

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Application No. D-10763, et al.]

Proposed Exemptions; The FINA, Inc. Capital Accumulation Plan (the Plan)**AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Notice of proposed exemptions.

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

Written Comments and Hearing Requests

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice

shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) 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.

The FINA, Inc. Capital Accumulation Plan (the Plan) Located in Dallas, Texas

[Application No. D-10763]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, as of June 4, 1999, to the acquisition, holding, and exercise by the Plan of certain warrants that were issued by Total, S.A. (Total),¹ pursuant to a tender offer (the Exchange Offer) made on May 6, 1999 to all shareholders of PetroFina S.A. (PetroFina), including the Plan, provided that the following conditions were satisfied:

(a) The Plan's acquisition and holding of the warrants issued by Total (the Total Warrants) in connection with the Exchange Offer occurred as a result of

¹The applicant states that the warrants issued by Total do not constitute "qualifying employer securities," as defined in section 407(d)(5) of the Act.

an independent act of Total as a corporate entity;

(b) All shareholders of PetroFina, including the Plan, were treated in a like manner with respect to all aspects of the Exchange Offer; and

(c) An independent fiduciary made the determination whether, and to what extent, the Plan should participate in the Exchange Offer.

EFFECTIVE DATE: This exemption, if granted, will be effective as of June 4, 1999.

Summary of Facts and Representations

1. The Plan is a defined contribution plan sponsored by Fina, Inc. (Fina). Fina is a Delaware corporation with its principal headquarters in Dallas, Texas. Fina is a wholly owned, indirect subsidiary of PetroFina, a *societe anonyme/naamloze vennootschap* organized under the laws of the Kingdom of Belgium. Fina and its subsidiaries were organized in 1956 as American PetroFina, Incorporated and are part of an international group of companies that are affiliated with PetroFina. Fina, through its subsidiaries, is engaged in crude oil and natural gas exploration and production; petroleum products refining, supply and transportation and marketing; chemical manufacturing and marketing; and natural gas marketing. As of March 31, 1999, the Plan had total assets of approximately \$246,215,000. As of March 31, 1999, the Plan had 2,534 participants and beneficiaries.

2. In connection with an earlier merger in which Fina became a subsidiary of PetroFina in August, 1998, PetroFina issued certain warrants (the PetroFina Warrants) to all shareholders of Fina, including the Plan.² One PetroFina Warrant entitled the holder to purchase nine-tenths (0.9) of one PetroFina American Depositary Share (a PetroFina ADS), each PetroFina ADS representing one-tenth (0.1) of one ordinary voting share of PetroFina (a

²The applicant states that the PetroFina Warrants were "employer securities," as defined in section 407(d)(1) of the Act but were not "qualifying employer securities," as defined in section 407(d)(5) of the Act. Section 407(a)(1)(A) of the Act prohibits a plan from acquiring or holding any employer security which is not a qualifying employer security. However, the Plan obtained authorization from the Department to acquire, hold, and exercise the PetroFina Warrants, pursuant to an authorization made under Prohibited Transaction Class Exemption 96-62 (61 FR 39988, July 31, 1996). Interested persons may review the information submitted to the Department by Fina in Submission E-00080, which is available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

PetroFina Share). The PetroFina Warrants are exercisable any time prior to August 5, 2003. PetroFina ADSs and PetroFina Warrants are listed for trading on the New York Stock Exchange, Inc. (the NYSE).

3. The Plan allows participants to contribute up to 10% of their pre-tax income to their respective individual accounts in the Plan and 6% of their after-tax earnings to another individual account, or a combination of pre-tax and after-tax contributions to each such account, not exceeding 10%. Each year, Fina contributes to a third account in the Plan, known as the Matching Contributions Account, an amount equal to 100% of the employee's contributions to the Plan, up to a total of 6% of the employee's gross annual income, for all employees who have completed at least one year of service.

Plan assets may be invested in various mutual funds, i.e., a money market fund, U.S. debt index fund, balanced fund, equity index fund, equity growth fund, and a global equity fund. In addition, the Plan has two other investment funds (which are not mutual funds) that hold PetroFina ADSs and PetroFina Warrants, respectively. Prior to the date of the Exchange Offer, all assets in the Matching Contributions Account could be invested only in PetroFina ADSs or PetroFina Warrants. As of March 31, 1999, the Plan held 2,954,328 PetroFina ADSs with a fair market value of approximately \$162,457,394, or approximately 66% of the Plan's total assets. As of the same date, the Plan held 720,461 PetroFina Warrants with a fair market value of approximately \$10,034,226, or approximately 4% of the Plan's total assets.

4. Effective January 14, 1999, Total, a major international integrated oil and gas company based in France, acquired approximately 41% of the outstanding PetroFina Shares. Consequently, as required by Belgian law, Total made an exchange offer in Belgium for all PetroFina Shares not held by persons in the United States. On May 6, 1999, concurrently with that offer, Total initiated the Exchange Offer in the United States to exchange: (1) Total American Depositary Shares (Total ADSs) for PetroFina ADSs; (2) Total Warrants for PetroFina Warrants; and (3) shares of common stock of Total (the Total Shares) for PetroFina Shares. Pursuant to the Exchange offer: (1) holders of PetroFina Shares could exchange two such shares for nine Total Shares; (2) holders of PetroFina ADSs could exchange 10 such ADSs for nine Total ADSs; and (3) holders of PetroFina Warrants could exchange 100 such

warrants for 81 Total Warrants. It is represented that the Exchange Offer was an independent act of Total as a corporate entity and that all shareholders of PetroFina, including the Plan, were treated in a like manner with respect to all aspects of the Exchange Offer.

The Total Warrants will expire concurrently with the PetroFina Warrants and otherwise have terms and conditions similar to the PetroFina Warrants, after giving effect to the exchange ratio for the underlying shares. Each Total Warrant entitles the holder to acquire one Total ADS at a price of \$46.94. The terms of the Exchange Offer were set forth in Total's Exchange Offer Prospectus, dated May 6, 1999, that was part of the Total registration statement on file with the Securities and Exchange Commission. Total ADSs and Total Warrants are listed for trading on the NYSE.

5. The PetroFina Board of Directors instructed Paribas, a European-based investment advisor, to evaluate, from a financial perspective, the fairness of the consideration to be received by the shareholders of PetroFina in the Exchange Offer. On April 7, 1999, Paribas delivered its opinion to the PetroFina Board of Directors to the effect that, as of such date, the terms and conditions of the Exchange Offer proposed by Total to PetroFina shareholders were fair from a financial perspective. A similar fairness opinion was provided by the Morgan Guaranty Trust Company of New York (Morgan) on the same date. The PetroFina Board of Directors concluded that the terms and conditions of the Exchange Offer proposed by Total were fair and recommended that PetroFina shareholders accept the offer and tender their PetroFina Shares, ADSs, and Warrants, pursuant to the Exchange Offer.

6. The Plan was amended to grant to the the Plan Committee, the named fiduciary of the Plan, broad discretionary authority to establish procedures to facilitate and/or implement the decision to participate in the Exchange Offer. The Plan was also amended to provide that U.S. Trust Company, N.A. (U.S. Trust) would be appointed as an independent fiduciary for the Plan to determine whether, and to what extent, the Plan should participate in the Exchange Offer. It is represented that, with assets under management totalling approximately \$56 billion, U.S. Trust is an experienced and qualified fiduciary with extensive trust and management capabilities, including discretionary asset management, asset allocation and

diversification, investment advice, securities trading, and independent fiduciary assignments under the Act.

7. U.S. Trust determined that the Plan should participate fully in the Exchange Offer and instructed Boston Safe Deposit and Trust Company (Boston Safe), the Plan trustee, accordingly. U.S. Trust represents that its decision was based upon the following considerations. First, the Exchange Offer clearly represented a significant premium to PetroFina's trading price at the same time of the offer, as well as historically, and the markets had maintained that premium to date based upon the proposed exchange ratio. Second, the Exchange Offer translated into valuation multiples that were above PetroFina's historical valuation levels and above the median levels for its peer group. Third, on a pro forma basis, Total Shares were trading in a reasonable range of valuation multiples relative to comparable companies, and, therefore, represented a fairly valued investment into which to exchange. Finally, U.S. Trust determined that the fairness opinion provided to PetroFina by its financial advisers, Paribas and Morgan, indicated that the Exchange Offer was fair and reasonable, and a review of the accompanying analysis by such advisers supported that conclusion.

8. The applicant represents that the following is a summary of the Exchange Offer. On June 4, 1999, the expiration date of the Exchange Offer, the Plan, pursuant to the determination by U.S. Trust, tendered 2,977,144 PetroFina ADSs, each with a fair market value of \$54.75, the closing price on the NYSE as of that date. The Plan received nine Total ADSs in exchange for each ten PetroFina ADSs tendered. Also on June 4, 1999, the Plan tendered 614,212 PetroFina Warrants, each with a fair market value of \$13.88, the closing price on the NYSE as of that date. The Plan received 81 Total Warrants for each 100 PetroFina Warrants tendered. Each participant in the Plan received his or her allocable share of Total ADSs and Total Warrants in exchange for the PetroFina ADSs and PetroFina Warrants held by his or her individual account, as of June 4, 1999. Following the exchange, participants exercise control over the Total Warrants and Total ADSs acquired in the exchange, through their individual accounts in the Plan, in the same manner as they did over the comparable PetroFina securities.³ The

³In connection with the Plan's earlier acquisition of the PetroFina Warrants, pursuant to an authorization made by the Department under PTE 96-62 (see Footnote 2), Plan participants were provided by Fina with instructional material

applicant represents that the Exchange Offer was successful, and Total subsequently changed its name to Total Fina, S.A.

9. In summary, the applicant represents that the subject transactions satisfied the criteria for an exemption under section 408(a) of the Act because, among other things: (a) The Plan's acquisition and holding of the Total Warrants in connection with the Exchange Offer occurred as a result of an independent act of Total as a corporate entity; (b) all shareholders of PetroFina, including the Plan, were treated in a like manner with respect to all aspects of the Exchange Offer; (c) U.S. Trust, acting as an independent fiduciary for the Plan, made the determination whether, and to what extent, the Plan should participate in the Exchange Offer; and (d) Boston Safe, as the Plan trustee, ensured that each Plan participant received his or her allocable share of Total ADSs and Total Warrants in exchange for the PetroFina ADSs and PetroFina Warrants held by his or her individual account, as of June 4, 1999.

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

Bankers Trust Company (BTC), Located in New York, New York

[Application No. D-10837]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to: (1) The proposed granting to BTC (a) by Aslan Realty Partners, L.P. (the LP), and by Aslan GP, LLC (the General Partner) of security interests in the capital commitments of certain employee benefit plans (the Plans)

explaining the value of the warrants and how that value could be realized, *i.e.*, either by selling or exercising the warrants prior to their expiration date. As noted in the second paragraph of Item 4, above, the Total Warrants will expire concurrently with the PetroFina Warrants and otherwise have terms and conditions similar to the PetroFina Warrants. The applicant represents that it will continue to provide Plan participants with pertinent information regarding the Total Warrants, including periodic reminders of the deadline to sell or exercise them.

investing in the LP, (b) by the LP of a borrower account funded by the Plans' capital contributions (Borrower Collateral Account), and (c) by the LP and the General Partner of the right to make capital calls (Capital Calls), and provide notice thereof (Capital Call Notices) under the agreement under which the LP is organized and operated (the Agreement), where BTC is the representative of certain lenders (the Lenders) that will fund a so-called "credit facility" providing loans to the LP and where the Lenders are parties in interest with respect to the Plans; and (2) the execution of an agreement and estoppel (the Estoppel) under which the Plans agree to honor Capital Calls made to the Plans by BTC, provided that (i) the proposed grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (ii) the decisions on behalf of each Plan to invest in the LP, and to execute such grants and agreements in favor of BTC, are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BTC; (iii) with respect to Plans that have invested or may invest in the LP in the future, such Plans have or will have assets of not less than \$100 million and not more than 5% of the assets of any such Plan are or will be invested in the LP. For purposes of this condition (iii), in the case of multiple plans maintained by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis, (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans; and (iv) the general partner of the LP must be independent of BTC, the Lenders and the Plans.

Summary of Facts and Representations

1. The LP is an Illinois limited partnership, the sole general partner of which is the General Partner, which is a Delaware limited liability company. The General Partner is a separate affiliate of Transwestern Investment Company, L.L.C. (TWIC), a Delaware limited liability company. The General Partner is an entity unrelated to BTC, the Lenders and the Plans. The LP will dissolve no later than September, 2007, and will be self-liquidating. The LP was formed by the General Partner (as sole General Partner), with the intent of seeking capital commitments from a limited number of prospective investors who would become limited partners (the Partners) of the LP. There are 19 current and prospective Partners having,

in the aggregate, irrevocable, unconditional capital commitments of at least \$236,000,000.

2. The LP has been organized to establish an integrated, self-administered and self-managed real estate operating company (see paragraph 11, below). The LP will make investments in real estate including, but not limited to: (i) The acquisition or development of office, retail, industrial, multi-family, parking garage, corporate real estate assets and other types of real estate assets, (ii) the acquisition of an interest in real estate or the acquisition of interests in public or private real estate investment trusts and corporations, limited partnerships and limited liability companies whose primary assets are commercial real estate, and (iii) the acquisition of publicly-traded or privately-traded debt or equity securities of issuers whose primary assets are real estate. The LP believes that significant opportunities exist to achieve superior risk-adjusted returns on its investments in excess of 20% per annum over a three- to five-year period. Proceeds from the sale or refinancing of properties generally will not be reinvested by the LP. Such proceeds generally will be distributed to the Partners on a quarterly basis or after a sale or financing, so that the LP will be self-liquidated.

3. It is contemplated that the LP will incur short-term indebtedness for the acquisition of particular investments and for working capital purposes (with the expectation that such acquisition indebtedness will be repaid from the Partners' capital commitments and/or from mortgage debt). This indebtedness will take the form of a revolving credit agreement (described in paragraph 5, below) secured by, among other things, a first, exclusive, and prior security interest and lien in and to (1) the Partners' capital commitments, (2) the Borrower Collateral Account, and (3) the Capital Calls, *i.e.*, the rights to call capital under the Agreement. The Borrower Collateral Account is an account established by the General Partner with BTC to hold the Partners' capital contributions.

4. The Agreement requires each Partner to execute a subscription agreement that obligates the Partner to make contributions of capital up to a specified maximum. The Agreement requires Partners to make capital contributions to fulfill this obligation upon receipt of notice from the General Partner. Under the Agreement, the General Partner may make Capital Calls up to the total amount of a Partner's capital commitment upon 15 business days' notice, subject to certain

limitations. The Partners' capital commitments are structured as unconditional, binding commitments to contribute capital when Capital Calls are made by the General Partner. All

such monies to be paid by the Partners pursuant to Capital Calls are to be deposited to the Borrower Collateral Account. In the event of a default by a

Partner, the LP may exercise any of a number of specific remedies.

The Partners constituting over 90% of the equity interests and their investments in the LP are:

Name of partner	Capital commitment
Bell South Master Pension Trust	\$72,956,877
Ameritech Pension Trust	25,000,000
Burgundy, Inc	10,000,000
Allstate Insurance Company	25,000,000
The Bell South Corporation Representable Employees Health Care Trust—Retirees	9,119,610
The Bell South Corporation RFA VEBA Trust	9,119,610
Joshua Arnow and Elyse Arnow Brill	225,000
JWA Investment Company	700,000
New York Life Insurance Company	20,000,000
Pew Memorial Trust	9,990,000
J.H. Pew Freedom Trust	2,100,000
J.N. Pew, Jr. Trust	1,050,000
Mabel Pew Myrin Trust	1,350,000
Northwestern Memorial Hospital	3,000,000
Massachusetts Bay Transportation Authority Retirement Fund Employees' Pension Plan Trust	15,000,000
The Medical Trust	600,000
Northwestern University	15,000,000
Private Syndicate Pty Ltd. As Trustee of Alternative Investment Private Syndicate	10,000,000
RHA Investment Company	700,000

5. The applicant states that the LP will incur indebtedness in connection with many of its investments. In addition to mortgage indebtedness, the LP will incur short-term indebtedness for the acquisition of particular investments. This indebtedness will take the form of a credit facility (the Credit Facility), described in representation 6, below, secured by, among other things, a pledge and assignment of each Partner's capital commitment. This type of facility will allow the LP to consummate investments quickly without having to finalize the debt/equity structure for an investment or having to arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Partners and the LP. Under the Agreement, the General Partner may encumber Partners' capital commitments, including the right to call for capital contributions, to one or more financial institutions as security for the Credit Facility. Each of the Partners has appointed the General Partner as its attorney-in-fact to execute all documents and instruments of transfer necessary to implement the provisions of the Agreement. In connection with this Credit Facility, each of the Partners is required to execute documents customarily required in secured financings, including an agreement to honor Capital Calls unconditionally.

6. BTC will become agent for a group of Lenders providing a \$175 million revolving Credit Facility to the LP. BTC will also be a participating Lender.

Some of the Lenders may be parties in interest with respect to some of the Plans that invest in the LP by virtue of such Lenders' (or their affiliates') provision of fiduciary or other services to such Plans with respect to assets other than the Plans' interests in the LP. BTC is requesting an exemption to permit the Plans to enter into security agreements with BTC, as the representative of the Lenders, whereby such Plans' capital commitments to the LP will be used as collateral for loans made under the Credit Facility to the LP, when such loans are funded by Lenders who are parties in interest to one or more of the Plans. However, BTC represents that neither it nor any Lender will act in any fiduciary capacity for the decision made by any of the Plans to invest in the LP (as discussed in Paragraph 13, below).

The Credit Facility will be used to provide immediate funds for real estate acquisitions made by the LP, as well as for the payment of LP expenses. Repayments will be secured generally by the LP from the Partners' capital contributions, the Borrower Collateral Account and Capital Calls on the Partners' capital commitments. The Credit Facility is intended to be available until February 3, 2002. The LP can use its credit under the Credit Facility either by direct or indirect borrowings, by Lender guaranties, or by requesting that letters of credit be issued. All Lenders will participate on a pro rata basis with respect to all cash loans, guaranties or letters of credit up to the maximum of the Lenders'

respective commitments. All such loans, guaranties and letters of credit will be issued to the LP or an entity in which the LP owns a direct or indirect interest (a Qualified Borrower), and not to any individual Partner. All payments of principal and interest made by the LP or a Qualified Borrower will be allocated pro rata among all Lenders.

7. The Credit Facility will be a recourse obligation of the LP, the repayment of which is secured primarily by the grant of a security interest to BTC, as agent under the Credit Facility for the benefit of the Lenders, from the LP, in both: (a) The Partners' capital commitments and (b) the Borrower Collateral Account. In addition, the LP and the General Partner will grant BTC, as agent under the Credit Facility for the benefit of the Lenders, a security interest in the Capital Calls and Capital Call Notices. The Borrower Collateral Account will be assigned to BTC to secure repayment of the indebtedness incurred under the Credit Facility. BTC has the right to apply any or all funds in the Borrower Collateral Account toward payment of the indebtedness in any manner it may elect. The capital commitments are fully recourse to all the Partners and to the General Partner. In the event of default under the Credit Facility, the agent (*i.e.*, BTC) has the right to make Capital Calls unilaterally on the Partners to pay their unfunded capital commitments, and will apply cash received from such Capital Calls to any outstanding debt.

8. Under the Credit Facility, each Partner that is a Plan will execute an

acknowledgment (the Estoppel) pursuant to which it acknowledges that the LP and the General Partner have pledged and assigned to BTC, for the benefit of each Lender which may be a party in interest (as defined in Act section 3(14)) of such Partner, all of their rights under the Agreement relating to capital commitments and Capital Call Notices. The Estoppel will include an acknowledgment and covenant by the Plan that, if an event of default exists, such Plan will unconditionally honor any Capital Call made by BTC in accordance with the Agreement up to the unfunded capital commitment of such Plan to the LP.

9. The applicant represents that at the present time the following Plans are partners in the LP:

(a) The Ameritech Pension Trust (the Ameritech Trust) holds the assets of three defined benefit plans (the Ameritech Plans) which own interests in the LP. The Ameritech Trust has made a capital commitment of \$25 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to some of the Ameritech Plans in the Ameritech Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such Ameritech Plans with respect to Ameritech Trust assets other than their limited partnership interests in the LP. The total number of participants in the three Ameritech Plans is approximately 118,000, and the approximate fair market value of the total assets of the Ameritech Plans held in the Ameritech Trust as of December 31, 1997 is \$13.7 billion.

The applicant represents that the fiduciary of the Ameritech Plans generally responsible for investment decisions in the real estate area for internally managed assets is the Ameritech Corporation Asset Management Committee, the Chief Investment Officer of Ameritech Corporation, and/or the Ameritech Corporation Investment Management Department's Real Estate Committee (comprised of the staff real estate professionals and another Investment Management Department Director), depending on the size and type of investment. The fiduciary responsible for reviewing and authorizing the Ameritech Pension Trust's investment in the LP under this proposed exemption was collectively the Chief Investment Officer of Ameritech Corporation, along with the members of the Ameritech Corporation Investment Management Department's Real Estate Committee.

(b) The BellSouth Master Pension Trust (the BellSouth Pension Trust),

holds the assets of two defined benefit plans (the BellSouth Pension Plans), which own interests in the LP. The BellSouth Pension Trust has made a capital commitment of approximately \$73 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to some of the BellSouth Pension Plans in the BellSouth Pension Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such BellSouth Pension Trust assets other than their membership interests in the LP. The total number of participants in the two BellSouth Pension Plans is approximately 137,703, and the approximate fair market value of the total assets of the BellSouth Pension Plans held in the BellSouth Pension Trust as of December 31, 1997 is \$17.3 billion.

The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of both BellSouth Pension Plans is the BellSouth Corporation Treasurer, who was the fiduciary responsible for reviewing and authorizing the investment in the LP.

(c) The BellSouth Corporation Representable Employees Health Care Trust—Retirees (BellSouth Health Care Trust) holds the assets of two welfare benefit plans (the BellSouth Health Care Plans) which own interests in the LP. The BellSouth Health Care Trust has made a capital commitment of approximately \$9 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to some of the BellSouth Health Care Plans in the BellSouth Health Care Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such BellSouth Health Care Trust assets other than their membership interests in the LP. The total number of participants in the two BellSouth Health Care Plans is approximately 30,000, and the approximate fair market value of the total assets of the BellSouth Health Care Plans held in the BellSouth Health Care Trust as of December 31, 1997 is \$1 billion. The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of both BellSouth Health Care Plans is the BellSouth Corporation Treasurer, who was responsible for reviewing and authorizing the investment in the LP.

(d) The BellSouth Corporation RFA VEBA Trust (BellSouth VEBA Trust) holds the assets of one welfare benefit plan, the BellSouth Group Life Plan which owns interests in the LP. The BellSouth VEBA Trust has made a

capital commitment of approximately \$9 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to the BellSouth Group Life Plan in the BellSouth VEBA Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such BellSouth VEBA Trust assets other than its membership interests in the LP. The total number of participants in the BellSouth Group Life Plan is approximately 133,560, and the approximate fair market value of the total assets of the BellSouth Group Life Plan held in the BellSouth VEBA Trust as of December 31, 1997 is \$937 million. The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of the BellSouth Group Life Plan is the BellSouth Corporation Treasurer, who was responsible for reviewing and authorizing the investment in the LP.

10. The applicant represents that the Plans listed in paragraph 9 are currently the only employee benefit plans subject to the Act that are Partners of the LP. However, the applicant states that it is possible that one or more other Plans will become Partners of the LP in the future. Thus, the applicant requests relief for any such Plan under this proposed exemption, provided the Plan meets the standards and conditions set forth herein. In this regard, such Plan must be represented by a fiduciary independent of the General Partner, the Lenders and BTC. Furthermore, the General Partner, who also must be independent of the Lenders and BTC, must receive from the Plan one of the following:

(1) A representation letter from the applicable fiduciary with respect to such Plan substantially identical to the representation letter submitted by the fiduciaries of the other Plans, in which case this proposed exemption, if granted, will apply to the investments made by such Plan if the conditions required herein are met; or

(2) Evidence that such Plan is eligible for a class exemption⁴ or has obtained an individual exemption from the Department covering the potential prohibited transactions which are the subject of this proposed exemption.

11. BTC represents that the LP has obtained an opinion of counsel that the

⁴For example, PTE 84-14 (49 FR 9497, March 13, 1984) permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are managed by a "qualified professional asset manager" (QPAM) who is independent of the parties in interest (with certain limited exceptions) and meets specified financial standards.

LP will constitute an "operating company" under the Department's plan asset regulations [see 29 CFR 2510.3-101(c)] if the LP is operated in accordance with the Agreement and the private placement memorandum distributed in connection with the private placement of the LP Partnership interests.⁵

12. BTC represents that the Estoppel constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships or limited liability companies, wherein the financing institutions do not obtain security interests in the real property assets of the partnership or limited liability companies. BTC also represents that the obligatory execution of the Estoppel by the Partners for the benefit of the Lenders was fully disclosed in the Private Placement Memorandum as a requisite condition of investment in the LP during the private placement of the Partnership interests. BTC represents that the only direct relationship with respect to the LP between any of the Partners and any of the Lenders is the execution of the Estoppel. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, are exclusively between the Lenders and the LP. BTC represents that the proposed execution of the Estoppel will not affect the ability of a Plan to withdraw from investment and participation in the LP.⁶ The only Plan assets to be affected by the proposed transactions are any funds which must be contributed to the LP in accordance with requirements under the Agreement to make Capital Calls to honor a Partner's capital commitments.

⁵ The Department notes that the term "operating company" as used in the Department's plan asset regulation cited above includes an entity that is considered a "real estate operating company" as described therein (see 29 CFR 2510.3-101(e)). However, the Department expresses no opinion in this proposed exemption regarding whether the LP would be considered either an operating company or a real estate operating company under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the LP or for transactions involving third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to carefully examine all aspects of the LP's proposed real estate investment program in order to determine whether the requirements of the Department's regulations will be met.

⁶ In this regard, the Department cautions Plan fiduciaries to fully understand all aspects of the Agreement, including the terms of the Estoppel, prior to making any capital commitments to the LP. The Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently when making investment decisions for the plan.

13. BTC represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to any of the Plans' investments in the LP and that BTC is independent of and unrelated to those fiduciaries (the Fiduciaries) responsible for authorizing and overseeing the Plans' investments in the LP. Each of the Fiduciaries represents independently that its authorization of Plan investments in the LP was free of any influence, authority or control by the Lenders, including BTC. Each of the Fiduciaries represents that the Plan's investments in and capital commitments to the LP were made with the knowledge that each Partner would be required subsequently to grant a security interest in Capital Calls and capital commitments to the Lenders and to honor requests for cash contributions, also known as "drawdowns", made on behalf of the Lenders without recourse to any defenses against the General Partner. Each of the Fiduciaries individually represents that it is independent of and unrelated to BTC and the Lenders and that the investment by the Plan for which that Fiduciary is responsible continues to constitute a favorable investment for the Plan and that the execution of the Estoppel is in the best interests and protective of the participants and beneficiaries of such Plan. In the event another Plan proposes to become a Partner, the applicant represents that it will require similar representations to be made by such Plan's independent fiduciary. Any Plan proposing to become a Partner in the future and needing to avail itself of the exemption proposed herein will have assets of not less than \$100 million,⁷ and not more than 5% of the assets of such Plan will be invested in the LP. As noted in paragraph 9 above, the Plans currently investing in the LP all have total assets which exceed \$100 million and have committed amounts to the LP which are less than 5% of their total assets.

14. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The Plans' investments in the LP were authorized and are overseen by the Fiduciaries, which are independent of the Lenders and BTC, and other Plan investments in the LP from other employee benefit plans subject to the Act will be

⁷ In the case of multiple plans maintained by a single employer or single controlled group of employers, the assets of which are invested on a commingled basis (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans.

authorized and monitored by independent Plan fiduciaries; (2) None of the Lenders (including BTC) has any influence, authority or control with respect to any of the Plans' investment in the LP or the Plans' execution of the Estoppel; (3) Each Fiduciary invested in the LP on behalf of a Plan with the knowledge that the Estoppel is required of all Partners investing in the LP, and all other Plan fiduciaries that invest their Plan's assets in the LP will be treated the same as other Partners are currently treated with regard to the Estoppel; (4) Any Plan which has invested or may invest in the LP in the future, which needs to avail itself of the exemption proposed herein, has or will have assets of not less than \$100 million,⁸ and not more than 5% of the assets of any such Plan are or will be invested in the LP; and (5) the General Partner of the LP is independent of BTC, the Lenders and the Plans.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of 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

⁸ See footnote 4, *ibid*.

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 accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 30th day of December, 1999.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 99-49; Exemption Application No. D-10244, et al.]

Grant of Individual Exemptions; Massachusetts Mutual Life Insurance Company (MM), et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at

the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

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

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Massachusetts Mutual Life Insurance Company (MM) Located in Springfield, MA

[Prohibited Transaction Exemption 99-49; Exemption Application No. D-10244]

Exemption

Section I. Covered Transactions

The restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: the sale and/or exchange by MM of a partial or complete interest in certain properties (the Properties) from its general investment account assets to one or more separate investment accounts (Separate Accounts), or other types of entities (such as limited partnerships or limited liability companies, hereafter referred to as "Other Entities" as defined in Section III) managed by MM or an affiliate which are deemed to hold plan assets under 29 CFR section 2510.3-101 (the Plan Asset Regulation),

for which MM shall receive as consideration cash and/or a corresponding interest in such Separate Account or Separate Accounts or Other Entities, provided the conditions set forth in section II are satisfied.

Section II. Conditions

(A) The sale and exchange of the Properties is a one-time transaction with respect to each Separate Account or Other Entity of MM which will be established for the Properties; i.e., all Properties transferred in that transaction will be conveyed at the same time, and no further properties will be transferred from MM to such Separate Account or Other Entity;

(B) In no event shall MM provide any financing with respect to any sale or exchange transaction which is the subject of this exemption;

(C) Before the subject transaction is consummated, (i) an independent appraisal firm will have valued each Property to be transferred by MM to one or more Separate Accounts or Other Entities; (ii) if the appraisal is more than one year old, the value of each Property so appraised will be updated by the appraiser as of a date not less than two weeks prior to the issuance of interests to third party investors in the Separate Accounts or Other Entities, and if a material change has occurred the appraiser will revise its appraisal to reflect that new value; (iii) an independent fiduciary for each employee benefit plan subject to the Act (collectively, the Plans) will, prior to agreeing to invest in the Separate Account or Other Entity, be provided with all information regarding the Properties to be sold to the Separate Account or Other Entity, including third party appraisals and a private placement memorandum or other offering document, which will describe the legal structure and include risk disclosures, a summary of principal terms and a schedule of fees; and (iv) such independent fiduciary will have reviewed all pertinent terms of the sale and exchange of the Properties to the Separate Accounts or Other Entities and will have concluded that the transaction is in the best interest of the Plan;

(D) Any Covered Transaction will be effected at fair market value as of the time of the transaction; and

(E) Only Plans with total assets having an aggregate fair market value of at least \$50 million are permitted to engage in the Covered Transactions, provided, however, that—

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization,