution, where the determination to make the contribution will be made by Citigroup as a corporate entity) will be made on behalf of the Citigroup Pension Plan by an Independent Fiduciary acting as an investment manager.

(g) To the extent the Citigroup board of directors exercises its rights under the Offering to redeem the Rights at the redemption price set forth in the Offering, all shareholders of Citigroup Stock will be treated the same, including the Plans; and

(h) The acquisition of the Rights as a result of a Stock/Right Contribution by Citigroup to the Plans shall result from a determination by Citigroup as a corporate entity.

(i) Neither the Participant Directed Plan participants nor the Citigroup Pension Plan will pay any fees or commissions in connection with the exercise of the Rights other than the aggregate Purchase Price with respect to the Rights then being exercised and an amount equal to any applicable transfer tax or other governmental charge.

*Section III: Definition*

The term "Independent Fiduciary" means an investment manager, as described in section 3(38) of the Act, that is:

(a) Independent of, and unrelated to, Citigroup Inc. and its affiliates (Citigroup), and

(b) appointed to act on behalf of the Citigroup Pension Plan for the purposes described in Section II.(f) above.

For purposes of this proposed exemption, a fiduciary will not be deemed to be independent of, and unrelated to, Citigroup if: (i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Citigroup; (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this proposed exemption, except that it may receive compensation for acting as an independent fiduciary from Citigroup in connection with the transactions described herein, if the amount or payment of such compensation is not contingent upon, or in any way affected by such fiduciary's decision; and (iii) more than 5 percent of such fiduciary's annual gross revenue in its prior tax year will be paid by Citigroup in the fiduciary's current tax year.

*Effective Date:* If granted, this proposed exemption will be effective as of June 22, 2009, the date of the announcement of the Offering and will expire on June 10, 2012.

**Summary of Facts and Representations**

1. The Applicants are Citigroup Inc. and its affiliates (Citigroup), the Citigroup 401(k) Plan, the Citibuilder 401(k) Plan for Puerto Rico (the Citibuilder Plan and collectively with the Citigroup 401(k) Plan, the Participant Directed Plans), the Citigroup Pension Plan (and collectively with the Participant Directed Plans, the Plans). The Applicants requested this relief in an application dated December 2, 2009 and a revised application dated July 23, 2010 (the Application).

Citigroup Inc. is a global diversified financial services holding company whose businesses provide consumers, corporations, governments and institutions with a broad range of financial products and services. Citigroup has approximately 200 million customer accounts and does business in more than 140 countries. Citigroup currently operates, for management reporting purposes, via two primary business segments: Citicorp, generally consisting of its regional consumer banking businesses and institutional clients group; and Citi Holdings, generally consisting of its brokerage and asset management and local consumer lending businesses, and a special asset pool. Citigroup's consumer and corporate banking business is a global franchise encompassing, among other things, branch and electronic banking, consumer lending services, investment services, and credit and debit card services. Citibank, N.A. (Citibank) is a principal subsidiary of Citigroup. As of September 30, 2009, Citigroup and its subsidiaries had total consolidated assets of approximately $1.89 trillion.

2. Citigroup sponsors the Citigroup 401(k) Plan and the Citigroup Pension Plan, while Citibank sponsors the Citibuilder 401(k) Plan for Puerto Rico. These Plans are involved in the transactions for which an exemption has been requested. These Plans are described, as follows:

(a) Citigroup 401(k) Plan: The Citigroup 401(k) Plan is a stock bonus plan, a portion of which is designated as an employee stock ownership plan, and contains within it a cash or deferred arrangement under section 401(k) of the Code and a qualified Roth contribution program under section 402A of the Code. The Citigroup 401(k) Plan is intended to qualify under the provisions of section 401(a) of the Code, and its related trust is intended to be tax-exempt pursuant to section 501(a) of the Code.

The Applicants represent that the Citigroup 401(k) Plan allows participants to direct investments of their own contributions and a portion of the employer contributions into several investment alternatives, including Citigroup Stock. In the event that Citigroup, as a corporate entity, decides to make an in-kind contribution of Citigroup Stock and attached Rights (a Stock/Right Contribution) to the Citigroup 401(k) Plan, the participants receiving a Stock/Right Contribution can sell the Citigroup Stock (including the attached Rights) and invest the proceeds in any other fund offered in the Citigroup 401(k) Plan immediately upon such Citigroup Stock (and attached Rights) being credited to the participants' accounts.[20]

The Citigroup 401(k) Plan is funded through a trust of which State Street Bank and Trust Company is the trustee. Reliance Trust Company is the sub-trustee for the Citigroup Stock fund offered as an investment option in the participant directed plans. The Plans Administration Committee of Citigroup Inc., a committee appointed by Citigroup, is the Plan Administrator of the Citigroup 401(k) Plan. The Applicants state that the 401(k) Plan Investment Committee is responsible for making all investment decisions related to the Citigroup 401(k) Plan, other than those investment decisions made by the participants and the decision to offer Citigroup stock as an investment in the Plan. Citigroup, as plan sponsor, is responsible for making all decisions regarding offering the Citigroup Stock fund as an investment option under the Citigroup 401(k) Plan.

As of June 22, 2009 (the Record Date), the Citigroup 401(k) Plan had approximately 180,935 participants and total assets of $6,990,680,850. The shares of Citigroup Stock held by the Citigroup 401(k) Plan were valued at approximately $393,394,961 as of the Record Date, and comprised approximately six percent (6%) of the total assets in the Citigroup 401(k) Plan. These shares represented approximately seven percent (7%) of the total shares of Citigroup Stock outstanding as of that date.

(b) The Citibuilder 401(k) Plan for Puerto Rico: The Citibuilder Plan is a defined contribution profit sharing plan which includes a qualified cash or deferred arrangement intended to meet

[20] In this regard, Section 408(e) of ERISA provides a statutory exemption for the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) if certain conditions are met. The Department assumes that the Citigroup 401(k) Plan is intended to satisfy the requirements of section 404(c) of ERISA.

the requirements of section 1165(e) of the Puerto Rico Internal Revenue Code of 1994, as amended (the PR Code). The Citibuilder Plan was established for the exclusive benefit of the eligible employees and beneficiaries of Puerto Rican subsidiaries of affiliates of Citibank. The Applicants assert that the Citibuilder Plan is not intended to meet, and has never in practice met, the requirements of section 401(a) of the Code. The Citibuilder Plan is subject to Title I of the Act.

The Applicants represent that the Citibuilder Plan allows participants to direct investments of their own contributions and employer contributions into several investment alternatives, including Citigroup Stock. In the event that Citigroup, as a corporate entity, decides to make a Stock/Right Contribution to the Citibuilder Plan, the participants receiving a Stock/Right Contribution can sell the Citigroup Stock (including the attached Rights) and invest the proceeds in any other fund offered in the Citibuilder Plan immediately upon such Citigroup Stock (and attached Rights) being credited to the participants' accounts. The Applicants assert that the Citibuilder Plan is intended to satisfy the requirements of section 404(c) of ERISA.

The Citibuilder Plan is funded through a trust. The trustee of the Citibuilder Plan is Banco Popular de Puerto Rico. The Plans Administration Committee of Citigroup Inc. is the Plan Administrator of the Citibuilder Plan. The Applicants state that the 401(k) Plan Investment Committee is responsible for making all investment decisions related to the Citibuilder Plan, other than those investment decisions made by the participants and the decision to offer Citigroup Stock as an investment in the Plan. Citigroup, as plan sponsor, is responsible for making all decisions regarding offering the Citigroup Stock fund as an investment option under the Citibuilder Plan.

As of the Record Date, the Citibuilder Plan had approximately 1,739 participants and total assets of $18,318,896. As of the Record Date, the shares of Citigroup Stock held by the Citibuilder Plan were valued at approximately $1,297,870 and comprised approximately seven percent (7%) of the total assets of the Citibuilder Plan. These shares represented approximately less than one percent (0.02%) of the total shares of Citigroup Stock outstanding as of the Record Date.

(c) The Citigroup Pension Plan: The Citigroup Pension Plan is a frozen defined benefit pension plan that generally provided benefits to eligible participants under a cash balance formula. Certain participants who have a protected benefit that was accrued under a plan that was merged into the Citigroup Pension Plan may be eligible to have a portion of their benefit calculated using a final average pay formula (Grandfathered Participants). Effective January 1, 2007, the Citigroup Pension Plan was closed to new participants. Effective January 1, 2008, participants' hypothetical cash balance accounts ceased benefit accruals, although these hypothetical accounts will continue to accrue interest credits. Grandfathered Participants are not subject to the benefit accrual freeze and continue to accrue benefits. The Applicants assert that the Citigroup Pension Plan is intended to qualify under the provisions of section 401(a) of the Code, and its related trust is intended to be tax-exempt pursuant to section 501(a) of the Code.

The Citigroup Pension Plan is funded through a trust of which The Bank of New York Mellon is the trustee. The Plans Administration Committee is the Plan Administrator of the Citigroup Pension Plan. The Applicants state that the Pension Plan Investment Committee has oversight over all investment decisions related to the Citigroup Pension Plan.

As of December 31, 2008, the Citigroup Pension Plan had approximately 260,890 participants and total assets of approximately $11,285,250,916. The Applicants note that the Citigroup Pension Plan did not hold any Citigroup Stock as of the Record Date.

3. The Applicants provide that Citigroup has accumulated a substantial amount of recognized net deferred tax assets, such as net operating loss carryforwards and tax credits (the Tax Benefits), which is included in its tangible common equity. As of December 31, 2009, Citigroup had recognized net deferred tax assets of approximately $46.1 billion. Citigroup expects to utilize the Tax Benefits to offset future taxable income. The Applicants assert that Citigroup's utilization of the Tax Benefits is in the interests of all Citigroup Stockholders, including the Plans, the participants and beneficiaries.

The Applicants note that Citigroup's ability to utilize these deferred tax assets to offset future taxable income may be significantly limited in the event that Citigroup experiences an "ownership change" as defined in section 382 of the Code.[21] Specifically, section 382 provides that a "loss corporation" (*i.e.,* a corporation with net operating loss carryforwards and certain other tax attributes) that experiences an ownership change will generally be subject to an annual limitation after the ownership change on the use of such attributes. The Applicants assert that in Citigroup's case, this means that, should an ownership change occur, Citigroup could experience a limitation on its ability to utilize a portion of its tax deferred assets. Since tax losses and tax credits have finite carryover periods, the limitation could negatively affect Citigroup's ability to use the tax losses and tax credits before they expire. The precise amount of the limitation that would arise from an ownership change under section 382 on Citigroup's ability to utilize its deferred tax assets would depend on the value of Citigroup's stock and prevailing interest rates at the time of the ownership change.

4. The Applicants state that given the possibility of such negative consequences, on June 9, 2009, the board of directors of Citigroup adopted the Tax Benefits Preservation Plan (the Rights Plan) in order to preserve its ability to use the tax benefits. It is represented that the Rights Plan uses mechanics and structures very similar to traditional shareholder rights plans (commonly known as "poison pill" plans) in that it creates disincentives for those who engage in certain activities. Unlike traditional shareholder rights plans which are designed to deter unsolicited takeover bids, section 382-focused rights plans are designed to protect tax assets by deterring actions that could increase the likelihood of a loss of tax assets.[22] As is the case with the Rights Plan, this is generally accomplished by seeking to deter any shareholder from accumulating positions that would qualify such shareholder as a "five percent shareholder" under applicable tax laws.

The Applicants note that, as with the many companies that have adopted section 382-focused rights plans in the past, the Rights Plan has the effect of significantly diluting the value of the shares of the shareholder whose acquisitions of Citigroup Stock caused

[21] The Applicants note that generally, an ownership change occurs if the "five percent shareholders" (as defined in section 382 of the Code) of a loss corporation increase their percentage ownership interest in the loss corporation by more than 50 percentage points during a rolling three year testing period.

[22] The Applicants state that Citigroup's Rights Plan also differs from the traditional shareholder rights plan in that the Rights Plan does not apply to acquisitions of a majority of Citigroup Stock made in connection with an offer to acquire 100% of Citigroup Stock, and lasts for only 36 months. Traditional shareholder rights plans generally last for 10 years.

the Rights Plan to become exercisable (the Acquiring Person) by allowing all other shareholders to purchase, for each Right, preferred stock equivalent to one share of Citigroup Stock but at half the price of a share of Citigroup Stock at the time of the purchase. Specifically, the mechanisms by which the Rights Plan works are as follows:

(a) In connection with the adoption of the Rights Plan, on June 9, 2009, Citigroup's board of directors declared a dividend of one preferred stock purchase right (a Right) for each outstanding share of Citigroup Stock. The dividend was payable to holders of record of Citigroup Stock on the Record Date, as well as shares of Citigroup Stock issued after such date and before the Final Expiration Date (June 10, 2012). Unless and until the Rights become exercisable (as described below), the Rights are not severable from Citigroup Stock, have no independent voting or dividend rights associated with them and can be transferred only in connection with the transfer of the underlying shares of Citigroup Stock.

(b) Each Right will initially represent the right to purchase, for $20.00 (the Purchase Price), one one-millionth of a share of Series R Participating Cumulative Preferred Stock, $1.00 par value per share (the Series R Preferred Stock).

(c) The Rights are not exercisable until the earlier of (i) the close of business on the 10th business day after the date (the Stock Acquisition Date) of the announcement that a person has become an Acquiring Person (as defined in the Rights Plan) and (ii) the close of business on the 10th business day (or such later day as may be designated by Citigroup's board of directors before any person has become an Acquiring Person) after the date of the commencement of a tender or exchange offer by any person which could, if consummated, result in such person becoming an Acquiring Person. The "Distribution Date" is referred to as the date that the Rights become exercisable.

(d) The Applicants state that it is important to note that the Rights may never become exercisable because Citigroup retained the ability to unilaterally (i) amend the Rights Plan in any manner prior to the occurrence of a Distribution Date, including by modifying the definition of "Final Expiration Date" and effectively terminating the Rights Plan immediately or (ii) redeem the Rights for $0.00001 per Right at any time prior to a Distribution Date.

(e) After any person has become an Acquiring Person, each Right (other than Rights treated as beneficially owned under certain U.S. tax rules by the Acquiring Person) can be exercised by the holder to purchase for the Purchase Price a number of shares of Series R Preferred Stock having a market value of twice the Purchase Price. Basically, all holders of these Rights (other than the Acquiring Person) will have the right to acquire one one-millionth of a share of Series R Preferred Stock, which will be the economic equivalent (*e.g.,* the same voting rights, dividend rights, trading price and market value) of one share of Citigroup Stock, for one-half (½;) of the price of a share of Citigroup Stock as of the Distribution Date. Any time after any person has become an Acquiring Person (but before any person becomes the beneficial owner of 50% or more of the Citigroup Stock), the board of directors of Citigroup may elect to implement such dilution remedy against an Acquiring Person by exchanging any Rights (other than the Rights beneficially owned by the Acquiring Person) for one one-millionth of a share of Series R Preferred Stock per Right (instead of having holders exercise Rights and pay the Purchase Price).

(f) In the event that an Acquiring Person causes an ownership change, such Acquiring Person would almost certainly suffer extreme dilution due to the triggering of the Distribution Date (and exercisability of the Rights under the Rights Plan). This creates a significant disincentive for any investor to acquire a sufficient position, or to increase its position in Citigroup Stock, to cause such person to be treated as a "five percent shareholder" for section 382 purposes. In addition, while exercise of the Rights by non-Acquiring Person shareholders is not automatic, any such shareholder who does not decide to exercise the Rights would almost certainly also experience significant dilution.

(g) Citigroup's board of directors may redeem all of the Rights at a price of $0.00001 per Right at any time before a Distribution Date.

(h) Prior to the Distribution Date, the Rights will be inseparable from the corresponding Citigroup Stock and not evidenced by a separate certificate and, as a result, the Rights will not be transferrable separately from the corresponding Citigroup Stock. Instead, the Rights will be evidenced by the certificates for (or current ownership statements issued with respect to uncertificated shares in lieu of certificates for) and will be transferred with Citigroup Stock, and the registered holders of Citigroup Stock will be deemed to be the registered holders of the Rights.

(i) After the Distribution Date, the rights agent will mail separate certificates evidencing the Rights to each record holder of Citigroup Stock as of the close of business on the Distribution Date, and thereafter the Rights will be transferable separately from Citigroup Stock. The Rights will expire on June 10, 2012 (the Final Expiration Date), with no value, unless the Rights are earlier exchanged or redeemed or the Plan is amended by the board of directors of Citigroup.

(j) At any time prior to the Distribution Date, the Rights Plan may be amended in any respect. At any time after the occurrence of a Distribution Date, the Rights Plan may be amended in any respect that does not adversely affect Rights holders (other than any Acquiring Person).

(k) A Rights holder has no rights as a stockholder of Citigroup as a result of holding the Rights, including the right to vote and to receive dividends. The Rights Plan includes antidilution provisions designed to maintain the effectiveness of the Rights.

5. Citigroup issued a press release regarding the adoption of the Rights Plan on June 10, 2009. In addition, shareholders of Citigroup Stock as of the Record Date, including participants in the Participant Directed Plans who were invested in the Citigroup Stock fund, were notified of the adoption of the Rights Plan by letter, dated June 22, 2009 (the Record Date). The notice was sent to active employees by electronic mail (with the relevant link) and to all others by first class mail. Shareholders did not have to pay any amount to acquire the Rights. As of the Record Date, Citigroup had approximately 196,000 registered Citigroup Stock shareholders of record. As of the Record Date, there were 5,671,743,807 shares of Citigroup Stock issued and outstanding.

On March 2, 2010, the Applicants informed the Department that Citigroup filed a February 26, 2010 preliminary proxy statement, Schedule 14A, pursuant to Section 14(a) of the Securities Exchange Act of 1934 (1934 Act), with the Securities Exchange Commission (SEC) providing the contents of the proxy statement that was mailed to Citigroup stockholders, for the Citigroup annual stockholders' meeting held on April 20, 2010. Proposal 6 of the proxy statement asks that the stockholders at the meeting ratify the June 9, 2009 board of directors' adoption of the Rights Plan. The proxy statement noted that because the Rights Plan protects the value of the deferred tax assets for the benefit of all

stockholders, the board of directors recommends that the stockholders vote for ratification of the Rights Plan. On April 26, 2010, the Applicants informed the Department that Form 8–K, filed by Citigroup on April 23, 2010 with the SEC pursuant to Section 13 or 15(d) of the 1934 Act, reported that the proposal to ratify the adoption of the Rights Plan was approved by the stockholders at the annual meeting held on April 20, 2010. On April 23, 2010, Citigroup shareholders ratified and approved the adoption of the Rights Plan.

6. The authorized capital stock of Citigroup consists of 15 billion shares of Citigroup Stock, with a par value $0.01 per share, and 30 million shares of preferred stock, without a par value per share. The Citigroup Stock is traded on the NYSE under the symbol of C. It is represented that the closing price of the Citigroup Stock on June 19, 2009, before the Offering was $3.17 per share. On June 22, 2009, the closing price of the Citigroup Stock was $3.00 per share. It is represented that sufficient shares of the Series R Preferred Stock will be available to satisfy fully all exercise elections made in connection with the Rights.

7. The Applicants note that the acquisition by each of the Plans of the Rights occurred or that will occur, in connection with the holding or acquisition of Citigroup Stock as a result of the Offering made available by Citigroup, on the same terms to all shareholders of the Citigroup Stock, including the acquisition of the Rights at no cost. The Applicants assert that neither the Participant Directed Plan participants nor the Citigroup Pension Plan will pay any fees or commissions in connection with the exercise of the Rights other than the aggregate Purchase Price with respect to the Rights then being exercised and an amount equal to any applicable transfer tax or other governmental charge.

8. Citigroup and its affiliates, as employers any of whose employees are covered by one or more of the Plans, subject to Title I of the Act, and as fiduciaries of one or more of the Plans, are parties in interest with respect to each such plan, pursuant to section 3(14)(A) and section 3(14)(C) of the Act, respectively. In addition, Citigroup and its affiliates, as employers any of whose employees are covered by one or more of the Plans, which are subject to Title II of the Act, and as fiduciaries with respect to one or more of such Plans are disqualified persons with respect to each such Plan, pursuant to section 4975(e)(2)(A) and section 4975(e)(2)(C) of the Code, respectively.

9. It is represented that the Citigroup Stock, the Rights, and the Series R Preferred Stock satisfy the definition of "employer securities," as set forth under section 407(d)(1) of the Act [23] and that the Citigroup Stock and Series R Preferred Stock satisfy the definition of a "qualifying employer security," as set forth in section 407(d)(5) of the Act. However, the Rights do not satisfy the definition of "qualifying employer securities," as defined under section 407(d)(5) [24] of the Act because the Rights, if considered separately from Citigroup Stock as a security under section 3(20) of the Act [25], is not stock, a marketable obligation or an interest in a publicly-traded partnership. Under section 407(a)(1) of the Act, a plan may not acquire or hold any "employer security" which is not a "qualifying employer security." Further, section 406(a)(1)(E) of the Act prohibits the acquisition, on behalf of a plan, of any "employer security" in violation of section 407(a) of the Act. Section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any "employer security" that violates section 407(a) of the Act.

The Applicants have requested retroactive relief, effective as of June 22, 2009, the Record Date of the Offering, from the prohibitions, as set forth in Title I of the Act, for the acquisition and holding of the Rights by the Plans. The Applicants have also requested the same retroactive relief from the prohibitions, as set forth in section 4975(c)(1)(A) through (E) of the Code, for the acquisition of the Rights by the Citigroup 401(k) Plan and the Citigroup Pension Plan.

10. The Applicants state that the Rights will only be exercisable in the event Citigroup experiences an ownership change under section 382 of the Code. The Rights will remain outstanding until the Final Expiration Date (or June 10, 2012), unless the Rights are earlier exchanged or redeemed pursuant to the terms and conditions of the Rights Plan or the Rights Plan is amended. The Applicants assert that the Rights issued by Citigroup are transferable only in connection with the transfer of the underlying shares of Citigroup Stock and cannot be separated from the Citigroup Stock unless and until such Rights are exercisable. This means that the Plans cannot simply refuse to accept the Rights. Since the Rights are inseparable from Citigroup Stock, it would be impossible for the Plans to hold Citigroup Stock (a qualifying employer security) and not engage in a prohibited transaction. Absent an exemption, the Plans would have to divest themselves of all Citigroup Stock in order to not hold the Rights and thereby avoid a prohibited transaction.

11. With regard to the Rights acquired by the Participant Directed Plans and potentially to be acquired in the future, it is represented by plan design that the participants of the Participant Directed Plans control the assets in their accounts in such Plans and that no plan fiduciary had the authority to exercise any control over such assets. Therefore, on the Record Date, a Right attached to each Citigroup Stock beneficially owned by a participant's account on that date and, thus, the Rights were allocated to the accounts of the participants in such Plans in proportion to the Citigroup Stock beneficially owned by each such account. In the event that the Participant Directed Plans acquire Citigroup Stock in the future, a Right will attach to each Citigroup Stock beneficially acquired by each participant's account and, thus, the Rights will be allocated to the accounts of the participants in such Plans in proportion to the Citigroup Stock beneficially acquired by each such account. In addition, it is represented that each participant in the Participant Directed Plans will be given the opportunity to exercise the Rights upon the Distribution Date in accordance with the terms and conditions of the Rights Plan. Accordingly, each participant will be able to make an independent decision whether to acquire Citigroup

[23] Section 407(d)(1) of the Act defines the term, "employer security," as "a security issued by an employer of employees covered by the plan, or by an affiliate of such employer."

[24] Section 407(d)(5) of the Act defines the term "qualifying employer security," as an employer security which is stock, a marketable obligation (as defined in subsection (e)), or an interest in a publicly traded partnership * * *"

[25] Section 3(20) of ERISA states that "security" has the same meaning as such term under section 2(1) of the Securities Act of 1933, as amended (the "Securities Act"). Section 2(1) of the Securities Act defines the term "security" as "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

Stock (except in the case of a Stock/Right Contribution as discussed below) and the attached Rights in the future and whether to exercise the Rights following the Distribution Date and receive shares of Series R Preferred Stock with a value equal to twice the Purchase Price.

12. With respect to the Citigroup Pension Plan, it is represented that the Citigroup Pension Plan did not hold any Citigroup Stock as of the Record Date. However, under the terms of the Citigroup Pension Plan, the Pension Plan Investment Committee of Citigroup Inc., as the named fiduciary of such Plan, has the authority to appoint a third party manager unaffiliated with Citigroup and its affiliates to serve as a "fiduciary" (within the meaning of section 3(21)(A) of the Act) and an "investment manager" (within the meaning of section 3(38) of the Act) (an Independent Fiduciary) over all or a portion of the assets of the Citigroup Pension Plan. Under investment guidelines applicable to the assets under the supervision and management of certain Independent Fiduciaries, such Independent Fiduciaries may be able to cause the Citigroup Pension Plan to invest in Citigroup Stock in accordance with sections 408(e) and 407 of the Act. In the event that the Citigroup Pension Plan acquires Citigroup Stock before the Final Expiration Date, it is represented that all decisions regarding the acquisition (except in the case of a Stock/Right Contribution as discussed below), holding and exercise or other disposition of Citigroup Stock and, therefore, the Rights by the Citigroup Pension Plan will be exercised by an Independent Fiduciary. In addition, Citigroup Inc. may in the future contemplate making employer contributions to one or more of the Plans in shares of Citigroup Stock and the Rights attached to such shares (a Stock/Rights Contribution). The determination to make such Stock/Right Contribution will be made by Citigroup as a corporate entity.

13. The Applicants represent that all shareholders of Citigroup Stock on or after the Record Date, including the participants in the Participant Directed Plans and any Independent Fiduciary of the Citigroup Pension Plan, have the ability to exercise the Rights acquired with Citigroup Stock after the Distribution Date through the close of business on the Final Expiration Date, unless earlier exchanged or redeemed in accordance with the terms and conditions of the Rights Plan. This deadline for exercising the Rights was implemented by Citigroup as the issuer of the Rights. Neither the shareholders (other than executive officers of Citigroup who are also shareholders of Citigroup Stock), the participants in the Participant Directed Plans nor any Independent Fiduciary had any voice in setting the deadline with respect to the Rights.

14. The Applicants assert that the acquisition, holding, and exercise or other disposition of the Rights by the Plans, pursuant to the Offering, is in the interests of and beneficial to such Plans and to the participants and beneficiaries of such Plans. The Applicants note that the existence of the Rights Plan and issuance of Rights is beneficial to the Plans to the extent they are shareholders of Citigroup Stock because the Rights Plan is explicitly designed to preserve Citigroup's ability to utilize its Tax Benefits (which in total had a reported value of $46.1 billion as of December 31, 2009) and to avoid limitations on the use of any portion of such amount. Citigroup's ability to utilize its Tax Benefits has significant value to Citigroup's shareholders, including the Plans that hold Citigroup Stock.

It is represented that the Plans' ability to acquire, hold and dispose of the Rights is in the interest of participants and beneficiaries because it allows them to hold Citigroup Stock. If the requested exemption were not granted, the Applicants represent that the Plans would not be permitted to acquire, hold or dispose of the Rights. Since the Rights are not severable from Citigroup Stock until they become exercisable, the Plans would not be permitted to acquire, hold or dispose of Citigroup Stock, even though the Citigroup Stock itself is a qualifying employer security and such actions are contemplated by the statutory scheme of ERISA.

The Applicants assert that the Plans' ability to exercise or otherwise dispose of the Rights is beneficial to the Plans because, if the Rights become exercisable, they will allow the Plans to acquire additional equity in Citigroup at a discount on the same terms and conditions as other holders of Citigroup Stock. If the Plans held Citigroup Stock but were not able to exercise the Rights, the value of their shares would be diluted significantly, resulting in harm to the Plans. However, the Applicants state that it is important to note that if the Rights Plan is successful, shareholders will be deterred from becoming Acquiring Persons and the Rights will never become exercisable.

15. It is represented that the acquisition, holding, and exercise or other disposition of the Rights by the Plans will be protective of such Plans and of the participants and beneficiaries of such Plans in that all of the shareholders of Citigroup Stock, including the Plans, will be treated in a similar manner with respect to the Rights. In addition, all decisions regarding the future acquisition (except in the case of an acquisition as a result of a Stock/Right Contribution, where the determination to make the contribution will be made by Citigroup as a corporate entity), holding and exercise or other disposition of the Rights by the Participant Directed Plans will be made in accordance with the provisions of such Plans for individually-directed investment of participant accounts by the individual participants. All decisions regarding the future acquisition (except in the case of an acquisition as a result of a Stock/Right Contribution, where the determination to make the contribution will be made by Citigroup as a corporate entity), holding and exercise or other disposition of the Rights by the Citigroup Pension Plan will be made by an Independent Fiduciary.

16. It is represented that the acquisition, holding, and exercise or other disposition of the Rights by the Plans is feasible and all shareholders of the Citigroup Stock (other than an Acquiring Person), including the Plans, were, and will be, treated in the same manner with respect to any past and future acquisition, holding, and exercise or other disposition of the Rights. With regard to the fact that the past acquisition and holding of the Rights were consummated prior to obtaining an exemption due to the timing of the Offering, it is represented that the fiduciaries were required to participate in the Offering before requesting the proposed exemption and such fiduciaries had no control over the timing of the transactions.

17. In summary, the Applicants represent that the proposed transactions satisfy the statutory requirements for an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The acquisition by each of the Plans of the Rights occurred or will occur in the future in connection with the holding or acquisition of Citigroup Stock as a result of the Offering made available by Citigroup on the same terms to all shareholders of Citigroup Stock, including the acquisition of the Rights at no cost;

(b) The past acquisition of the Rights by the Participant Directed Plans resulted from an independent act of Citigroup as a corporate entity. The acquisition of the Citigroup Stock with the attached Rights by (i) the Participant Directed Plans in the future will occur at the direction of individual

participants, (ii) the Citigroup Pension Plan at the direction of the Independent Fiduciary, or (iii) as a result of a Stock/Right Contribution where the determination to make the contribution will be made by Citigroup as a corporate entity; in all cases, incidental to, and as a consequence of, the purchase or other acquisition of Citigroup Stock. All holders of the Rights holding Citigroup Stock (other than an Acquiring Person), including the Plans, were, and will continue to be, treated in the same manner with respect to the acquisition of the Rights;

(c) All shareholders of Citigroup Stock, including the Plans acquired, or will acquire, the same proportionate number of Rights based on the number of shares of Citigroup Stock held by such shareholder, including the Plans;

(d) Except with respect to a Stock/Right Contribution, the acquisition of the Rights by the Participant Directed Plans was made, or will be made, pursuant to provisions of each such plan for individually-directed investment of participant accounts;

(e) All decisions regarding the holding and exercise or other disposition of the Rights that will be made by the Participant Directed Plans will be made in accordance with the provisions of such Participant Directed Plans for individually-directed investment of participant accounts by the individual participants whose accounts in each such Participant Directed Plan acquired the Rights in connection with the Offering, and if no instructions are received, the Rights will expire in accordance with the terms and conditions of the Rights Plan; and

(f) The authority for all decisions regarding the acquisition, holding and exercise or other disposition of the Rights by the Citigroup Pension Plan will be exercised by an Independent Fiduciary.

(g) Neither the Participant Directed Plan participants nor the Citigroup Pension Plan will pay any fees or commissions in connection with the exercise of the Rights other than the aggregate Purchase Price with respect to the Rights then being exercised and an amount equal to any applicable transfer tax or other governmental charge.

**Notice to Interested Persons**

The Applicants represent that within thirty (30) days of the date of publication of the proposed exemption in the **Federal Register**, the Applicants will provide notice of the proposed exemption (consisting of a copy of the proposed exemption as published in the **Federal Register** and the supplemental statement required by Department of Labor Regulation Section 2570.43(a)(2), (collectively, the Notice to Interested Persons)) to (i) all current participants (active and inactive) in the Participant Directed Plans, and (ii) the current Independent Fiduciaries (as defined in the proposed exemption) of the Citigroup Pension Plan. With respect to the Participant Directed Plans, the Applicants will provide all current participants with the Notice to Interested Persons, as well as an explanatory cover letter, by first class mail. The Notice to Interested Persons may be included in the same package that includes the quarterly statements and other participant notices if the timing of the mailing of the Notice to Interested Persons coincides with the timing of the mailing of such other statements and notices. With respect to the Citigroup Pension Plan, the Applicants will provide the Independent Fiduciaries with the Notice to Interested Persons by electronic mail, with a request for a delivery receipt for the electronic mail.

The Department must receive all written comments and requests for a hearing no later than thirty (30) days from the last date of the mailing of the Notice to Interested Persons.

**FOR FURTHER INFORMATION CONTACT:** Wendy M. McColough of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

## The West Coast Bancorp 401(k) Plan (the Plan) Located in Lake Oswego, Oregon [Application No. D–11611]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[26] If the exemption is granted, the restrictions of sections 406(a)(1)(A) and (E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) and the sanctions resulting from the application of section 4975(c)(1)(A) and (E) of the Code, shall not apply, effective January 29, 2010, to: (1) the acquisition of stock rights (the Rights) by the Plan issued by the West Coast Bancorp, Inc. (Bancorp), the Plan sponsor and a party in interest with respect to the Plan under the terms and conditions of a Rights offering (the Offering); and (2) the holding of the Rights by the Plan until their expiration, during the subscription period (the Subscription Period) of the Offering, provided that the following conditions were met:

(a) The receipt of the Rights by the Plan occurred in connection with the Offering and was made available by Bancorp on the same terms to all shareholders (the Shareholders) of the common stock of Bancorp (Common Stock);

(b) The acquisition of the Rights by the Plan resulted from an independent act of Bancorp as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to such acquisition;

(c) All Shareholders of Common Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Common Stock held by such Shareholders;

(d) All decisions regarding the Rights held by the Plan were made by the individual Plan participants whose accounts in the Plan received the Rights, in accordance with the provisions under the Plan for individually-directed investment of such account; and

(e) The Plan did not pay any fees or commissions in connection with the acquisition and or holding of the Rights.

*Effective Date:* This proposed exemption, if granted, will be effective as of January 29, 2010, the commencement date of the Offering (the Commencement Date).

**Summary of Facts and Representations**

*The Parties*

1. Bancorp, which maintains its principal place of business in Lake Oswego, Oregon, is the bank holding company for West Coast Bank (the Bank), its primary subsidiary. The Bank maintains $2.7 billion in assets and operates in 65 Oregon and Washington state locations. As of the Commencement Date, there were 87,171,915 shares of Common Stock and 121,328 shares of Series B Preferred Stock (Series B Preferred Stock) outstanding. As of March 9, 2010, Bancorp was authorized to issue 250 million additional shares of Common Stock in order to raise capital, as discussed below.

2. Bancorp sponsors the Plan, a Code section 401(k) profit sharing plan, for its subsidiaries. As of the Commencement Date, the Plan had 752 participants and assets totaling $22,717,737.22. Under the Plan, participants may make pre-tax and after-tax 401(k) contributions. Eligible employees may also make rollover contributions into the Plan from other employers' qualified plans or from IRAs. Further, the Plan allows

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

participants to self-direct the investment of their individual accounts pursuant to section 404(c) of the Act. West Coast Trust Company, a wholly-owned subsidiary of Bancorp serves as the Plan's directed trustee (the Trustee).

3. The Plan provides participants with several investment options, which include the Federated Government Obligations Money Market Fund (the Money Market Fund) and the West Coast Bancorp Employer Stock Fund (the Stock Fund). The Money Market Fund provides conservative investors with current income and stable principal. Accordingly, the Money Market Fund invests primarily in a portfolio of short-term U.S. Treasury and government agency securities.

The Stock Fund allows participants to invest voluntarily in the Common Stock. As of January 19, 2010, the Plan held 454,923.56 shares of common stock or approximately 0.52% of the then outstanding shares of Common Stock, with a value of $1,187,350 based on the $2.61 closing price on the NASDAQ Global Select Market. The Common Stock trades under ticker symbol "WCBO." As of the Commencement Date, the Common Stock represented approximately 5.23% of Plan assets as of the Commencement Date.

*Regulatory Involvement*

4. From 2007 to early 2009, the value of the Common Stock decreased by over 90 percent as a result of the stock market crash, the subprime mortgage crisis and the recession. Bancorp represents that the Common Stock's price reflected the trend for comparable bank stocks. Although Bancorp had exposure to home mortgage loans that were eventually written down, Bancorp represents that it was not a recipient of any funds from the U.S. Treasury's Troubled Asset Relief Program.

5. On March 30, 2009, the Federal Deposit Insurance Corporation (FDIC) and the Oregon Division of Finance and Corporate Securities (DFCS) issued a joint Report of Examination (ROE) following a routine examination of the Bank. The ROE, as summarized, stated that the Bank had engaged in unsafe and unsound banking practices by: (a) Operating with management whose policies and practices were detrimental to the Bank; (b) operating with a board of directors which failed to provide adequate supervision over and direction to the active management of the Bank; (c) operating with inadequate capital in relation to the kind and quality of assets held by the Bank; (d) operating with a large volume of poor quality loans; (e) engaging in unsatisfactory lending and collection practices; (f) operating in such a manner as to produce operating losses; (g) operating with inadequate provisions for liquidity; and (h) operating in violation of Part 323 of the FDIC Rules and Regulations, 12 CFR Part 3234, concerning appraisals; and (i) operating in violation of Part 353 of the FDIC Rules and Regulations, 12 CFR Part 353, concerning suspicious activity reporting.

6. On October 15, 2009, the FDIC, the DFCS and the Bank entered into a Stipulation and Consent to the Issuance of an Order to Cease and Desist (the Consent Agreement) (FDIC–09–4536). In the Consent Agreement, the Bank, without admitting or denying alleged charges of unsafe or unsound banking practices and violations of law and/or regulations, agreed to the issuance of an Order to Cease and Desist (the Consent Order). On October 22, 2009, the FDIC and the DFCS issued the Consent Order which essentially required the Bank to take steps outlined in the Consent Agreement. In this regard, The Bank was required to increase its capital levels, reduce underperforming assets, submit plans for a securities issuance to the FDIC, set capital and leverage ratios, prevent fraudulent lending, and eliminate dividends within certain time frames.[27] The Bank represents in its Form 10–K (Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934) filing for its fiscal year ending December 31, 2009 that it is in material compliance with all aspects of the Consent Order. On July 15, 2010, the FDIC and DFCS issued a joint termination of the Consent Order.

*New Investment in the Bank*

7. On October 23, 2009, Bancorp entered into investment agreements with 52 outside investors as part of a private sale of $155 million of newly-issued preferred stock and warrants issued by Bancorp (the Capital Raise). Sandler O'Neill and Partners, L.P., Bancorp's financial advisor with respect to the Capital Raise, represented Bancorp with the outside investors, none of whom are parties in interest with respect to the Plan.

During the Capital Raise, Bancorp received net proceeds of $139.2 million from the investors in exchange for 1,428,849 shares of mandatorily convertible cumulative participating preferred stock (the Series A Preferred Stock), 121,328 shares of mandatorily convertible cumulative participating preferred stock (the Series B Preferred Stock), and Class C warrants (the Class C Warrants), exercisable for a total of 240,000 shares of Series B Preferred Stock (each at a price of $100 per share together with certain other expired warrants).

As a result of shareholder approvals, on January 20, 2010, shares of Series A Preferred Stock issued by Bancorp in the Capital Raise were automatically converted into an aggregate of 71,442,450 shares of Common Stock on January 27, 2010. Shares of Series B Preferred Stock issued in the Capital Raise became automatically convertible into 12 million shares of Common Stock upon transfer of such preferred stock to third parties in a "widely dispersed" offering.[28] Finally, shares of Series B Preferred Stock issuable upon the exercise of the Class C Warrants became automatically convertible into 12 million shares of Common Stock following exercise of the Class C Warrants and the transfer of the Series B Preferred Stock issued by Bancorp to third parties in a "widely-dispersed" offering.

Bancorp contributed the $139.2 million of proceeds from the Capital Raise to the Bank, thereby improving the Bank's operating flexibility. In addition, the regulatory capital ratios of the Bank improved significantly as a result of the Capital Raise.

*The Offering*

8. Following the Capital Raise, Bancorp embarked on an effort to raise $10 million in additional capital through the Offering.[29] The Offering commenced on January 29, 2010 and it expired on March 1, 2010 at 5 p.m. PST (the Offering Expiration Date). The shares of Common Stock issued in connection with the Offering were listed on the NASDAQ Global Select Market.

In the Offering, Bancorp distributed, at no charge, the Rights to the Shareholders of record on January 19, 2010 (the Record Date). The Rights entitled the Shareholders to purchase up to 5,000,000 shares of Common Stock for a subscription price (the Subscription Price) of $2.00 per share. Each Shareholder received .31787 Rights for each share of Common Stock they owned on the Record Date. The Rights were allocated in whole numbers

[27] Bancorp also entered a written agreement with the Federal Reserve Bank of San Francisco (the Reserve Bank) and the DFCS on December 15, 2009, agreeing not to take any dividends or other payments representing a reduction in capital from the Bank without the prior consent of the Reserve Bank and the DFCS.

[28] Bancorp's Form 10–K Report states, on page 35, that for the fiscal year ending December 31, 2009, no conversion of Series B Preferred Stock can occur until the condition of a "widely-dispersed" offering of such stock has occurred, due to regulatory reasons.

[29] Bancorp apprised the FDIC and DFCS of the Offering pursuant to the Consent Order.

only and were rounded down to the nearest whole number.

9. The Rights could not be sold, transferred or assigned, and they were not listed for trading on the NASDAQ or any other exchange or over-the-counter market. Bancorp represents that the Rights were nontransferable to allow only legacy Shareholders the opportunity to purchase additional shares of Common Stock to help offset the share dilution such shareholders had incurred when the Preferred Stock was acquired by the outside investors, as discussed above in Representation 7. Further, Bancorp states that the use of transferable Rights would have allowed persons other than legacy Shareholders to acquire Common Stock at the below market price; whereas, the Offering was intended to benefit legacy Shareholders. Any Rights that were not exercised by the Shareholders expired.

As noted above, each Right entitled a Shareholder an opportunity to purchase one share of Common Stock at the Subscription Price of $2.00 per share. The Subscription Price, which was established by the Bancorp's Board of Directors (the Board), was equal to the implied per share value of the Common Stock that was negotiated by the new investors, as discussed above in Representation 7. The Subscription Price was not related to Bancorp's book value, results of operations, cash flows, financial condition or the predicted future market value of the Common Stock after the Offering. In addition, the Board did not make any recommendations to the Shareholders regarding whether they should exercise their Rights but urged the Shareholders to make independent decisions based on their assessment of Bancorp's business and the risk factors associated with a rights offering.

10. The Rights entitled the Shareholders to a basic subscription privilege (the Basic Subscription Privilege) and an over-subscription privilege (the Over-Subscription Privilege). The Basic Subscription Privilege entitled the Shareholders to purchase one share of Common Stock at the Subscription Price. The Over-Subscription Privilege entitled Shareholders to purchase as many additional shares of Common Stock available in the Offering as they wanted at the Subscription Price. Shareholders were required to exercise their Basic Subscription Privilege in full before they could exercise their Over-Subscription Privilege. Additionally, Shareholders were required to exercise their Over-Subscription Privilege at the same time they exercised their Basic Subscription Privilege. However, Bancorp reserved the right to reject in whole or in part any Over-Subscription requests, regardless of the availability of shares of Common Stock.[30] Bancorp represents that no Shareholders who exercised their Basic Subscription Privileges, including Plan Shareholders, had their Over-Subscription requests rejected either in whole or in part.

If the Shareholders collectively exercised their Over-Subscription Privileges in excess of the 5,000,000 shares authorized by Bancorp in the Offering, Bancorp was required to fulfill first all Basic Subscription Privileges. Then, any remaining shares of Common Stock were to be sold pro rata among the Over-Subscription Shareholders based on the number of shares for which the over-subscribing Shareholders had subscribed under their Basic Subscription Privileges.

*Request for Exemptive Relief and Rationale*

11. Bancorp represents that the Rights satisfy the definition of an "employer security," which under section 407(d)(1) of the Act is defined as "a security issued by an employer of employees covered by the plan, or by an affiliate of such employer," However, Bancorp states that the Rights do not satisfy the definition of a "qualifying employer security," as set forth in section 407(d)(5) of the Act, which defines the term as an employer security which is stock, a marketable obligation, or an interest in a publicly-traded partnership (provided that such partnership is an existing partnership as defined in the Code). Under section 407(a)(1) of the Act, a plan may not acquire or hold any "employer security" which is not a "qualifying employer security." Moreover, section 406(a)(1)(E) of the Act prohibits the acquisition, on behalf of a plan, of any "employer security in violation of section 407(a) of the Act. Finally, section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan to permit the plan to hold any "employer security" that violates section 407(a) of the Act. Because the Plan's acquisition and holding of the Rights would violate the Act,[31] Bancorp requests an administrative exemption from the Department. If granted, the exemption would be effective on the Commencement Date.

*The Rights Disclosures*

12. On February 3, 2010, Bancorp posted a "Rights Offering Notice" on its intranet for its employees. On February 4, 2010, Bancorp completed mailing a prospectus for the Offering. Plan Shareholders also received special instructions entitled "Special Instructions for Participants in our 401(k) Plan—What You Need to Know about the Bancorp Stock Rights Offering and Your 401(k) Account" (Special Instructions). As discussed below, the Special Instructions gave Plan Shareholders, as opposed to non-Plan Shareholders, different timeframes and payment methods in which to exercise their Rights.

*Exercise of Rights*

13. Shareholders were permitted to exercise all, some or none of their Rights. An election to exercise a Right was irrevocable once made. Bancorp did not charge any fees or sales commissions to issue the Rights or to issue shares of Common Stock to those who exercised their Rights. However, if Shareholders exercised their Rights through a broker or other holder of their shares, the Shareholders were responsible for paying any fees that person may have charged. No fees or expenses were paid by the Plan.

14. To exercise their Rights, including their Basic and Over-Subscription Privileges, non-Plan Shareholders were required to complete and submit a Subscription Rights Certificate to Wells Fargo, N.A. which acted as the Subscription Agent for the Offering (the Subscription Agent). The Subscription Agent collected these payments and held them in a segregated bank account until the Offering was completed. Once the Offering had been completed, the Subscription Agent purchased the new shares of Common Stock in accordance with the terms of the Offering. Generally, non-Plan Shareholders had until 5 p.m. PST on the Offering Expiration Date (*i.e.,* March 1, 2010) to

[30] Bancorp had reserved the rejection right, which is customary in a rights offering by a banking institution, to avoid any shareholder from acquiring an ownership interest in Bancorp that would either jeopardize Bancorp's ability to claim certain tax advantages, such as net operating losses, or require Bancorp to first obtain approval from federal or state banking authorities.

[31] Other provisions of the Act that are implicated by the transactions include section 406(a)(1)(A) of the Act and the fiduciary self-dealing and conflict of interest provisions section 406(b)(1) and (b)(2) of the Act. In relevant part, section 406(a)(1)(A) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if the fiduciary knows or should know that the transaction is a prohibited sale or exchange of any property between a plan and a party in interest. Section 406(b)(1) of the Act prohibits a fiduciary from dealing with the assets of a plan in his own interest of or for his own account. Section 406(b)(2) of the Act prohibits a fiduciary with respect to a plan from acting in any transaction involving the plan on behalf of a party, or represent a party, whose interests are adverse to the interests of the plan or its participants and beneficiaries.

exercise their Rights, but those who held their shares in a brokerage account had to comply with the earlier deadline set by their particular broker.

15. To exercise their Rights, Plan Shareholders were required to complete and submit a Subscription Rights Certificate and Election Form to the Subscription Agent, which was not a party in interest with respect to the Plan, by 5 p.m. CST (3 p.m. PST) on February 22, 2010 (the Participant Expiration Time), six business days before the Offering Expiration Date.[32] From the Commencement Date to the Participant Expiration Time, the Subscription Agent was required to provide the Trustee with daily reports of the participants who submitted forms and the number of Rights they chose to exercise under both their Basic and Over-Subscription Privileges.

In order to exercise their Rights, Plan participants were not required to remit any payments to the Subscription Agent. Instead, participants were required to have enough money available in their Money Market Fund accounts by the Participant Expiration Time to pay for their Basic and Over-Subscription Privilege shares (their Subscription Prices).[33] Because participants were not likely to have sufficient funds in their Money Market Fund accounts initially, the Special Instructions provided detailed instructions about how participants could transfer additional funds into the Money Market Fund from other Plan investment funds and specified the timeframes in which to do so. Participant directions to move funds in the Money Market Fund from any other investment funds in the Plan except the Stock Fund had to be received by February 17, 2010. Participant instructions to move funds from the Stock Fund into the Money Market Fund had to be received by February 19, 2010 in order to allow additional time to settle trades on the Common Stock.

16. As soon as practicable after the Participant Expiration Time, the Trustee froze the Money Market Fund accounts of the participants exercising Rights[34] and liquidated funds sufficient to cover their Subscription Prices. If a participant did not have enough money, the Trustee (as instructed by Bancorp) exercised that participant's Rights to the maximum extent possible with the funds available. Once the Trustee was finished liquidating funds, it lifted the freeze on the Money Market Fund.

17. To provide the participants with a contemporaneous confirmation of the number of shares they had purchased in the Offering while working within the restrictions placed by the administration system of the Plan's recordkeeper, the Stock Fund was credited with the number of shares for which the participants had subscribed and paid, even though at the time those shares had not yet been purchased.[35] The Special Instructions explicitly stated that the use of the term "shares" only indicated a pending trade and that the actual shares they purchased would not be officially credited to their accounts until after the Offering had closed and the shares had been purchased. For these reasons, the Stock Fund was frozen for those participants. The freeze was in effect from the time the shares were credited as a pending trade until the shares were actually purchased and credited to their accounts. Bancorp informed participants that the freeze would last until five to ten business days after the Offering Expiration Date.[36]

18. Because the Participant Expiration Time was set six business days before the Offering Expiration Date, Bancorp explains that participants would possibly have been at a slight disadvantage relative to non-Plan Shareholders who had a few additional days to observe the trading price of the Common Stock and determine whether they wanted to participate in the Offering.[37] Therefore, the Trustee was instructed to note the public trading price of the Common Stock on Friday, February 26, 2010 (one business day before the Offering Expiration Date). If, on that date, the Common Stock last traded at above $2.00 per share, the Trustee was to exercise the participant's Rights pursuant to the terms of the Offering as described above. If, however, the Common Stock traded at $2.00 per share or lower, the Trustee was to re-deposit all money into the appropriate participant's Money Market Fund account and delete the pending trade from the participant's account in the Stock Fund.

If a Plan Shareholder instructed the Trustee to exercise such participant's Rights, the Trustee was required to remit the participant's money to the designated clearing agency for the Offering, Depository Trust & Clearing Corporation (DTC). DTC would then purchase the Common Stock from Bancorp, and the Trustee would credit such participant's account in the Stock Fund with the corresponding shares. In the event participants over-subscribed to more shares than were available under the Offering, the money liquidated from the participant's Money Market Fund account to buy those shares was re-deposited into the appropriate account.

19. As of the Commencement Date, 339 Plan participants were eligible to exercise a minimum of one Right. However, only 70 or 20.1 percent of Plan Shareholders exercised their Rights. In addition, the Common Stock never closed below $2.00 per share during the entire Subscription Period.[38] With respect to Plan Shareholders, the closing price of the Common Stock on February 26, 2010 was $2.63 per share and was $2.59 per share on the Expiration Closing Date. Accordingly, the Trustee exercised the Rights for all such Plan Shareholders at the same time.

[32] Bancorp represents that the extra business days were required to provide the Trustee, the Subscription Agent for the Offering, the Plan's recordkeeper, the custodian for the Stock Fund and the clearing agency for the Offering sufficient time to process Plan participants' elections to exercise their Rights, tabulate and confirm the results, liquidate the participants' funds, confirm the orders and the availability of the funds and remit payment to purchase the shares.

[33] Participants had to have sufficient funds to pay for their Basic and Over-Subscription Privileges, but they could choose the source of such funds from within their individual accounts in the Plan. By liquidating only the participants' Money Market Fund accounts rather than making a pro rata liquidation from each of the Plan investment funds in which participants were invested, Bancorp explains that the Plan allowed participants to choose which of their Plan investment funds they wanted to liquidate to pay for their shares of Common Stock. Thus, participants were not forced to use money from other investment funds within the Plan which they wished to keep invested at their then current levels.

[34] Bancorp states that the reason behind freezing the participant's Money Market Fund accounts was to prevent the participants from moving money out of such fund after the Participant Expiration Time lapsed but before the Trustee could liquidate it.

[35] According to Bancorp, the original intent was to create a special temporary investment fund in the Plan designated as the "Rights Offering Subscription," in order to show a counterbalancing asset for the money that was liquidated from the participants' Money Market Fund. However, the administrative system of the Plan's recordkeeper was unable to create this special account. Consequently, the only available option was to show the subscription rights as actual shares within the Stock Fund, pending the actual purchase of those shares.

[36] Bancorp represents that the five to ten business days allowed sufficient processing time for the Subscription Agent to determine the number of shares acquired in the over-subscription, for the shares to be issued, and for the crediting of the shares to the participants' accounts.

[37] According to Bancorp, most of the non-Plan Shareholders held their shares in brokerage accounts. This meant that they had to send their subscription elections to their brokers, who would then patch those elections for their customers with the election cutoff date set by their brokers, which was typically several business days before the Offering Expiration Date.

[38] During this period, shares of Common Stock closed as low as $2.47 per share on February 17, 2010 and as high as $2.80 per share on February 3, 2010.

20. Bancorp represents that the acquisition and holding of the Rights by the Plan was administratively feasible, in that the Offering was a one-time transaction, and all shareholders of Common Stock, including the Plan shareholders, were treated in the same manner with respect to the acquisition and holding of the Rights. With regard to the fact that Plan shareholders had less time to decide whether to exercise their Rights, Bancorp represents that the various service providers involved in the Offering, rather than Bancorp, required the additional time. Additionally, Bancorp explains that the Offering included specific protections instructing the Trustee not to exercise the Rights of Plan Shareholders if the Common Stock fell below the Subscription Price. Further, Bancorp states that the proposed exemption would be in the best interests of the Plan and its participants and beneficiaries because Plan Shareholders that exercised their Rights avoided the dilution of their interests in Bancorp and increased the value of their individual accounts.

*Summary*

21. In summary, Bancorp represents that the transactions satisfied the statutory requirements for an exemption under section 408(a) of the Act because:

(a) The Plan's receipt of the Rights occurred in connection with the Offering and was made available by Bancorp on the same terms to all shareholders of the Common Stock;

(b) The acquisition of the Rights by the Plan resulted from an independent act of Bancorp as a corporate entity, and all Shareholders of the Rights, including the Plan, were treated in the same manner with respect to such acquisition;

(c) All Shareholders of the Common Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of the Common Stock held by such Shareholders;

(d) All decisions regarding the Rights held by the Plan were made by the individual Plan participants whose accounts in the Plan received the Rights, in accordance with the provisions under the Plan for individually-directed investment of such accounts; and

(e) The Plan did not pay any fees or commissions in connection with the acquisition or holding of the Rights.

**FOR FURTHER INFORMATION CONTACT:** Mr. Anh-Viet Ly of the Department at (202) 693–8648. (This is not a toll-free number.)

**General Information**

The attention of interested persons is directed to the following:

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

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

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

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

Signed at Washington, DC, this 30th day of September, 2010.

**Ivan Strasfeld,**

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

[FR Doc. 2010–24892 Filed 10–5–10; 8:45 am]

**BILLING CODE 4510–29–P**